

**New York State Commission
on Sentencing Reform**

Buffalo Public Hearing

**Buffalo and Erie County
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November 19, 2007

Compilation of Written Testimony

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New York State Commission on Sentencing Reform

November 19, 2007 Hearing in Buffalo, NY

Statement by Robert N. Seidel, Ph.D.

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Thank you for your generosity in listening to us from the Monroe County area. It's an honor to be here. I am Bob Seidel, a retiree who lived for over three decades in the city of Rochester. Also, I am a volunteer member of the Judicial Process Commission's Public Policy Group, the Monroe County Reentry Task Force, the Safer Monroe Area Reentry Team (SMART at www.smartny.org), and a downtown church. As well, I mentor reentering men and women, and I write, research, advocate, and counsel on prison reentry issues. Professionally, after leaving farming and a period of intense higher education, I mentored adult students for 25 years at SUNY Empire State College. I am intimately familiar with dynamics of Rochester and the politics of Monroe County.

This Commission deserves our sincere and profound gratitude. If adopted and carried out, your preliminary recommendations will produce a veritable revolution that will undoubtedly benefit untold numbers of individuals, families, and neighborhoods, not to mention every taxpayer in the state. This will be most surely true, of course, if they occur in conjunction with positive things happening elsewhere among the many New York State and local agencies dealing with crime, adjudication, incarceration, and reentry.

I want to say just this to the Commission about reentry: Move forward. Stay the course. Continue on the path along which the state has made a strong and correct commitment, to cooperate with coalitions of local organizations, public and private, large and small.

Around the Monroe County Reentry Task Force, whose able and articulate coordinator Ann Graham is with us today, we have built up a tremendous community-based head of steam in good will, good work, and good prospects. We are determined to move forward beyond these beginnings. I also want to highlight the work of another person present today. This is Sue Porter, coordinator of the Judicial Process Commission in Rochester. Sue and JPC have done important and excellent work in advising and mentoring incarcerated and reentering men and women for many years and will do even more in the future.

A couple of corollaries focusing on reentry:

The Commission is exactly correct to indicate the importance of multiple handicapping conditions that constrain many persons reentering society from incarceration. This is certainly borne out by the evidence-based conclusions that drive your recommendations. It is also the case with regard to a less tangible but still decisive matter: the expectations that prisoners have as they prepare for reentry. Most of us who have fared quite well in this regard still have encountered occasions upon which we have to forego or revise completely and even suddenly our expectations. The fact that we have coped is testimony to our resilience, fortitude, steadfastness, and relationships. How else could we have dealt with an entirely unforeseen personal tragedy, vocational debacle, or business crisis?

I hope that what occurs regarding the expectations of men and women nearing the conclusion of their terms of incarceration will enable them to handle their circumstances as well as possible in the field of dreams, growth, and reality. My own short experience tells me just how important it is for all of us to be aware of, and respond to, this phenomenon in the lives of people who have had a hard time with reasonable and growth-directed expectations.

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One story tells it all for me: One day a man for whom I was mentor experienced a severe crisis. This was the day he for which he had expectations for some time. It was the precise end date of his parole. However, anticipation did not generate accommodation. In this case, the man's emergency was heightened and intensified, apparently, by the conjunction of depression, post traumatic stress disorder, normal anxieties, and a very serious chronic medical condition. He claimed that his over eight years of imprisonment had produced PTSD and accentuated his anxieties.

I don't know all of this for sure. In any event, the man felt comfortable in calling me. And I was willing to sit down with him help him sort out his thoughts and feelings. This averted what could have been a catastrophe. I came to know the man even better over time and learned that my judgment, a year and a half ago, was correct.

Mentors to formerly incarcerated men and women thus take on a grave responsibility. They are in a position to help folks who – due to habits, family circumstances, and prison – need a lot of help to overcome the deficits of not having learned how to live in the real world. This is especially true of youngsters who did not have good nurturing through their formative, adolescent years. A mentor has to be aware of the bad habits that accumulate in prison, particularly dissembling and conning. A mentor can help teach -- and be a model for -- scheduling, making good notes, handling money, budgeting, handing "paperwork," taking responsibility for oneself, self-advocacy, and so forth.

In the end, as we know from the practice of treatment and recovery, the individual has in the final analysis to decide and do for her- or himself. In turn, mentors must know their limits and keep reasonable boundaries.

This stuff is subjective and difficult to objectify and quantify, I know. Yet I'm sure you know its value. Bad attitudes and habits, ill health, and related behaviors, in youth and in one's encounters with adjudication and incarceration, need to be changed or addressed competently and professionally. The systems in place are designed in part at least to deal with them, or at least to keep all involved as safe as possible in the face of bad attitudes and related behavior. I'm encouraging attention to the positive side, not to overrule the safety issue at all, but because it is necessary.

Thus, perhaps it will be useful to keep these in mind:

- Do more to encourage, and try not to discourage.
- Do more to engender hope, and try not to produce despair.
- Contribute more, in reuniting families and loved ones, and in mentoring, to foster warm human relationships.
- Finally, and most important, go all out to build bridges and foster intra- and inter-agency and organization coordination, connectedness, and information-sharing. This is really necessary to make the "system" better able serve reentering men and women comprehensively and to keep them on the right road.

Thank you very much for your kind attention.

* * * * *

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INTRODUCTION

The NYS Board of Parole enjoyed a reign of terror under the Pataki administration exercising their discretion in ways contrary to the legislation that created their existence and governed their duties. This unbridled discretion was used to trample on the fundamental rights of the incarcerated and extinguished any reasonable expectation that one will ever go home if incarcerated in this state. For the most part, parole decisions embedded with discretion, escape judicial review. This allows Parole to function as an usurped re-sentencing authority.

As mentioned in the NYS Sentencing Commission's preliminary report, this became an issue with the enactment of the "truth in sentencing grants" which fueled the increased incarceration of violent felony offenders (NYS Sentencing Commission, 2007, Preliminary Report). Governor Pataki called for "eliminate parole for violent felons" and turned our state's criminal justice system into a modern day model for slavery; incarceration in exchange for federal dollars.

The issue became so bad that a class action lawsuit was filed, Graziano v. Pataki 7:06-cv-00480, on behalf of A-1 felons being denied parole solely based on the nature of the crime. Parole releases for violent felons dropped to almost non-existent at 3% in 2005, according to John Caher, formerly of the NYLJ (Caher, 2006). Repeated denials were experienced by violent felony offenders, plea-bargained persistent felons and

youthful offenders. The common place of these defendants is their sentences are all indeterminate; 2-life, 5-life or 25-life allowing for Parole Board discretion.

The new administration of the Spitzer elect began in January 2007, including the appointment of Parole Commissioner George Alexander promising change. On April 16, 2007, George Alexander issued a memo indicating the commissioners had to follow the law and judge parole release decisions based on the criteria. His memo stated:

“Accordingly, when assessing the appropriateness of an inmate’s release to parole supervision where the minimum term is in excess of eight years, you must continue to consider the statutory factors set forth in Executive Law 259 i (1) and (2). In addition after considering and weighing those statutory factors you must apply the standard articulated section 259 i(2)(c) (a) of the Executive Law for determining the appropriateness of the inmate’s release. That legal standard requires the Board to consider in each inmate’s case ALL of the following:

1. whether there is a reasonable probability that, if such inmate is released, he or she will live and remain at liberty without violating the law; and
2. whether his or her release is incompatible with the welfare of society; and
3. whether the inmate’s release will so deprecate the seriousness of the offense as to undermine respect for the law.” (Alexander Memo, April 16, 2007).

The NY Law Journal reported on November 7, 2007, a potential settlement was reached in the Graziano case in which de novo hearings would be conducted consistent with the above provisions. The commissioners would also be required to assess whether an inmate has remorse or insight into the crime, and the rehabilitative component of prison. (various sources; NYLJ, November 7, 2007; Letter from Robert Isseks to all named plaintiffs; Graziano November 2, 2007).

Commissioners are specifically directed that the decision shall neither consider nor be influenced by their own penal philosophies or alternate sentences they may regard as appropriateness from the crimes convicted (various sources; NYLJ, November 7, 2007; Letter from Robert Isseks to all named plaintiffs; Graziano November 2, 2007). It

is now rumored that this settlement will not happen and after publicity in NY papers the Governor has decided to fight the case.

George Alexander himself has advocated in his addendum attached to the NYS Sentencing Commission's preliminary report as an addendum to NOT take away the discretion of the Parole Board in indeterminate sentences.

He stated:

"Discretion should be continued because I fear the mechanistic release of felony offenders" (Alexander Addendum, 2007).

He quoted Joan Petersilia:

"Perhaps most important, when information about the offense and the offender has been gathered and prison behavior observed, Parole Boards can reconsider the tentative release date. More than 90% of offenders in the United States are sentenced because they plead guilty, not as the result of a trial. Without a trial there is little opportunity to fully air the circumstances of the crime or the risks posed by the offender. A Parole Board can revisit the case to discover how extensive the victim's injuries were and whether a gun was involved. The Board is able to do so even though the offense to which the offender pled, by definition, involved no weapon. As one observer commented on this power of the Parole Board in a system which incorporates discretionary parole the system gets a second chance to make sure it is doing the right thing." (Petersilia, 2000).

When questioned about the policy of the Parole Board in plea-bargained offenses, Head counsel Terrence Tracy responded October 19, 2007:

"As that there is no statutory authority or settled case law that requires the Parole Board to consider an inmate's plea minutes when assessing the appropriateness of his or her discretionary release, there is no basis for a change in the Division's current policy" (Terrence Tracy, Letter of October 19, 2007).

The discretion afforded to the NYS Board of Parole is resulting in wide fundamental violations of incarcerated people's constitutional and statutory rights. The above statements are in themselves in violation of the constitutional rights a defendant relinquishes to enter a plea bargain. These statements show proof the Parole Board has developed into a re-sentencing authority which is volatile to the statutory criteria in

which they should be operating. Board members have continued to ignore George's memo as evidenced in real live cases discussed within this document below even after Graziano and April 16, 2007.

I have met Mr. Alexander, and believe his intention to be in good faith and admirable. I even believe that he may be the lion tamer. However, the uncontrollable animal the Pataki administration has left behind cannot be tamed by one man, Mr. Alexander. It is very questionable how this will occur when the remnants of this administration linger even under new Commissioner Alexander including Board members and Executives running parole. These changes will only come with changes to the legislation eliminating the unbridled discretion the Board currently maintains. Until this happens justice will never be served.

THE PLIGHT OF VIOLENT FELONY OFFENDERS IN NYS

The NYS Division of Parole is made up of 19 members who are appointed by the Governor for terms lasting 6 years (NYS Division of Parole, 2006). These individuals are responsible for making determinations of which inmates applying for discretionary release (parole) after serving the minimum sentence of incarceration are ready for parole release (NYS Division of Parole, 2006).

While statistics show that people incarcerated for long periods of time have a lower recidivism rate, the NYS Division of Parole ignores the statutory criteria and denies parole. The Sentencing Project found, "4 of 5 (79.4%) of lifers released in 1994 had no arrests for a new crime in three years after their release. This compares with the arrest free rate of just 1/3 (32.5%) of all offenders released from prison" (Mauer, Marc, King, Ryan, Young, Malcolm C., 2004). The NYS Division of Parole in 2005, released only 3%

of all applicants applying for parole with an A-1 felony, or violent felony offense. (Caher, 2006).

BACKGROUND

The mission of the NYS Division of Parole is: “to promote public safety by preparing inmates for release and supervising parolees to the successful completion of their sentence” (NYS Division of Parole, 2006). In 1817, NYS was the first state to pass a good time initiative law that allows inmates to be granted parole prior to completing a valid sentence of incarceration based on good behavior while in prison (NYS Division of Parole, 2006). In 1876, this system evolved where prison sentences changed so that they had a minimum and maximum expiration, which allows inmates to be granted parole once they complete their minimum sentence if they are selected by prison officials (NYS Division of Parole, 2006). In July 1930, the ability to determine prison release on parole was taken away from corrections officials when the Executive Department created the NYS Division of Parole (NYS Division of Parole, 2006). In 1971, the divisions of corrections and parole combined again in response to the Attica Prison riot (NYS Division of Parole, 2006). Shortly thereafter in 1977, parole again separated from the NYS Department of Corrections and a new set of parole release guidelines were enacted to decrease the arbitrariness in parole release decisions (NYS Division of Parole, 2006). It should be noted there is no constitutional right to parole release. (Hammock & Seelandt, 1999). Therefore, these parole release decisions are governed by the statutes enacted by the legislature. The NYS Division of Parole must apply these statutory mandates when they make Parole Board decisions.

These guidelines are found in NYS Executive Law § 259 (i) and 9 NYCRR §

8002.

These statutes state:

“NYS Executive Law § 259 (i) (2) (c) (a)

“Discretionary release on parole shall not be granted, merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law.”

The Parole Board shall consider:

- (I) The institutional record including program goals and accomplishments, academic achievements, vocational, educational, training or work assignments, therapy and interpersonal relationships with staff and inmates;
- (II) Performance, if any, as a participant in a temporary release program;
- (III) Release plans including community resources, employment, education and training and support services available to the inmate;
- (IV) Any deportation order issued by the federal government against the inmate while in the custody of the Department of Correctional Services and any recommendation regarding the deportation made by the commissioner of the Department of Correctional services pursuant to Section One Hundred Forty-Seven of the Correction Law;
- (V) Any statement made to the Board by the crime victim or the victim’s representative, where the crime victim is deceased or is mentally or physically incapacitated. The Board shall provide toll-free telephone access for crime victims. In the case of an oral statement made in accordance with subdivision one of Section 440.50 of the Criminal Procedure Law, the Parole Board member shall present a written report of the statement to the crime victim’s closest surviving relative, the committee or guardian of such person, or the legal representative of any such person. Such statement submitted by the victim or victim’s representative may include information concerning, threatening or intimidating conduct towards the victim, the victim’s representative, or the victim’s family, made by the person sentenced and occurring after the sentencing. Such information may include, but not be limited to, the threatening or intimidating conduct of any other person who or which is directed by the person sentenced.” NYS Executive Law § 259 (i) (2) (c) (a)

The Board must also consider:

“(1) Seriousness of the offense with due consideration to the type of sentence, length of sentence, and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence report as well as any other mitigating factors and activities following arrest and prior to confinement.

(2) Criminal history, including nature and pattern of offenses, adjustments to previous probation and parole and the adjustment to confinement.” NYS Executive Law § 259 (i) (1) (a)

9 NYCRR § 8002.3 (b) (1) (2) (3)

“B. In those cases where the guidelines have previously been applied, the board shall consider the following in making parole release decisions. Release shall be granted unless one or more of the following is unsatisfactory:

1. The institutional record, including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates;
2. Performance if any in a temporary release program; or
3. Release plans, including community resources, employment, education, training, and support services available to the inmate.” 9 NYCRR § 8002.3 (b) (1) (2) (3)

In New York state, the sentencing laws changed again in 1998, with the enactment of Jenna’s Law. This law eliminated parole release for newly committed violent felony offenders (NYS Division of Parole, 2006). This law cannot be applied retroactively to inmates previously incarcerated. However, it seems that the political climate of the governor’s policy rubbed off, indicating we must end parole for all violent felons. There is a decline in parole release for violent felony offenders as discussed below (Caher, January 31, 2006). The legislative statute did not change so the parole release decisions should still be governed by the statutes indicated and not the policy of the governor.

As indicated above, the NYS Division of Parole’s mission is “to promote public safety by preparing inmates for release and supervising parolees to the successful completion of their sentence” (NYS Division of Parole, 2006). Under the statutes listed above, NYS Executive Law § 259 (i) and 9 NYCRR§ 8002, the NYS Division of Parole has a duty to inmates that apply for parole release to review their applications based upon

the statutory mandates of New York state as mandated by the NYS Legislature. NYS Executive Law § 259 (i); 9 NYCRR§ 8002.

However, within this statute the NYS Division of Parole is given great discretion in that they must decide:

“Discretionary release on parole shall not be granted, merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law.” NYS Executive Law § 259 (i) (2) (c) (a)

In applying this statute, they have the duty to predict whether or not the inmate appearing before them will be a threat to the community if he is released.

CASE ANALYSIS

Jalil Muntaqim, aka Anthony Bottom, was convicted after two trials, the first being a mistrial. Along with his co-defendants Albert “Nuh” Washington and Herman Bell, they were convicted of the charge of Murder in the second degree of two NYC police officers (Jalil Muntaqim, 2006). Jalil received a sentence of twenty-five to life. Although Jalil maintained his innocence throughout his 35 years of incarceration, seeking several legal challenges, he has been unsuccessful in overturning his conviction (Jalil Muntaqim, 2006).

After serving his minimum term, in 2002, Jalil first saw the NYS Division of Parole and was denied parole at his initial appearance. The Board held:

“Based on the violent nature and circumstance of the instant offense. Two convictions for Murder 1 which involved you and accomplices ambushing two police officers and cold bloodedly shooting them to death...the instant offense, involving the senseless killing of two law enforcement personnel demonstrates to this panel a continued propensity and escalation in your criminal behavior...”

He has been subsequently denied parole on two further occasions (Jalil Muntaqim, 2006). On all three occasions, Jalil was denied parole for the “serious nature of the crime” (Jalil Muntaqim, 2006).

The 2004 denial states:

“Upon a review of the record, personal interview and due deliberation, it is the determination of this panel that parole is denied. You are presently incarcerated upon your conviction of murder by verdict. You and two cohorts ambushed and gunned down two New York City Police officers, killing both. Your criminal justice history also includes California and federal felony convictions. The panel has considered your programming and clean disciplinary record since your last Board appearance. Also considered is a comprehensive submission advocating for your release. All factors considered, this panel concludes that discretionary release must again be denied. You committed a vicious and particularly violent crime evidencing a callous disregard for the sanctity of human life. Your proclivity toward weapon related criminality lends further support to the panel’s conclusion that you lack suitability for release into the community. You destroyed two lives, denying children of their fathers and wives of their husbands and release at this time would deprecate the severity of your conduct, undermine respect for the law and tend to trivialize the tragic loss of life”

In 2006, Anthony Bottom was also denied parole. The 2006 panel found:

“Following a careful review and deliberation of your record and interview, this panel concludes that discretionary release is not presently warranted due to concern for the public safety and welfare. The following factors were properly weighed and considered. Your instant offense in Manhattan in May, 1971 you and your co-defendant shot and killed two New York City police officers. Your criminal history also includes convictions in California. Your institutional programming reveals continued program involvement. Your disciplinary record appears clean and is noted and considered. Your discretionary release at this time would thus not be compatible with the welfare of society at large and would tend to deprecate the seriousness of the instant offenses and undermine respect for the law.

A current appeal is pending.

Jalil Muntaqim earned several college degrees while in prison. He was a fundamental part of quelling two prison riots. He serves as a role model to younger prisoners through his involvement with the Auburn Correctional Facility Lifer’s Committee and other initiatives such as a poetry class (Jalil Muntaqim, 2006). He never

received a violence-related disciplinary issue during his prison term. He has stable release plans that include pursuing further education goals and becoming an entrepreneur establishing his own restaurant. He has family and community support. There is a victim impact statement given on his behalf by one of the victim's sons (Jalil Muntaqim, 2006). Yet the NYS Division of Parole continues to deny this man parole for no other reason than the "serious nature of the crime".

Again the statute in which the Board should have followed states:

9 NYCRR § 8002.3 (b) (1) (2) (3)

"B. In those cases where the guidelines have previously been applied, the Board shall consider the following in making parole release decisions. Release shall be granted unless one or more of the following is unsatisfactory:

1. The institutional record, including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates;
2. Performance if any in a temporary release program; or
3. Release plans, including community resources, employment, education, training, and support services available to the inmate." 9 NYCRR § 8002.3 (b) (1) (2) (3)

In this case, Jalil Muntaqim appeared before the Division of Parole on two prior occasions so the guidelines were previously applied (Jalil Muntaqim, 2006). As stated above in the analyzing section (1). the institutional record, program goals, accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates shall be considered 9 NYCRR § 8002.3 (b) (1). Jalil has more than met these standards and should be released on parole. He earned two college degrees while incarcerated. He helped quell two prison riots. He does not have a history of violence while in prison. He has an exemplary prison disciplinary record. He serves as a role model for other prisoners

through his work with the Auburn Correctional Facility Lifer's Committee. He completed all of the programs offered by the Department of Corrections (Jalil Muntaqim, 2006).

9 NYCRR § 8002.3 (b) (2) does not apply.

9 NYCRR § 8002.3 (b) (3) instructs the NYS Division of Parole to evaluate the inmate's release plans, including community support, employment, education, training and support services 9 NYCRR § 8002.3 (b) (3). In this case, Jalil has a stable release plan, He has secured employment. He has plans to continue with his education pursuing a Master's degree. He demonstrated that there is wide community support for his release (Jalil Muntaqim, 2006). He obtained an education while in prison (Jalil Muntaqim, 2006). Based on the above, Jalil Muntaqim should be granted parole release.

As stated, he was denied parole for the following reason:

“Upon a review of the record, personal interview and due deliberation, it is the determination of this panel that parole is denied. You are presently incarcerated upon your conviction of murder by verdict. You and two cohorts ambushed and gunned down two New York City Police officers, killing both. Your criminal justice history also includes California and federal felony convictions. The panel has considered your programming and clean disciplinary record since your last Board appearance. Also considered is a comprehensive submission advocating for your release. All factors considered, this panel concludes that discretionary release must again be denied. You committed a vicious and particularly violent crime evidencing a callous disregard for the sanctity of human life. Your proclivity toward weapon related criminality lends further support to the panel's conclusion that you lack suitability for release into the community. You destroyed two lives, denying children of their fathers and wives of their husbands and release at this time would deprecate the severity of your conduct, undermine respect for the law and tend to trivialize the tragic loss of life.”

In the decision, the commissioners state and relate to the “serious nature of the crime” as being the underlying reason for parole denial. Because Jalil's sentence was 25-life, he must be monitored by the Division of Parole for the rest of his life. Based on 9 NYCRR § 8002.3 (b) (1) (3), he meets the statutory criteria for release. The interests of

the community are served in that he would be monitored by the NYS Division of Parole for life. Therefore, if he demonstrates behavior that is contrary to the best interest of the community they revoke his parole and return him to prison.

There is no point for further incarceration, Jalil has been incarcerated for over thirty-five years. There is no more rehabilitation available. He completed all of the necessary programs. As indicated, he would be monitored for life.

As stated previously, while statistics show people that are incarcerated for long periods of time have a lower recidivism rate, the NYS Division of Parole ignores the statutory criteria and denies parole. The Sentencing Project found, "4 of 5 (79.4%) of lifers released in 1994 had no arrests for a new crime in three years after their release. This compares with the arrest-free rate of just 1/3 (32.5%) of all offenders released from prison" (Mauer, Marc, King, Ryan, Young, Malcolm C., 2004). The NYS Division of Parole must continue to monitor Jalil for life as he was convicted and given an indeterminate sentence.

In this example, an argument is definitely made that the actions of the NYS Board of Parole is self serving in continually denying parole to violent felony offenders. In the Hammock and Seelandt article, the governor of the state of New York implemented new sentencing policies concerning violent felony offenders that were intended to end parole release for these individuals (Hammock & Seelandt, 1999). Jenna's Law, the new sentencing scheme mandates determinate sentences for first time offenders convicted of violent felonies with a determined period of post-release supervision eliminating parole (Liotti, 1999). The courts are hesitant to interfere with Parole Board decisions (Hammock & Seelandt, 1999).

Based on these factors it is easy to see the Parole Board has a self interest in denying parole. Once all offenders under the old sentencing scheme are released there will no longer be a need for them to sit as the parole board. Weighing the receipt of federal grant money is also not mentioned within the statutory criteria. Determining a greater value of life for someone murdered such as a police officer is not within the statute. Worrying about what the Police Benevolent Association will say or what the headlines will read is not within the statute.

In looking at the parole denial rate prior to Governor Pataki taking office and the current statistics, there was a grave difference for release of violent felony offenders. In 1994, the last year Governor Cuomo was in office, the release rate for violent felony offenders on their first appearance before the Parole Board was 63.5% (Kates, 2002). The release of A-1 felons was 3% (Caher , 2006). The reasons for these denials were for the most part the "serious nature of the crime", a factor that never changes (Caher, 2006). *Under the new administration there has been an increase in release rates but it still is not enough.*

Ray Barnes was interviewed. Ray, a former inmate, served decades in prison and was denied parole several times before the Board actually granted parole. Ray indicated the effect the constant denials had on the inmates was to instill a constant feeling of hopelessness (Ray Barnes, 2006). He indicated that when you completed all of the programs the NYS Department of Corrections offers and you are still denied parole it is sending a clear message. There is nothing you can do to guarantee your release (Ray Barnes, 2006). When you have life on the end of your sentence this is very hopeless. Ray

feels this issue contributes to the atmospheres in prison (Ray Barnes, 2006). He feels that it increases stress in the environment and may be the result of some conflicts that exist. (Ray Barnes, 2006).

Ray Barnes has proven that despite his previous conviction of a violent felony offense he can be somebody. He can contribute to his community and society. He achieved rehabilitation despite the serious nature of his crime. Ray Barnes works at the Center for Community Alternatives in Syracuse, NY making a difference in at risk youths lives. He was incarcerated in Auburn Correctional Facility for almost three decades with mentioned inmates Jalil Muntaqim and Donald Ferrin.

Again as stated previously, the Parole Board must still monitor individuals convicted of A-1 felonies for life. There is no need to keep them incarcerated unless they presently show a danger to society. The alternative to denying parole to violent felony offenders should be to grant parole if they aren't currently a threat.

In the case of Jalil Muntaqim aka Anthony Bottom, currently being litigated, the Parole Board through its counsel the NYS Attorney General's Office produced an affidavit from Counsel Craig Mausler (Parole) indicating Jalil was not eligible for parole because he was extradited to California and would not see a Parole Board until he was returned to the state of NY. The Article 78 was dismissed and Jalil has now been re-sentenced by the Parole Board to life without parole as they have refused to allow him any Parole Board hearings. As stated, their unbridled discretion wins every time at the expense of the inmate's constitutional and statutory rights being trampled.

In the case of Donald Ferrin, an elderly man currently in Westchester Hospital receiving treatment for throat cancer wherein recently his voice box has been removed

and he can no longer speak has been denied parole nine times on a twenty-to-life sentence. He has been incarcerated over three decades. He is scheduled to see the Parole Board for the tenth time in January of 2008.

Donald Ferrin has obtained two letters from his sentencing judge, Lawrence J. Bracken. On May 6, 1997, he wrote:

“I have had occasion to review copies of the minutes of the Parole Board and have been familiarized with his attitude during imprisonment, and his efforts to educate himself and develop a life as a model prisoner. I cannot express my opinion as to whether he fully appreciates the enormity of his actions for which I sentenced him. I can only say that what I have been informed as to his actions while in prison is that he has made a sincere effort to better himself and accept responsibility for his prior actions.”

On January 21, 2000, he wrote:

“Some 25 years have now past during which time Mr. Ferrin has been in prison by virtue of the sentence imposed upon him which was 20 years to life. During the intervening time I noted and continue to note that Mr. Ferrin has undertaken a number of steps to rehabilitate himself and make himself worthy of release. I recognize your decision encompasses a number of details with respect to his past which are not necessarily known to myself. I do consider it important that he has educated himself, that he has taken steps to be a model prisoner, and that he has retained the loyalty and affection of his family. As I noted in my May 6, 1997 letter, he has apparently made a sincere effort to accept responsibility for his criminal behavior.”

The NYS Supreme Court has recently held in Alvaro Sanchez Jr. v. Dennison, Index No. 1942-07 (Egan, Albany County, 2007), the Parole Board must give heed to a psychological assessment indicating the subject is not a danger to society and can be successfully managed in the community. It is also mentioned the importance of letters from correctional staff.

On 4/15/97, Correctional Officers Manzer, Volpe, and Knox wrote:

“For the past five years, inmate Ferrin has worked for us as a runner and has always done what was expected of him. Some of his tasks involved heavy lifting and many trips up and down stairs carrying property and supplies. Ferrin has always been available for extra odd jobs and has been a valuable aid to the running of my unit. It is my opinion that Ferrin should be seriously considered for parole.”

NYS Licensed Psychologist, Joel H. Schorr evaluated Donald Ferrin on 9/2/2003.

Mr. Schorr evaluated Mr. Ferrin by using clinical interview tactics; The Shipley Hartford Scale, The Thematic Apperception Test, The Rorschach Test, The House-Tree-Person Drawing Test, The Sentence Completion Test, and the letter provided by the sentencing judge. This evaluator found the following:

- “Mr. Ferrin is judged by the evaluator to be remorseful and sincere in his statements;
- There is no evidence in this interview of lingering anger or an explosive behavior tendency in this point of his development;
- There is no evidence of emotional disturbance during this interview;
- Donald’s SGT test reveals regrets over his offense and determination to live a good life hereafter there were no signs of psychopathy or dangerous behavior tendencies. Donald demonstrates appropriate guilt over his past behavior. His Rorschach responses are absent of any indications of psychotic thinking processes and/or delusional thinking patterns. There is no suggestion of any degree of underlying pathology related to potential behavioral patterns for this individual at this time;
- In this examiner’s opinion, Donald clearly understands that what he did was very wrong and in the most important way was unfixable. He has, in this examiner’s opinion, developed into an individual with good self control, a sense of self that allows him to pursue his goals in a peaceful and non-conflictual manner upon his release from prison;
- He does not present as a person who at this point of his life, is emotionally either consciously or unconsciously compelled to commit violent acts;

Donald is definitely ready to be released from prison and that he presents no predicable danger to others at this time. He demonstrates no signs of psychologically driven violent compulsions or preoccupations. He demonstrates no signs of angry or impulsive demeanor as part of his personality picture...He is felt to be no danger to his community members or any other persons, with regards to violent behavior at this time.

- Ongoing supervision after release is appropriate but there is no evidence from this evaluation that he would be a danger of any kind nor would he be a difficult parolee.”

Yet the NYS Board of Parole continues to deny parole. Donald would also be a member of the Graziano class.

Donald's parole denials read as follows:

1990 “Parole is denied due to the nature and circumstances of the instant offense a felony murder. You shot and killed your unarmed victim at close range, the bullet striking him between the eyes. This crime was committed shortly after your conditional release on concurrent Robbery convictions. You have been given prior credit for a previous sentence, and at this time have actually served about 16 and a half years on the current sentence. Your institutional adjustment has been far less than satisfactory with numerous disciplinary infractions.”

1992 “Your parole is denied. It is the opinion of the Board that your release at this time is incompatible with the interest of society. The severity of your instant offense, murder 2nd in which you shot your victim to death, militates against your discretionary release. You have an extensive criminal history dating from 1961 which includes youthful offender adjudication and approximately 3 felony convictions. Past attempts to correct your criminal behavior failed in that you were under parole supervision when you committed the instant offense.”

1994 “Under conditional release parole supervision on Robbery charges for a scant 6 months, you became involved with the instant offense. Apparently you were involved in an argument with the deceased wherein you shot him between the eyes. Coupled with your extensive prior criminal history you have displayed such extreme violence in the community that discretionary release is contrary to public safety. It is interesting to note that you do not consider yourself a violent person, despite your history of violence. Continue in constructive institutional programs and seek any group or individual counseling to gain insight into your violence.”

1996 "Parole is denied. You continue to serve a sentence of 20 years to life for the crime of murder. This crime involves you shooting a man in the face causing his death. At the time of this offense, you were on parole from a prior state sentence for two counts of Robbery. While we note your positive institutional adjustment, both in terms of your programming and disciplinary record, the panel concludes that due to the serious nature of the offense, your release to parole supervision would be inappropriate at this time."

1998 "Parole denied. Prior to your instant offense, the killing of a male subject by shooting him between the eyes, you have a criminal history and in fact, at the time of the said offense, you were on parole for two robberies. It is not thought that the community can live in safety with your release at this time."

2000 "Parole is again denied. You continue to serve a sentence of twenty years to life for murder. This crime involved you shooting a male victim in the head causing his death. All factors considered including escalation in your criminal conduct that this violent crime represents. This panel concludes that your release would deprecate the seriousness of your offense."

2002 "Denied. Hold for twenty-four months. Parole is denied. After a personal interview, record review, and deliberation, this panel finds your release is incompatible with public safety and welfare. Your instant offense involved the murder of another man where you shot and killed him. At the time of this crime, you were on parole for a prior robbery 2nd robbery 3rd sentence. Prior probation and local jail time are also noted. Consideration has been given to your program completion and satisfactory behavior. However, due to your poor record on community supervision, the violence you exhibited during the instant offense, and emerging pattern of gun related crime, your release at this time is denied. There is a reasonable probability you would not live and remain at liberty without violating the law."

2004 "Denied. Hold for twenty-four months. The instant offense, murder, involved you shooting your victim in the head causing his death. You committed this offense when you were under parole supervision. Just over 5 months, (for two prior robbery convictions) and then you fled to another state. Your criminal record commenced in 1961 and also includes two prior burglary convictions, documents patterns of criminal behavior undeterred by various criminal justice sanctions. When asked why you committed this crime you stated that maybe it was your ghetto mentality but provided no clear understanding of the motivational factors related to your fatal actions. You repeated numerous times that this has been described as a bar room brawl that led to a homicide; as if that lessened your crime or the senseless loss of a human life. All considered, including your positive programming and disciplinary record, as well as family/community support, parole cannot be granted given your wanton disregard for the life of another."

2006 "Denied. Hold twenty-four months. After a review of the record and this interview parole is denied. The I.O. murder 1st, involved your fatally shooting a male victim outside of a bar. You were under conditional release supervision for approx. 5 months at the time

of the instant offense for two separate robbery convictions. Your history includes a Y.O. adjudication for a burglary related offense and a probation term for assault. Your vocational, academic, and rehabilitative programming is noted and has been considered. Your disciplinary record since your last Parole Board appearance includes one Tier 2 misconduct report. Your indifference for human life and violation of the law despite previous legal intervention leads this panel to determine that your release is inappropriate at this time as it would deprecate the seriousness of the crime and serve to undermine respect for the law.”

Mr. Alexander is currently looking into this case; however this case is an example of why the Board should no longer have discretion.

THE IGNORAL OF THE CRIMINAL PROCESS OF YOUTHFUL OFFENDERS AND PLEA BARGAINED CASES BY THE NYS BOARD OF PAROLE.

NYS juvenile offenders, generally at the age of 21 are becoming lost in the system when transferred to adult correctional facilities as mandated under the law. Plea-bargained defendants sentences are lengthened wherein they serve much longer criminal sentences than intended in their bargain. This problem is caused by NYS Parole Board members who are ignorant to or are ignoring criminal legislation and re-sentencing these offenders by erroneous application of parole laws. Again, another example of why parole’s discretion must be curtailed.

Specifically, the NYS Parole Board abides by conflicting policies regarding juvenile offenders, plea-bargained offenders and adult offenders convicted by trial. They treat all of these people the same despite legislation mandating otherwise. The penal laws and criminal procedure laws are in direct conflict with NYS Executive Law § 259 (i) governing discretionary parole release.

In general in the statute, there is no distinction directly in the section of the Executive Law indicating the Board should treat these three types of offenders differently, specifically in the criteria used to evaluate parole decisions. However, with

further legal analysis there is support herein these offenders should be treated differently and they were intended to be treated differently when sentenced in the criminal courts.

The NYS Executive Law § 259 (i) states when evaluating a criminal defendant for discretionary parole release the NYS Board of Parole must look at:

NYS Executive Law § 259 (i) (2) (c) (a)

“Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law.” The Parole Board shall consider; “(I) The institutional record including program goals and accomplishments, academic achievements, vocational, educational, training or work assignments, therapy and interpersonal relationships with staff and inmates; (II) Performance, if any, as a participant in a temporary release program; (III) Release plans including community resources, employment, education and training and support services available to the inmate; (IV) Any deportation order issued by the federal government against the inmate while in the custody of the Department of Correctional Services and any recommendation regarding the deportation made by the Commissioner of the Department of Correctional Services pursuant to Section One Hundred Forty-Seven of the Correction Law; (V) Any statement made to the Board by the crime victim or the victim’s representative, where the crime victim is deceased or is mentally or physically incapacitated. The Board shall provide toll-free telephone access for crime victims. In the case of an oral statement made in accordance with subdivision one of Section 440.50 of the Criminal Procedure Law, the Parole Board member shall present a written report of the statement to the crime victim’s closest surviving relative, the committee or guardian of such person, or the legal representative of any such person. Such statement submitted by the victim or victim’s representative may include information concerning, threatening or intimidating conduct towards the victim, the victim’s representative, or the victim’s family, made by the person sentenced and occurring after the sentencing. Such information may include, but not be limited to, the threatening or intimidating conduct of any other person who or which is directed by the person sentenced.” Executive Law § 259 (i) (2) (c) (a)

As stated, no where in this statute does it say there is a different evaluation process for juvenile or youthful offenders or plea-bargained sentences.

In the three classes of offenders, this analysis will focus on the youthful offender and the plea-bargained offender. Specifically, it should be noted that both of these

offenders are offenders that have waived fundamental constitutional rights to enter a plea of guilty saving the prosecution of their burden to convict them beyond a reasonable doubt in exchange for a lighter sentence. It should be further noted, when criminal defendants enter a plea bargain, the sentencing phase of such is a two-part process; the plea allocation and the sentencing. In a plea case, the recommendations of the district attorney, defense attorney, and sentencing judge are usually found in the plea allocation. This allocation also contains the actual plea bargain which becomes the foundation for the plea-bargained defendant's conviction.

The NYS Board of Parole's policy in regards to plea bargains is that they do not feel they should have to review plea allocations as part of what is defined as an inmate's sentencing minutes. Counsel to the NYS Division of Parole, Terrence X. Tracy has unequivocally stated in correspondence dated October 19, 2007:

"There is no statutory authority or settled case law that requires the Parole Board to consider an inmate's plea minutes when assessing the appropriateness of his or her discretionary release, there is no basis for a change in the Division's current policy".

The current policy is unconstitutional. NYS Executive Law § 259 (i) is unconstitutional. The NYS Parole Board is functioning outside of its statutory authority becoming a re-sentencing body directly in conflict of the separation of powers clause establishing the judiciary duties and legislative duties. The current policy ignores the purposes for the criminal justice system in establishing plea-bargained and youthful offender statuses. The current system treats all three offenders the same under NYS Executive Law ignoring the separation that was intended by the underlying criminal justice system. This constitutes a system that is unfair, illegal and a violation of defendant's due process and other constitutional rights.

The inherent secondary problem presented is that due to the great discretion of the Parole Board criminal defendants cannot receive judicial relief in reviewing these unconstitutional decisions. It is well-governed precedent that the NYS Parole Board's decisions are discretionary and, if made in accordance with statutory requirements, are not subject to judicial review. Matter of Sweeper v. State of New York Exec. Dep't. Bd. Of Parole, 233 A.D. 2d 647, 648 (3d Dept. 1996); Matter of Zane v. Travis, 231 A.D. 2d 848 (4th Dept. 1996); Matter of Secilmic v. Keane, 225 A.D. 2d 628, 628-9 (2d Dept. 1996). Absent a convincing demonstration that the Parole Board failed to consider the applicable statutory outlined criteria, it must be presumed that the Parole Board fulfilled its duty. Matter of McKee v. New York State Bd. Of Parole, 157 A.D. 2d 944, 945 (3d Dept. 1990). To warrant judicial intervention, the petitioner must show that the Parole Board's decision amounted to "irrationality bordering on impropriety." Matter of Russo v. New York State Bd. Of Parole, 50 N.Y. 2d 69 (1980). It is also established that a prisoner's right to liberty was extinguished with his conviction and sentencing and therefore, a petitioner has no constitutional guarantee to parole, Russo, (id). Citing; Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7(1979).

THE PLEA BARGAIN

A plea is defined as:

"An accused person's formal response of guilty, not guilty, or no contest to a criminal charge" (Black's Law Dictionary, 1996).

A plea bargain is defined as:

"A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for

some concession by the prosecutor usually a more lenient sentence or dismissal of the other charges” (Black’s Law Dictionary, 1996).

A guilty plea is defined as:

“An accused person’s formal admission in court of having committed the charged offense. A guilty plea is usually part of a plea bargain. It must be made voluntarily, and only after the accused has been informed of and understands his or her rights. The plea ordinarily has the same affect as a guilty verdict and conviction after a trial on the merits” (Black’s Law Dictionary, 1996).

A conviction is defined as:

“1. The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty; 2. The judgment (as by jury verdict) that a person is guilty of a crime; 3. A strong belief or opinion” (Black’s Law Dictionary, 1996).

Ninety percent of all criminal convictions occur when a defendant waives the right to trial and pleads guilty (Olin, 2002). The plea bargain was an episodic tool prior to the 19th century but gained popularity during the Age of Industrialization (Olin, 2002).

The purpose of using a plea bargain in sentencing was primarily for efficiency purposes, avoiding burdensome caseloads, and securing a conviction for prosecutors (Fisher, 2003). For judges it decreased the likeliness of reversal as in most cases the defendant must also waive their right to appeal (Fisher, 2003). For defendants to enter a plea, the defendant must waive fundamental constitutional rights. These rights may include the right to trial by jury, the right to present witnesses and cross examination of witnesses, the right to avoid self incrimination, and sometimes the right to appeal the conviction (Fisher, 2003). A defendant enters a plea for many reasons including: receiving a lesser sentence in exchange for his plea; receiving lesser charges in exchange for his plea; receiving dismissal of some charges in exchange for his plea; and a

guaranteed outcome in the matter in regards to sentencing in exchange for his plea (Fisher, 2003).

Courts have interpreted the use of plea bargaining. A criminal plea is considered a contract of sort that the defendant enters into with the state or prosecutor. These bargains entitle the defendant specific performance, Santobello v. New York, 404 U.S. 257 (1971); People v Youngs, 156 A.D. 2d 885 (3d Dept., 1989). Generally, the terms of a plea bargain are entered into the record when the defendant accepts the plea. Once the bargain is placed on the record, it is incumbent for the sentencing court to inform the defendant of the plea bargain's terms. It is an abuse of the court's discretion to add any non-agreed upon terms after sentencing, People v. Youngs, 156 A.D. 2d 885 (3d Dept., 1989). Judicial recognition of a plea bargain is concluded by entry on the record, People v. Hood, 62 N.Y. 2d 863 (1984). Lastly, for a plea bargain to be valid, a defendant must enter a plea knowingly, willingly, and intelligently, People v. Shea, 254 A.D. 2d 512 (3d Dept., 1998); People v. Moissett, 76 N.Y. 2d 909 (1990); People v. Harris, 242 A.D. 2d 782 (3d Dept., 1997); People v. Catu, 4 N.Y. 3d 242 (2005).

If the defendant is deprived of information necessary to make an informed choice of whether to take a plea bargain or to choose alternative courses of action, the plea is invalid because it is involuntary, Catu (id). In the Catu case, the defendant was not aware of a term of post-release supervision that was attached to his criminal conviction. The court must make the defendant aware of the terms of the plea or the plea is not considered voluntary and the conviction must be reversed, Catu (id). A defendant must be advised of the direct consequences of a plea of guilty, People v. Ford, 86 N.Y. 2d 397 (1995). Post-

release supervision is considered a direct consequence of a criminal conviction if it is part of the valid sentence, People v. Catu, 4 N.Y. 3d 242 (2005).

Parole is also a direct consequence of a criminal conviction if the terms of the sentence allow parole. Defendants are not being advised during their sentencing that Parole can ignore the plea bargain entered. Parole cannot ignore the terms of a plea or the plea becomes a plea that was entered involuntarily. Defendants would then have grounds to have their sentence vacated under NYS CPL§ 440.

To represent this factor of ensuring a plea is knowingly and voluntarily being entered, a sentencing judge, during the plea colloquy, must read the original charges into the record. They must read the charges the defendant agrees to plead to. These are generally reduced charges and the sentencing judge will indicate if any charges are being dismissed in satisfaction of the plea. The sentencing judge then weighs all factors and imposes the agreed upon plea. Once a defendant admits the agreed upon conduct to satisfy the elements of the crime into the record this becomes the defendant's conviction, solely the agreed upon plea and nothing additional.

NYS CPL § 430.10 indicates:

“ Except as otherwise specifically authorized by law when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced.” NYS CPL § 430.10

The Supreme Court long ago established the sentence imposed by the sentencing judge is controlling; it is this sentence that constitutes the court's judgment and authorizes the custody of a defendant, Hill v. U.S. ex rel. Wampler, 298 U.S. 460 (1936);

(see also: Greene v. U.S. 358 U.S. 326 (1959); Johnson v. Mabry, 602 F. 2d 167 (8th Cir., 1979); Earley v. Murray, 451 F. 3d 71 (2nd Cir., 2006).

The prisoner is detained not by virtue of the warrant of commitment but on account of the judgment and sentence, Hill (id). Biddle v. Shirley, 16 F. 2d 566 (8th Cir. 1926). The judgment of the court establishes a defendant's sentence and that sentence may not be increased by an administrator's amendment, Hill (id). When courts evaluate a defendant's appealable issues they must evaluate both the sentencing minutes and the plea allocation to fully understand whether any of the appealed claims are valid, People v. Bell, 36 A.D. 2d 406 (2d Dept., 1971).

In the Bell case, the issue presented was because Bell was convicted by means of plea bargain rather than a verdict by trial. The record from the trial court constituted the sole means for appellate review in regards to the basis of his conviction, Bell (id). In cases such as these, when the minutes were not available and the plea could not be reconstructed, the defendant was entitled to reversal of their conviction, People v. Grimmet, 127 A.D. 2d 547 (1st Dept., 1987); People v. Mealer, 57 N.Y. 2d 214 (1982); People v. Glass, 43 N.Y. 2d 283 (1977); People v. Rivera, 39 N.Y. 2d 519 (1976). The Parole Board has violated the U.S. Constitution's separation of powers clause by substituting their opinion and ignoring the entered upon plea.

In Earley v. Murray 451 F. 3d 71 (2nd Cir., 2006), an issue was raised wherein the NYS Department of Corrections altered an inmate's sentence by adding a term of post-release supervision to a sentence that did not include that punishment, Earley (id). The sentencing minutes did not include the term of post-release supervision. The NYS Department of Corrections altered the original sentence and illegally added a term of

post-release supervision that was not pronounced by the sentencing judge during sentencing. The court in Earley held the NYS Department of Corrections did not have the power to alter a sentence and the sentence imposed is only what the sentencing judge imposed, Earley (id).

As indicated, a criminal defendant's valid sentence is contained in the plea he entered. The NYS Board of Parole also does not have the authority to change the defendant's plea. They must review his plea minutes to know what the plea was. Defendants are entitled to *specific performance of a plea bargain*, People v. McDonnell, 49 N.Y. 2d 340 (1980). No one, no court clerk, no corrections officer, no one working for the Division of Parole can add anything to a judge's sentence, People ex. rel Joyner v. NYS DOP, 2007 N.Y. Slip Op. 50961U (Bronx Co., 2007). Yet Terrence Tracy, counsel to NYS Board of Parole has initiated a "we do not review plea minutes as part of sentencing minutes" policy.

The NYS Board of Parole, in their practices have ignored these factors and have taken it upon themselves to violate the law and become a re-sentencing authority which they are not, ignoring the benefit the defendant entered into as part of their plea bargain. This is a travesty of justice. In essence, it renders the plea bargain invalid. What does anyone have to gain to enter a plea bargain as opposed to going to trial when the Parole Board can ignore the terms of the plea?

At the time many defendant's entered pleas decades ago, it was standard for a defendant to serve the minimum sentence and then be released on parole as evidenced by the statistics for parole releases during this time frame in 1993, prior to Governor Pataki taking office. After these defendants entered their plea and with the enactment of new

sentencing laws and Governor Pataki's "we must end parole for violent felons" campaign, the expectation for release has become null and void with only 3% of A-1 felons being released in 2005 (Caher, 2006). These defendants are entitled to the deal they were promised in exchange for their waiving constitutional rights. The Parole Board is acting unlawfully and outside their authority in rendering a decision contrary to the conditions of plea bargains.

Furthermore, NYS CPL § 380.70 mandates that a certified copy of an inmate's sentencing minutes must be delivered to the person in charge of the institution to which the inmate has been delivered, presumably to be placed in the inmate's permanent file so that it is available for parole hearings.

9 NYCRR § 8000.5 (a) indicates:

"The division shall cause to be obtained and filed, as soon as practicable, information as complete as may be obtained with regard to each inmate who is received in an institution under the jurisdiction of the State Department of Correctional Services, including a complete statement of the crime for which the inmate has been sentenced, the *circumstances of such crime*, all *pre-sentence memoranda*, the *nature of the sentence*, the court in which he was sentenced, the name of the judge and district attorney, and copies of such probation reports as may have been made as well as reports to the inmates social, physical, mental, and psychiatric condition and history." 9 NYCRR § 8000.5 (a)

Where an inmate is serving a sentence by means of plea, the Board must look at the plea minutes in addition to the sentencing minutes, as this contains the bargain the inmate entered with the district attorney. A plea is a lesser charge and statements of the district attorney and judge are relevant when making Parole Board decisions.

It has been recognized that the Parole Board must give heed to the sentencing minutes in a Parole Board hearing. It must pay attention to the wishes of the sentencing judge and the district attorney. The Third Department recently visited this issue in the

Standley case. In Standley, the inmate was serving a term of 20-life for Murder in the second degree. The court found that when the Parole Board did not consider the sentencing minutes and the recommendations of the sentencing judge, the judgment of a parole denial must be reversed. NYS Executive Law § 259 (i) (a) (1); (2) (c) (a); Matter of Edwards v. Travis, 304 A.D. 2d 576 (2d Dept., 2003); Matter of Walker v. NYS Division of Parole, 203 A.D. 2d 757 (3d Dept., 1994); Pennix v. Dennison, Index No. 1977/2006 (Sup. Ct., Dutchess Co., 2006); Standley v. NYS Division of Parole, Index No. 99252 (3d Dept., 2006); Lovell v. NYS Div. of Parole, 2007 N.Y. Slip. Op. 03809 (3d Dept., 2007); Carter v. Dennison, 2007 N.Y. Slip. Op. 501614 (3d Dept., 2007); Rios v. NYS Division of Parole, Index No. 31731-06 (Sup. Ct. Kings County, 2007).

In McLaurin v. NYS Board of Parole, 2006 N.Y. Slip Op. 01806 (2d Dept., 2007), the court held the Parole Board was required to order a copy of the sentencing minutes and granted the petitioner a new hearing. The Board must consider the minutes prior to making a parole release decision. NYS Executive Law § 259 (i); Matter of Edwards v. Travis, 304 A.D. 2d 576 (2d Dept., 2003); Matter of Weinstein v. Dennison, 7 Misc. 3d 1009A (2005); Lovell v. NYS Div. of Parole, 2007 N.Y. Slip. Op. 03809 (3d Dept., 2007). Specifically, the case of Weinstein cited above indicates the Board must give heed to the plea minutes as well as the sentencing minutes.

In the Matter of Williams v. Travis, Index No. 1448-03 (Sup. Ct., Albany Co., 2003), the court indicated Parole had to review the defendant's plea minutes. In this case, Parole considered matters outside of the defendant's plea bargain including facts that he did not admit to committing. The issue involved was whether the instant offense could include those facts alleged wherein the defendant never admitted the conduct in the plea

allocation, Williams (id). Parole must review the plea or they are functioning as a re-sentencing authority. This exceeds their purpose as defined by the legislature and violates the separation of powers clause of the U.S. Constitution.

CASE EXAMPLE MARC MURRAY

Marc Murray, is currently incarcerated serving a sentence of 15-life for Murder in the second degree reached by plea agreement. Throughout his incarceration, the petitioner has maintained the murder was an accidental shooting. On 8/23/06, he appeared in front of his initial Board and was denied parole. They imposed a hold for an additional twenty-four months.

The Board found:

“Parole is denied. After a careful review of your record, your personal interview, and due deliberations it is the determination of this panel that, if released at this time there is a reasonable probability that you would not live at liberty without violating the law, your release at this time is incompatible with the welfare and safety of the community, and will so deprecate the seriousness of the crime as to undermine respect for the law. This decision is based on the following factors: the seriousness and violent nature of the instant offense of Murder in the second where in concert with another you shot and killed the victim in the course of an armed robbery, and your poor record of institutional adjustment which includes 18 Tier Two infractions and 1 Tier Three infraction. Consideration has been given to your program completion, however, due to the reasons stated and your indifference to the values of human life, your release at this time is denied”

This writer appealed the above mentioned decision based on the factor the Parole Board did not have the petitioner’s sentencing minutes at the time of his appearance. This appeal was filed in January 2007. Commissioners Johnson, Grant, and Greenan sat on the original Board.

It was discovered when this writer called in to check on the status of the appeal, the Appeals Unit misplaced the appeal. It was retrieved from Otisville Correctional

Facility approximately one month later. An initial decision was rendered in July 2007, affirming the Parole Board decision. This decision was rescinded.

On September 7, 2007, Commissioners Ortloff, Hernandez, and Loomis signed off on the appeal granting a de novo hearing. Marc Murray appeared before the NYS Parole Board on October 17, 2007, in front of Commissioners Ortloff (he wasn't supposed to be on this Board), Lemons, and Thompson for his de novo hearing. Marc Murray was denied parole.

The Commissioners held:

"Following a careful review of your records and of the interview, it is the conclusion of this panel that if you were released at this time there is a reasonable probability that you would not live and remain at liberty without violating the law and that your release would be incompatible with the public safety and welfare of the community. Your instant offense of Murder 2 was an incident that started out as a robbery committed by you and your codefendants. The two of you while both armed with guns selected the two innocent victims to rob and during the robbery you shot one of the victims causing his death. This senseless act was a sample of the lawless lifestyle you led at the time. Since your incarceration you have programmed well and completed your GED. You have interviewed well and have shown true remorse. However, released at this time would so deprecate the seriousness of the instant offense as to show disregard for the law".

This second decision was rendered after George Alexander issued his memo dated April 16, 2007. The memo stated:

"Accordingly, when assessing the appropriateness of an inmate's release to parole supervision where the minimum term is in excess of eight years, you must continue to consider the statutory factors set forth in Executive Law § 259 i (1) and (2). In addition after considering and weighing those statutory factors you must apply the standard articulated section 259 i (2)(c) (a) of the Executive Law for determining the appropriateness of the inmate's release. That legal standard requires the Board to consider in each inmate's case ALL of the following:

1. whether there is a reasonable probability that, if such inmate is released, he or she will live and remain at liberty without violating the law; and
2. whether his or her release is incompatible with the welfare of society; and
3. whether the inmate's release will so deprecate the seriousness of the offense as to undermine respect for the law." (Alexander Memo, April 16, 2007).

The commissioners include the language in their denial. However, it is their discretion that allows them to issue this denial. They clearly state "You have interviewed well and have shown true remorse." However, they still decide this man should remain in prison. They clearly state "Since your incarceration you have programmed well and completed your GED" However, they still deny parole. Marc Murray entered a plea in which he was given a minimum sentence of 15-life. The Board refuses to review his plea minutes. They continue to re-sentence him to serve longer because of their discretion and their personal beliefs of what his punishment should be.

YOUTHFUL OFFENDERS

This policy is even more troubling in analyzing the effect on youthful offenders. Juvenile courts were created upon the premise that courts should look at the individual offender and try to address their needs and whatever family problem was contributing to the delinquency (Ruth & Reitz, 2003). Furthermore, the system was designed on the factor in which the system noted the culpability of the juvenile was separate and distinct then that of an adult offender (Ruth & Reitz, 2003). The underlying principle of allowing juvenile offender adjudication is based on "an impulse of kindness on the belief juveniles stand a better chance of a successful transition to adulthood without the baggage of a criminal record and on strong doubts about procedural safeguards afforded in juvenile courts (Ruth & Reitz, 2003 p.272). With this being said a clear intent is there. Youthful or juvenile offenders were intended to be treated differently.

A youthful offender is defined by Black's Law Dictionary as:

"1. A person in late adolescence or early adulthood who has been convicted of a crime. A youthful offender is often eligible for special programs not available to older offenders including community supervision, the successful completion of which may lead to erasing the conviction from the offender's record" (Black's Law Dictionary, 1996).

NYS Criminal Procedure Law § 720.35 (1) indicates:

“A youthful offender adjudication is not a judgment of conviction is not a judgment of conviction for a crime or any other offense and does not operate as a disqualification of any person to hold public office or public employment, or licenses but shall be deemed a conviction only for purposes of transfer of supervision and custody.” NYS CPL §720.35(1)

Again a clear distinction is made between youthful offenders and other offenders.

PAROLE'S GUIDELINES

NYS Executive Law § 259 (i) (4) states part of parole's duties is to:

“Establish written guidelines for its use in making parole decisions as required by law, including fixing minimum periods of incarceration or ranges thereof of different categories of offenders.” NYS Executive Law § 259 (i) (4)

This part of NYS Executive Law seems to draw a distinction that there are different categories of offenders.

The ability to craft guidelines is further codified in 9 NYCRR § 8001.3. This statute states:

“The guidelines adopted by the NYS Board of Parole represent the policy of the Board concerning the customary total time served before release of each category of offense based on the crime of conviction, actual criminal conduct, and each category of offender based on prior criminal history.” 9 NYCRR § 8001.3(b)

Again, if parole does not review the plea minutes in plea-bargained or youthful offenders how do they know what the criminal conduct was? They don't.

In December 1981, the NYS Division of Parole produced the Juvenile Offender Guidelines Manual. This manual further outlined the procedures for youthful offenders were different than that of an adult offender. The manual defines that in 1978 the legislation created criminal court jurisdiction over juvenile offenders

(NYS Board of Parole, 1981). The manual indicates the Division of Youth can transfer a juvenile to the NYS Department of Corrections at any time when the offender is between the ages of 16-21 depending on certain circumstances (NYS Board of Parole, 1981). However, they must do so when the offender turns 21 years of age (NYS Board of Parole 1981).

As a youthful offender, parole decisions are governed by laws pertaining to inmates housed in adult state facilities (NYS Board of Parole, 1981). The New York State Executive Law governs all parole releases. As stated above, the NYS Executive Law states when considering an inmate for parole the Board must:

NYS Executive Law § 259 (i) (2) (c) (a)

“Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law.” The Parole Board shall consider; “(I) The institutional record including program goals and accomplishments, academic achievements, vocational, educational, training or work assignments, therapy and interpersonal relationships with staff and inmates; (II) Performance, if any, as a participant in a temporary release program; (III) Release plans including community resources, employment, education and training and support services available to the inmate; (IV) Any deportation order issued by the federal government against the inmate while in the custody of the Department of Correctional Services and any recommendation regarding the deportation made by the Commissioner of the Department of Correctional Services pursuant to Section One Hundred Forty-Seven of the Correction Law; (V) Any statement made to the Board by the crime victim or the victim’s representative, where the crime victim is deceased or is mentally or physically incapacitated. The Board shall provide toll-free telephone access for crime victims. In the case of an oral statement made in accordance with subdivision one of Section 440.50 of the Criminal Procedure Law, the Parole Board member shall present a written report of the statement to the crime victim’s closest surviving relative, the committee or guardian of such person, or the legal representative of any such person. Such statement submitted by the victim or victim’s representative may include information concerning, threatening or intimidating conduct towards the victim, the victim’s representative, or the victim’s family, made by the person sentenced and occurring after the sentencing. Such information may include, but not be limited to, the

threatening or intimidating conduct of any other person who or which is directed by the person sentenced.” Executive Law § 259 (i) (2) (c) (a)

Here is where the conflict enters. In the Juvenile Offender Manual it mandates a juvenile offender’s guidelines are determined by a point system. The point system is calculated wherein the evaluator looks at certain factors such as felony class, weapon use, forcible contact, and criminal history (NYS Board of Parole, 1981). The guidelines are then calculated suggesting a release timeframe.

If the Division of Parole does not evaluate the offender in compliance with the plea he entered, the offender will receive a higher point score because they are looking at the whole indictment as opposed to the plea bargain. This will result in a longer suggested period of imprisonment. Secondly, once the youthful offender is transferred to an adult facility the parole officers preparing the inmate status report are calculating the guidelines based on adult offender guidelines and not that for juvenile offenders. Furthermore, juvenile offenders are appearing alongside the adult offenders when being reviewed for discretionary release. The distinction that was created is being lost in the shuffle and the juveniles are having their intended sentences lengthened by the NYS Parole Board.

Juvenile offenders only represent 1% of the adult prison population in the nation (Snyder & Sickmund, 2006). Specifically, in NY there are 2,308 juveniles in custody (Snyder & Sickmund, 2006). However, this problem can be demonstrated in the statistics of parole releases. Alongside the adult offenders, the juvenile offender release rate has also declined. In 1985, 51% of juveniles appearing before Parole Boards were released (US Department of Justice, 2007). In 1997, that number decreased to a mere 41% (US Department of Justice, 2007).

CULPABILITY OF JUVENILE OFFENDERS

As a society there is evidence we recognize the limitations of an adolescent mind. "We restrict the privilege to vote, serve on a jury, consumption of alcoholic beverages, marry, enter a contract, and even the ability to watch movies with adult content" (American Bar Association, (ABA, 2004, p.1).

In study after study, scientists have concluded a teenage brain differs from that of an adult (ABA, 2004). Dr. Elizabeth Sowell in her study found the section of the brain that does critical thinking, the frontal lobe, goes through many changes during adolescence (ABA, 2004). She concluded on this factor, adolescents do not have the ability to reason as well as adults (ABA, 2004).

In the case of Patterson v. Texas, evidence was presented indicating:

"Research has shown the brain does not cease to mature until an individual reaches the twenties in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences and other characteristics that make people morally culpable. This process doesn't fully develop until the age of 21 or 22" (Gur, undated cited in ABA, 2004).

It has been further indicated that adolescents who experience childhood experiences that are abusive have a predisposition of violent behavior (ABA, 2004). Risk factors include witnessing domestic violence, drug abuse in the home, poor supervision and being a victim of physical and/or sexual abuse (ABA, 2004).

Former Parole Commissioner Vernon Manley has cited that there is a problem within the NYS Board of Parole pertaining to juvenile offenders in a statement he gave as part of a panel discussion. He stated:

"I saw that they were treating juveniles just like adults, the Board was. I remember handing out articles to all of the commissioners that the NY Times had put out and said that, you know, the neurons in the brain of a juvenile are not connected. They are not

connected in the area of the brain that deals with consequences of what they do. And so do you hold them to the same standard then?" (Manley, 2007).

Even here the former commissioner points to the lesser culpability but makes no mention that the law and the rules of parole require them to hold the juveniles to a different standard. They are not doing so.

CONSEQUENCES

- The NYS Board of Parole is ignoring the legislative rules in which they are required to function
- The NYS Board of Parole is ignoring the sentencing judge, district attorney, and defense counsels recommendations which are found in the plea minutes
- The NYS Board of Parole is destroying the intent and purpose of the American Criminal Justice System's use of the plea bargain and creating a unfair bargaining system for criminal defendants
- The NYS Board of Parole is re-sentencing criminal defendants and lengthening their agreed upon sentences
- The NYS Board of Parole is ignoring the underlining purpose of youthful offender adjudication and holding Y.O.'s to the same standard of judgment as adult offenders
- The NYS Board of Parole is ignoring the underlying purpose and intent of plea bargains and holding plea-bargained defendants to the same standard as felons convicted by trial eliminating the benefit of entering a plea bargain

- Criminal defendants' pleas are not being entered knowingly, willingly, and voluntarily as the NYS Board of Parole in their policies can ignore the plea and do not even review the plea minutes when making Parole Board decisions.

SOLUTIONS

- Legislation must be amended accounting for the three distinct classes of offenders; youthful offender, plea-bargained offender and convicted offender.
- *Eliminate discretion at the Parole Board.*
- Parole policies must be changed to model the criminal and penal code intentions.
- Plea bargains must be honored or the system has to be re-vamped as fundamental constitutional protections are being ignored.
- Judicial review must be allowed in parole denials.

CONCLUSION

By addressing these issues you will restore faith and fairness in the criminal justice system and parole. Eliminating the discretion of the Parole Board will also serve as a benefit to corrections. Thousands of inmates will again believe it is worth it for them to participate in programs, to seek rehabilitation, and to maintain a good disciplinary record as they may actually have a chance of going home one day. Parole because it was afforded discretion cannot operate outside the guidelines created by the legislature. Criminal defendants in this country are afforded wide fundamental constitutional protections. When they waive these rights and enter a plea this does not give parole the right to ignore the bargain they entered.

To conclude I have enclosed an actual plea allocation to remind us of all of the constitutional rights waived in entering a plea bargain.

“Court: you understand that you have an absolute right to remain silent in the face of the charges pending against you in this indictment but that if you do plead guilty here today in accordance with this plea bargain that you are waiving and giving up your right to remain silent and in fact you will be admitting that you committed a crime?”

Defendant: Yes.

Court: And you have discussed this matter to your satisfaction with your attorney?

Defendant: Yes.

Court: Have you had enough time to speak with your attorney, family, friends, advisors, whomever you wish to speak with so you know how you will proceed here today in reference to this plea bargain?

Defendant: Yes.

Court: Have you discussed with your attorney the strengths and weaknesses of the people’s evidence against you in this case as he views the evidence?

Defendant: Yes.

Court: In addition, have you discussed with your attorney any possible legal or constitutional defenses that you might have to the crimes charged against you on the indictment?

Defendant: Yes.

Court: Are you satisfied with the legal representation given to you in this matter by your attorney?

Defendant: Yes I am.

Court: In addition, to your attorney, is there anyone else that you feel that you absolutely have to speak with or have present here today before you can proceed with this matter?

Defendant: No...

Court: Do you understand that you have a right to a trial by jury or by the court sitting alone without the jury with regard to the charges pending against you in this indictment?

Defendant: Yes.

Court: Do you understand that as such a trial the People of the State of New York in this case represented by the DA’s Office would have to prove every necessary element of a crime by proof beyond a reasonable doubt in order to obtain a conviction against you of that crime?

Defendant: Yes.

Court: Do you understand at such a trial you would have the right to confront witnesses and to cross-examine them through your attorney?

Defendant: Yes.

Court: Do you understand that at such trial you as a defendant have no burden of proof? The burden of proof is on the People. It never shifts to the defendant. You have to prove absolutely nothing. You can stand mute if you wish to and the people would have to prove every necessary element of a crime by proof beyond a reasonable doubt do you understand that?

Defendant: Yes.

Court: Do you understand that at such a trial you would have the right to present evidence on your behalf, you would have the right to call witnesses to testify in your behalf by subpoena, if necessary, and or you would have the right to testify on your own behalf if you chose to do any or all of these things?

Defendant: Yes.

Court: Do you understand however, if you plead guilty here today in accordance with this plea bargain to the agreed upon counts of this indictment that you have resolved this indictment, you have resolved this matter there will not be a trial and therefore, you will have waived or given up all of those rights that I just told you about?

Defendant: Yes.

Court: Do you understand that your pleas of guilty to the agreed upon counts are convictions just as if you had taken this indictment to trial and been convicted by verdict after trial for those counts of the indictment?

Defendant: Yes...

Court: Do you understand and agree that in consideration of this negotiated plea, this plea bargain that you are waiving and giving up certain rights that you have regarding this matter and this indictment, including your right to have motions filed on your behalf by your attorney?

Defendant: Yes.

Court: *Including your right to have any hearings including suppressional hearings that you otherwise might have been entitled to receive?*

Defendant: Yes...

Court: Now if you plead guilty here today in accordance with this plea bargain everything stated on the record will become part of an overall plea agreement as to sentence and will itself be incorporated into and become part of the plea agreement. You need to remain in compliance with the plea agreement in order to be assured that you receive the plea bargain sentence in this case.

Court: You are receiving the plea bargain in substantial part because of your willingness to accept responsibility for your criminal actions"

Surely this is what a plea should represent. It was intended that the Parole Board is also bound by this agreement. As stated, their discretion is what allows them to disregard this and trample the constitutional and statutory rights of all plea bargained inmates in this state, which as stated represents a good 90% of all convicted people.

Sincerely,

Cheryl L. Kates Esq.

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**Testimony of Alan Rosenthal
Center for Community Alternatives
before the
New York State Commission on Sentencing Reform
Buffalo, New York
November 19, 2007**

Thank you to this Commission for the opportunity that this public hearing presents, and thank you to the Commission for the hard work that this Preliminary Proposal represents.

The Center for Community Alternatives is uniquely positioned to comment on the proposal based upon our work in direct service, reentry programs, research, policy and sentencing advocacy. It is with over 20 years of such experience that I make these comments on behalf of CCA.

The focus on reentry over the last few years, culminating in President Bush's highlighting the issue in his 2004 State of the Union address, was viewed by many as an opportunity to examine the traditional goals of sentencing. In the summer of 2006 the New York State legislature did just that when it enacted an amendment to Penal Law §1.05(6), adding the goal of **"the promotion of their successful and productive reentry and reintegration into society"** to the four traditional goals of sentencing.

Equipped with the knowledge and consciousness that reentry and reintegration are inextricably connected to public safety, there were those of us who hoped that this Commission would fashion a sentencing scheme that reflected the course the legislature had charted. Many hoped that this Sentencing Commission was in search of a sentencing model that would be compatible with our current balance of sentencing goals, concern over racial disparities, mass incarceration, the disintegrative effects of incarceration and our new understanding that reentry and reintegration are the road to public safety.

We recognize that the Commission's Preliminary Proposal offered several specific recommendations that would advance reintegration and reentry. However, it did not connect the goal of reentry and reintegration to sentencing. Moreover, the recommendation for determinate sentencing continues to anchor New York's sentencing model on the traditional goal of punishment.

THE PROPOSED DETERMINATE SENTENCING MODEL IS THE WRONG MODEL AT THE WRONG TIME

A sentencing model should fit the current goals of sentencing. The historic overview provided in the Commission report makes clear why determinate sentencing is the wrong model for New York for the 21st Century.

- 1796 - A new penal code with the goals of punishment and deterrence brought determinate sentence to New York. The goal and the sentencing model coincided.
- 1877-1870 - New York saw the ascendancy of rehabilitation as a goal and the creation of the indeterminate model to make sentencing practices compatible with that goal.
- 1970 - Present - Focus shifted away from rehabilitation. New York and the rest of the nation turned to the goals of retribution and incapacitation.

Between 1970 - 1975 New York turned from the goal of rehabilitation but continued to use the indeterminate model that was designed with rehabilitation as the goal.

It was a system out of sync.

The goals of sentencing and the model need to be compatible. However, that is not the path down which this Preliminary Proposal would have us travel.

In 1995, New York began its crossover to determinate sentencing. It started with so-called violent offenses. The goal was punishment. It was driven by the promise of federal money and, on the national level, the private prison lobby.

Determinate sentencing is not consistent with New York's new 5 goals of sentencing and a focus on reintegration. Reliance on indeterminate sentencing would once again create a sentencing model out of sync with our sentencing goals. We are trying to fit the square peg of our sentencing goals into the round hole of a determinate sentencing model.

The clear advantage of indeterminate sentencing is that when appropriate criteria are used for parole release decision-making it serves to enhance reintegration and limits the risk that a person will remain incarcerated beyond that which is necessary. Stated another way, it helps to avoid needless punishment.

ANALYZING THE ARGUMENTS IN FAVOR OF THE DETERMINATE SENTENCING MODEL

The Preliminary Proposal sets forth 6 arguments to justify determinate sentencing:

1. Simplification
2. Certainty
3. Follow the trend
4. Uniformity, fairness and "truth-in-sentencing"
5. Criticism of parole decision-making
6. Facilitate more informed plea bargaining

Let's take a closer look at them one at a time:

1. Simplification - Creating a sentencing model that is simple - but inconsistent with the stated goals of sentencing - is not necessarily desirable nor is it consistent. It creates a system at odds with itself and will surely prove counter-productive to reintegration and public safety.
2. Certainty - This is promoted as the centerpiece of the determinate position.

Proponents of determinate sentencing criticize indeterminate sentencing, by pointing to the uncertainty of 5 potential release dates:

- 1) Supplemental merit release date (for drug offenses)
- 2) Merit release date
- 3) Parole date
- 4) Conditional release date
- 5) Maximum release date

This gives us 5 potential release dates when the supplemental merit release date, applicable only to drug offenses, is included.

But, what is the certainty of determinate sentencing? A careful examination of the potential release dates under determinate sentencing reveals the uncertainty of this certainty.

- 1) Merit release date
- 2) Conditional release date
- 3) Maximum determinate release date
- 4) Maximum determinate release date plus additional time for post-release supervision
- 5) Up to an additional 6 month kicker - Penal Law §70.45
- 6) And for Sex Offenders (effective April 13, 2007 SOMTA) we have a determinate sentence compounded by the uncertainty of a release date set by the parole board for any post release supervision violator with a time assessment of more than 3 years.

There are 6 potential release dates when we include sex offenses. In short, the uncertainty of whether parole will be granted is replaced by the uncertain of the time assessment.

Moreover, there are 5 additional possible release dates for determinate sentencing:

- 1) Work release date
- 2) CASAT release date
- 3) Willard release date
- 4) Shock release date
- 5) Civil commitment – and the uncertainty of a lifetime of confinement

The truth about the determinate truth-in-sentencing model is that it will inject no more certainty into the process than indeterminate sentencing and perhaps less.

3. It is logical to follow the trend towards determinate sentencing.

We suggest that New York should not simply follow sentencing policy trends, particularly if the trend is inconsistent with our new sentencing goals and the arguments in favor of the trend do not hold up under scrutiny.

4. Uniformity, fairness and “truth-in-sentencing.”

“Truth-in-sentencing,” whatever that term implies, clearly does not mean certainty, uniformity or fairness. For example, a 7 year determinate sentence with 5 years post-release supervision illustrates the uncertainty. Under the best case scenario, earning merit time and good time, incarceration would last 5 years. Under the worst case scenario, including violations of post-release supervision, incarceration could total 12 ½ years.

Does that broad incarceration range, really represent a concept that is dubbed “truth-in-sentencing?” What is truthful about a 7 year determinate sentence that could result in 12 ½ years of incarceration?

5. The Commission’s criticism of Parole Board decision making is well-founded. To date, the Parole Board has engaged in an **over-reliance on the underlying conviction as a basis for denial of parole.**

But is this a reason to scrap indeterminate sentencing? We think not. This criticism argues for the reform of the parole board decision-making process to make it consistent with the goals of reentry and reintegration rather than the abandonment of indeterminate sentencing.

This criticism sounds familiar. For the past three decades advocates, people in prison and their families have leveled this criticism and it has fallen on deaf ears. But the call was to reform the parole board decision making - not scrap it.

If this criticism is so heart-felt by this Commission, and given as a reason to move to determinate sentencing, yet for those who will languish in prison with the old or life indeterminate sentences - the question must be asked: Why is the Commission's reaction so tepid when it comes to reforming the decision making process?

"The commission will consider the implications of proposing an amendment to Parole's discretionary release guidelines to require that less weight be given by the Parole Board to the underlying offense and greater focus be given to the inmate's behavior while in prison."

If it is a good enough reason to scrap the entire indeterminate sentencing mode, why does it earn only "consideration of implications" when it comes to the reform of the parole granting criteria? CCA urges the Commission to make this recommendation forthrightly and propose that the primary focus be placed on behavior and progress while in prison. After all, many people - lifers, people serving old indeterminate sentences, parole violators, and sex offenders serving time on post-release supervision violations - will be subject to parole board decision making that should not rely on the nature of the offense.

6. Determinate sentences facilitate more informed plea bargaining because the parties can bargain over fixed terms.

As discussed above, in reality there is no more certainty in a determinate sentence than in an indeterminate sentence. Plea bargaining as we currently know it - in our mixed system of determinate and indeterminate sentencing - offers no more informed decision making by the parties to the negotiations under one sentencing model as opposed to the other. In fact, the willingness and ability of the parties to engage in plea bargaining seems unaffected by the nature

of the sentencing model invoked.

I urge you not to forego the search for a sentencing model that serves to promote our newest sentencing goal. What is remarkable about the six justifying arguments for determinate sentencing is that none of them address public safety or the promotion of successful reentry and reintegration. The history of determinate sentencing in New York and elsewhere reflects that it is simply about longer sentences and. While incapacitation deters crime during the period of incarceration it does little to improve public safety after release. Determinate sentencing is simply not conducive to our best efforts to promote successful reentry and reintegration.

ADDITIONAL ISSUES

Drug Law Reform

As one who has researched, written and lectured on the racial disparities in our criminal justice system, driven in large part by our drug policy, including sentencing, I was deeply disappointed that the best that the Commission could provide for New York was the hope that it “will study existing proposals for reform...to determine whether additional drug law-related reform can be accomplished without jeopardizing public safety.” There is a voluminous body of research that shows that our current drug laws undermine public safety by incarcerating so many men and women of color in ways that undermine the health, economic well-being and safety of their families and communities, and in ways that undermine confidence in our system of justice.

One of the areas of drug reform that screams out for attention is to complete the resentencing eligibility for people convicted of A-II drug offenses. As this Commission is aware, the DLRA II made some people serving life sentences on A-II drug offenses eligible for resentencing. Tragically, for many others, because of the tortured language regarding eligibility

for such resentencing, they could not even apply. The case of *People v. Mills*, a decision by Judge Anthony Aloia, illustrates the point. Mills, serving a sentence of 3 to life had served 11 years by the time he applied for resentencing. Unlike the person in the cell next to him, who was serving a sentence of 5 to life, for the very same A-II drug offense, and who had served only one year of that sentence, Mills was determined under the DLRA II to be ineligible for resentencing. The patent unfairness requires reform. Excluding Mills and others similarly situated from resentencing, while permitting others to be resentenced is not justified by a public safety concern. The inequity was recognized by Judge Aloia who beseeched the legislature to correct this injustice:

"The Court is hopeful that this case will prompt the State Legislature to rewrite this legislation to address the inequities raised by this and similar cases." (Mills Decision is attached).

Two years later there has been no change.

Expanding Merit Time

The Commission should move from its position of "considering" whether the merit time program "should be expanded" to making this an outright recommendation. It should be expanded for all determinate sentences. Denial of merit time is particularly inappropriate, as is now the case, in the situation of a person who is serving both a lengthy non-violent sentence and a shorter violent sentence running concurrently. Even after the maximum shorter sentence has been served, the person is barred from earning merit time on the longer, non-violent sentence. This policy should be reformed.

Expanding Work Release

Work release is an essential backend component of our renewed commitment to reentry and reintegration. Over the past decade the use of work release has shrunk as the political grasp of Executive Orders have strangled the life out of this program that prepares people for community reintegration. This Commission is urged to breathe new life into work release. Move beyond “the close examination” and embrace the concept. Fear of the bad publicity caused by the aberrant case should not deter the progress that can be made by improving public safety through the use of work release. Using work release to prepare a person more fully for reintegration will decrease recidivism and prevent further victimization.

Using Evidence-Based Outcomes to Reduce Recidivism

Almost one third of this report was devoted to identifying areas where New York might make use of evidence-based practices, yet remarkably there is not one word about applying evidence-based research to our sentencing practices. I urge this Commission to review the Multnomah, Oregon experience with evidence-based sentencing and the writings on this subject by Oregon Circuit Court Judge Michael Marcus. (*Sentencing in the Temple of Denunciation: Criminal Justice’s Weakest Link*, 1 Ohio Law Journal of Criminal Law 671 (2004)). Judge Marcus convincingly argues that by using evidence-based “smart sentencing” and rigorously scrutinizing data on what sentences work or not on which defendants, we can allocate our correctional resources far more efficiently – measured by public safety – than if we settle for “just deserts” with no accountability for outcomes. Applying evidence-based practices to sentencing (as opposed to merely developing defendant profiles and defendant risk assessments)

will help us avoid the conclusion about our sentencing practices that Judge Marcus so poignantly articulates:

"A foreign observer might reasonably conclude that this society has no literature or discipline related to corrections or criminology, and that the ritual is not designed for public safety or that the participants trust sentencing by hubris as a matter of faith."

Thank you.

*1] THE PEOPLE OF THE STATE OF NEW YORK, against Donald Mills, Defendant.

94-2116

COUNTY COURT OF NEW YORK, ONONDAGA COUNTY

2007 NY Slip Op 50100U; 2007 N.Y. Misc. LEXIS 129

January 16, 2007, Decided

NOTICE:

[**1] THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PRIOR HISTORY: People v. Mills, 12 Misc. 3d 1188A, 824 N.Y.S.2d 765, 2006 N.Y. Misc. LEXIS 2082 (2006)

COUNSEL: WILLIAM J. FITZPATRICK, ESQ., District Attorney of Onondaga County, AUDRA ALBRIGHT, ESQ., of Counsel, For the People.

ERIC JESCHKE, ESQ., Attorney for Defendant.

JUDGES: Hon. Anthony F. Aloï, County Court Judge.

OPINION BY: Anthony F. Aloï

OPINION:

Anthony F. Aloï, J.

This is a motion by the People pursuant to CPL Section 440.40(1) seeking to set aside the defendant's re-sentencing. On June 22, 2006 the defendant was re-sentenced to an eight year determinate sentence with a five year post-release supervision period, pursuant to the 2005 *Drug Law Reform Act* (DLRA) (L 2005 Chapter 643).

The People are now requesting that this Court set aside the defendant's re-sentencing upon the grounds that it was invalid as a matter of law, based upon the ruling in *People v. Bautista*, 26 A.D.3d 230, 809 N.Y.S.2d 62 (First Dept., 2006), appeal dismissed, 7 N.Y.3d 838, 857 N.E.2d 49, 823 N.Y.S.2d 754 (2006).

The Court in *Bautista* held that while Chapter 643 and Corrections Law 851(2) [**2] , when read together, are not models of clarity, that the 2005 Drug Law Reform Act provides that a defendant who was convicted of a Class A-II felony drug offense and sentenced to an indeterminate sentence under prior law to an indeterminate term of imprisonment with a minimum of not less than three years, and who is more than 12 months from being an "eligible inmate", as that term is defined in Corrections Law Section 851 (2), may apply to be re-sentenced in accordance with Penal Law Section 70.71. The Court held in *Bautista* that an "eligible inmate" is "a person confined in an institution who is eligible for release on parole or who will become eligible for release on parole or conditional release within two years" (Corrections Law Section 851(2)). When read together, these provisions mandate that, in order to qualify for [*2] re-sentencing under the 2005 DLRA, a Class A-II drug offender must not be eligible for parole within three years.

The People further contend that the Court in *People v. Modesto Perez*, NYLJ, February 3, 2006 (New York County), a trial level case, has reversed itself in an unpublished decision on March 10, 2006. The [**3] Court in *People v. Perez*, in its March 10, 2006 decision, stated that on May 26, 2005 the Court sentenced the defendant to a prison term of three years to life as a result of the defendant's guilty plea to *Criminal Possession of a Controlled Substance in the Second Degree*, and that the defendant on November 22, 2005 moved *pro se* for re-sentencing pursuant to Chapter 643 of the laws of 2005. On January 24, 2006 that Court rejected the People's argument that defendant was outside the scope of that law because he belonged to that class of inmates who become parole eligible in more than one but less than three years, and assigned counsel on defendant's behalf.

However, the *Perez* Court, in citing *People v. Bautista* (March 2, 2006) has subsequently stated that:

"The First Department subsequently held that Chapter 643 relief is limited to those inmates who become parole eligible more than three years from the date of their re-sentencing applications. Because defendant becomes parole eligible only slightly more than two years from the date of his application, I am constrained by *Bautista* to deny the application. Accordingly, defendant's motion for re-sentencing [**4] is denied."

Clearly the Court in *Perez* reversed itself because a trial-level judge in the First Department was required to follow the Appellate Division, First Department's decision in *Bautista*.

In another First Department trial-level case not cited by the People, *People v. Santos*, 13 Misc. 3d 1230A, 2006 NY Misc. LEXIS 3112, 2006 NY Slip Ops 52063U, that Court also stated that:

"This Court is constrained to follow *Bautista*, and therefore holds that the defendant is ineligible to be re-sentenced (See *People v. Turner*, 5 NY3d 476, 482, 840 N.E.2d 123, 806 N.Y.S.2d 154 (2005); *Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 664-65, 476 N.Y.S.2d 918 -- (2d Dept. 1984). In the absence of Court of Appeals precedent, *Bautista* is binding on all trial-level

courts. (Turner, 5 NY3d at 482). The Court of Appeals recently determined that Chap. 643 did not provide for appeal by permission to the Court of Appeals, and therefore dismissed the appeal in *Bautista* 7 N.Y.3d 838, 857 N.E.2d 49, 823 N.Y.S.2d 754, 2006 N.Y. LEXIS 2527, 2006 NY Slip Op 6508; 2006 WL 2689700. While the First Department decision in *Bautista* is entitled to respect from other appellate [**5] courts, *Turner*, 5 NY3d at 482, the Second Department is of course free to reach another conclusion."

The People contend, therefore, that as a result of the Court in *Perez* having reversed itself, and since this Court cited *Perez* in support of this Court's decision to re-sentence the defendant, Donald Mills, that this Court is required to set aside the defendant's re-sentencing based on the First Department's holding in *Bautista*. The Court in *Perez*, as a trial-level court within the First Department, must follow the determination of the Appellate Division, and once the *Perez* Court became aware of the Appellate Division, First Department's decision in *Bautista*, the *Perez* Court was required to vacate and set aside its decision. [*3]

While the First Department decision in *Bautista* is entitled to great respect from other courts, absent *Court of Appeals precedent*, this Court and the Appellate Division, Fourth Department are free to reach the same or another conclusion.

The Court would note, however, that in a decision published subsequent to the oral arguments of this motion, the *Appellate Division, Third Department*, on December 7, 2006, in [**6] *People v. Thomas*, 2006 NY Slip Op 9060; 2006 NY App. Div. LEXIS 14461, reversed a trial-level re-sentence pursuant to the 2005 Drug Law Reform Act (L 2005, Chapter 643), and in so doing cited the holding in *People v. Bautista*, 26 AD3d 230, 809 N.Y.S.2d 62, finding that when the Drug Law Reform Act and Correction Law 851(2) are read together, these provisions mandate that in order to qualify for re-sentencing under the 2005 DLRA a Class A-II felony drug offender must not be eligible for parole within three years. The defendant in *Thomas* was sentenced to an indeterminate term of imprisonment of eight years to life on September 13, 1999 as a result of his plea of guilty to the A-II drug felony of *Criminal Possession of a Controlled Substance in the Second Degree*, and he applied to be re-sentenced in September of 2005. The *Thomas* Court held, since the record revealed that at the time of his application to be re-sentenced defendant was eligible for parole in February 2007, "well within the three year period," the Appellate Division, Third Department stated "Accordingly, County Court erred in re-sentencing him under the 2005 [**7] DLRA and the judgment must be reversed."

Additionally the *Appellate Division, Second Department*, in a decision dated December 26, 2006, in ; *People v. Parris* 6 N.Y.3d 851, 849 N.E.2d 980, 816 N.Y.S.2d 757, 2006 NY Slip Op 10110 (lv. denied) has now also followed the holding in *People v. Bautista*. The Appellate Division, Second Department, in affirming the denial of the defendant's application to be re-sentenced under DLRA II stated:

"Chapter 643 of the Laws of 2005 (hereinafter Chapter 643) grants to certain

inmates convicted of class A-II drug felonies the right to move for resentencing. Although, as the Appellate Division, First Department, observed, Chapter 643 is "not a model of clarity" (*People v. Bautista*, 26 AD3d 230, 809 N.Y.S.2d 62), it affords possible relief to certain inmates who are "more than twelve months from being an eligible inmate as that term is defined in subdivision 2 of section 851 of the correction law" (L 2005 ch 643 Section 1). The import of this language is that it does not apply to an inmate who is already an "eligible inmate", namely "a person confined to an institution who is eligible for release on parole [**8] or who will become eligible for release on parole or conditional release within two years (Correction Law Section 851[2]), or to any inmate who would fit within that class of persons in a year or less. In short, Chapter 643 does not apply to inmates who are three or fewer years from eligibility for parole (see *People v. Bautista, supra*; see also *People v. Cuebas*, 12 Misc 3d 987, 989, 820 N.Y.S.2d 688; *People v. McCurdy*, 11 Misc 3d 757, 763, 813 N.Y.S.2d 860). Here, although the defendant and the People disagree on the specific date that the defendant will be eligible for parole, both dates were less than three years from the date the defendant filed his motion for resentencing. Consequently, the County Court properly found that the defendant was not entitled to seek relief under Chapter 643."

The instant case is factually distinguishable from *Bautista, Thomas* and *Parris* in that the defendants in those cases had not served the minimum sentence imposed by the Court. [*4] Therefore, the issue still remains, is the defendant, Donald Mills, and similarly-situated defendants who have served their court-imposed [**9] minimum sentences and have appeared before the Parole Board and have been denied parole, eligible to be re-sentenced under this poorly-written Drug Law Reform Act, and is the *Bautista* holding applicable under such circumstances?

When the holdings of the foregoing Appellate Division cases are considered, it is clear that "Chapter 643" affords possible relief to certain inmates who are more than twelve months from being an "eligible inmate" as that term is defined in Correction Law 851(2). The courts, in following the holding in *Bautista*, have cited Correction Law 851(2) and have quoted the definition of "eligible inmate" as follows:

"Eligible inmate" means: A person confined in an institution who is eligible for release on parole on who will become eligible for release on parole or conditional release within two years."

Based on that definition and the Appellate Division's holdings in *Bautista, Thomas* and *Parris*, those courts have held that the re-sentencing provisions of Chapter 643 do not apply to an inmate who is already an "eligible inmate", namely, a person confined to an institution who is eligible [**10] for "release on parole" or who will become eligible for release on parole within

two years, or to any inmate who would fit within that class of persons in a year or less, and conclude therefore, that Chapter 643 does not apply to inmates who are three or fewer years from "parole eligibility".

The courts that have dealt with this issue have not had occasion to quote the additional definition of "eligible inmate" in Correction Law 851(2), since those cases have not involved a re-sentencing application by an inmate who had served his court-imposed minimum and had been subsequently denied parole.

Correction Law 851(2) further defines the term "eligible inmate" in relevant part as that term relates to an inmate's eligibility for temporary release, subsequent to having been denied parole as follows:

"If an inmate is denied release on parole, such inmate shall not be deemed an eligible inmate until he or she is within two years of his or her next scheduled appearance before the State Parole Board."

This portion of the definition of "eligible inmate" and the issue presented as it relates to the facts of the case was not raised [**11] by the People or discussed by the Court in the original re-sentence application or decision. Thus, does this further specific definition of "eligible inmate" also contained in Correction Law 851(2) upon further consideration of the language of Chapter 643, alter in any respect the holdings of *Bautista, Thomas* and *Parris* as they relate to the facts of this case? While those courts did not deal with this portion of the definition of "eligible inmate", it is clear that Chapter 643 extends possible re-sentencing relief only to certain inmates who are more than twelve months from being an "eligible inmate", *as that term is defined in subdivision 2 of Section 851 of the Correction Law.* The reference to the definition of "eligible inmate" contained in 851(2) by the language of Chapter 643 does not limit the definition of "eligible inmate" to only the first portion of Correction Law 851(2) cited by the foregoing Appellate Division decisions. Therefore, an inmate, pursuant to Correction Law 851(2), may be deemed an [*5] "eligible inmate" when he is (1) eligible for release on parole, [**12] or (2) who will become eligible for release on parole or conditional release within two years, or (3) having been denied release on parole is within two years of his or her next scheduled appearance before the State Parole Board, or (4) he or she is an inmate who would fit within the foregoing class of persons set forth in (1), (2) or (3) above within a year or less.

The defendant, on July 26, 1995, was sentenced to an indeterminate sentence of three years to life, and on June 9, 1998 was issued an inmate-earned eligibility certificate. The defendant was therefore eligible for parole. However, the decision as to whether the defendant would be granted parole release is still left to the discretion of the Parole Board. Subsequently the defendant has been denied parole in 1998, 2000, 2004 and April of 2006, each Parole Board hearing, consistent with the Board policy, having been set at twenty-four-month intervals. The defendant's next parole hearing has been scheduled for *April 28, 2008*. Based upon the definition of "eligible inmate" as set forth in Correction Law 851(2) as that definition relates to

this defendant, Donald Mills is again "eligible [**13] for parole" on *April 28, 2008*. Therefore, in accordance with the foregoing definition of "eligible inmate", a defendant is deemed an "eligible inmate" when he or she is "within two years of his or her next scheduled appearance before the State Parole Board". In accordance with this definition, the defendant, Donald Mills, is an "eligible inmate" within the definition of 851(2), in that he is within two years of his next scheduled appearance before the Parole Board. Consequently, by virtue of Chapter 643's requirement that possible re-sentence relief be afforded to certain inmates who are "more than twelve months from being an eligible inmate", as that term is defined in Corrections Law 851(2), the benefits of Chapter 643 relief do not apply to inmates who have been denied parole and are within two years of their next scheduled appearance before the Parole Board. In short, Chapter 643 does not apply to inmates who are three or fewer years from eligibility for parole or appearance before the Parole Board, and the holdings of *Bautista, Thomas* and *Parris* and the three-year "cut out" period are also applicable to inmates who have been denied parole. [**14]

Since Executive Law 259(i) requires that the Parole Board specify a date not more than twenty-four months from an inmate's denial of parole for reconsideration thereof, and the setting of the parole hearing date within that two-year period, in accordance with 851(2) that inmate becomes an "eligible inmate". Therefore, by virtue of Chapter 643 requirements that an inmate be more than twelve months from being an "eligible inmate" as that term is defined in Correction Law 851(2), an inmate who has been denied parole would never be eligible to be re-sentenced under Chapter 643, no matter how long he or she has served under the present language of Chapter 643.

In conclusion, since the defendant, Donald Mills, is an "eligible inmate" under Correction Law 851(2) and is eligible for parole on April 28, 2008, which is less than three years from the date the defendant filed his motion to be re-sentenced, this Court is constrained to find that the defendant's re-sentencing must be *vacated* as a matter of law.

This Court is of the opinion that while it is the responsibility of a judge to interpret the law as written and [**15] not to rewrite the law, it is clear that the State Legislature, by this confusing legislation, has not only failed in their sworn duties in that respect but has more fundamentally failed to implement the Legislature's express intent of ameliorating long A-II drug sentences by providing more humane and realistic sentences for A-II drug felons. The defendant, Donald [*6] Mills, has already served more than the maximum sentence of ten years that can be imposed pursuant to the terms of the Drug Law Reform Act. Mr. Mills will have been incarcerated 13 years before his next scheduled appearance before the Parole Board. Certainly if the Legislature's intent was to ameliorate long A-II drug sentences it would seem that Mr. Mills and defendants similarly situated should have been included within the re-sentencing provision of the Drug Law Reform Act.

Clearly, to exclude from that consideration the prospect of a re-sentencing for a defendant who has served over 11 years in state prison, has earned his parole eligibility certificate in 1998, and who has continued to make positive accomplishments while incarcerated, and has maintained a positive disciplinary record and has expressed remorse [**16] for his past conduct and who is

prepared to live within the law and has lived within the law since his release, appears to be in direct conflict with the stated intent of the Legislature in enacting DLRA II . The legislation, as written, takes from the courts the ability to exercise the discretion to re-sentence on a case-by-case basis each A-II drug felon serving a 3 to life sentence, and delegates that authority to the Parole Board, who is not bound to implement the alleged express intent of the Legislature. The Parole Board's denial of parole, when predicated upon their subjective view of the severity of the underlying offense to deny parole, not only contravenes the discretionary scheme mandated by the Executive Law, but more fundamentally and effectively constitutes an unauthorized re-sentencing of the defendant. The Court is hopeful that this case will prompt the State Legislature to rewrite this legislation to address the inequities raised by this and similar cases.

Therefore, the defendant's eight-year determinate sentence with five-year post release supervision period, is hereby vacated and the defendant is to appear before this Court to be sentenced to the original sentence [**17] of three years to life.

The Decision herein constitutes the Order of the Court.

Hon. Anthony F. Aloï

County Court Judge

Dated: Syracuse, New York

January 16th, 2007

Testimony
of
PRISONERS' LEGAL SERVICES
to the
New York State Commission
on Sentencing Reform
Buffalo, New York
November 19, 2007

Presented by:
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INTRODUCTION

We would like to thank you for the opportunity to share our concerns regarding the critically important issues surrounding sentencing in New York State. In your announcement of this public hearing you listed a myriad of issues that the Commission is interested in exploring, all of which are relevant to conducting a comprehensive review of New York's current sentencing structure and practices. Because of our expertise in working with inmates for over thirty years, we will focus our testimony on those issues that directly relate to preparing offenders for successful reintegration from prison to the community.

Each year, some 26,000¹ individuals are released from prison into our communities. The successful reintegration of these individuals into our communities is a critical public safety issue. Reentry efforts, to be successful, must begin with arrest and continue through sentencing to an individual's release into the community, whether that occurs upon arrest, sentencing, or after imprisonment. Thus our comments will address alternatives to incarceration, New York's existing sentencing laws, and the need for in-prison rehabilitative programming, education and re-entry preparation services.

Alternatives to Incarceration

Seldom discussed is the impact that incarceration itself may have on an individual's ability to successfully reintegrate into the community.² In fact, prison itself has a criminogenic effect on individuals. Studies have discussed several possible reasons for this, including: the pain and discomfort incarceration inflicts on individuals; the highly routinized, restrictive, and isolating nature

¹ Travis, Jeremy, *But They All Came Back: Facing the Challenges of Prisoner Reentry*, The Urban Institute Press (citing Admission and Release Data from DOCS for 2005).

² See e.g. Lynne Vieraitis, et al., "The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974-2002," *Criminology and Public Policy*, Vol. 6, Issue, at 589, 614 (August 2007). The authors of this study evaluated other many other studies and ultimately concluded as follows: "Using a state panel data set for 46 states from 1974 to 2002, our analysis indicates that increases in the number of prisoners released from prison seems to be significantly associated with increases in crime... [W]e attribute the apparent positive influence on crime that seems to follow prior to release to the community to be the criminogenic effects of prison."

of prison; the failure of prisons to address inmates' substance abuse, mental health, medical, vocational, and educational needs prior to their release; the severance of important family and legitimate community ties; and perhaps most importantly, the stigmatization associated with being labeled an "ex-offender" upon release.³ Though removing people from the community may successfully incapacitate them, it also severs their supportive relationships in the community, making it that much more difficult for them to reintegrate upon their release.

Alternative to incarceration (ATI) programs maintain these important community connections, and as a result, can play a critical role in successful reintegration. Indeed, several studies have shown that ATI programs significantly reduce recidivism⁴ while another has concluded that use of ATI's does not increase the risk that individuals will re-offend.⁵ In 2005, the Washington State Legislature directed the Washington State Institute for Public Policy to report on whether evidence-based and cost-beneficial policy options existed to reduce the need for future prison beds,

³ *Id.* at 614-615.

⁴ In New York City, some youths who are indicted in Supreme and Family Court are given the opportunity to participate in community based "alternative-to incarceration" programs. Youths who completed these programs had an average recidivism rate as low as 18%. Milton, T. B. (Nov. 2006), *A Second Chance: Community Based Alternative to Incarceration Programs for Juvenile Offenders in New York City*, Paper presented at the annual meeting of the American Society of Criminology (ASC), Los Angeles Convention Center, Los Angeles, CA, Nov. 1, 2006, available at: http://www.allacademic.com/meta/p126998_index.html. Similarly, the New York City Criminal Justice Agency (CJA) found that felony ATI participants were significantly less likely to be rearrested than similar people sent to and discharged from jail; ATI participants and probationers were no more likely to be rearrested than similar people sentenced to and released from probation or State prison. The report concluded: "To the extent that they are viewed as alternatives to jail sentences, these ATI programs can be recommended as more effective in reducing recidivism." Jukka Savolainen, Ph.D., CJA Research Brief No. 2, *The Impact of Felony ATI Programs on Recidivism*, (April 200), available at www.nycja.org. See also National Center on Addiction and Substance Abuse at Columbia University (CASA), "Crossing the Bridge: An Evaluation of the Drug Treatment Alternative-to-Prison (DTAP) Program," at www.cascolumbia.org. (finding that DTAP participants were 67% less likely to return to prison two years after leaving the program, and graduates had re-arrest rates that were 33% lower, re-conviction rates that were 45% lower than a matched comparison group and were 87% less likely to return to prison and 3 ½ times more likely to be employed than the matched comparison group.)

⁵ Porter, Rachel, Lee, Sophia, Lutz, Mary, *Balancing Punishment and Treatment Alternatives to Incarceration in New York City*, Vera Institute of Justice, May 2002.

save money, and reduce recidivism.⁶ The Institute exhaustively reviewed all research evidence that it could locate in searching for what works, if anything, to reduce crime. In analyzing fifty-seven (57) evaluations of the effectiveness of adult drug courts across the nation, the study found that average adult drug court programs reduce the recidivism rate of participants by 8.0 percent. A cost-benefit analysis of adult drug programs across the county found that the benefits of the programs, fewer crime victims and less tax dollars spent on incarceration, far outweighed the costs associated with the programs. The Institute concluded that the use of adult drug courts typically results in an economic benefit of almost \$5,000.00 per participant.

In this regard, we applaud the Commission for recommending that evidence based practices be used to guide decision making and programming, and we discuss this in more detail below with regard to prison-based reentry initiatives. We are concerned, however, that the Commission's view of evidence based approaches is much too limited, and that while the Commission sees the value of such approaches for purposes of making decisions about transitional and prison-based programming, the Commission overlooks the value of evidence based approaches in making what is perhaps the most critical decision – that is, whether an individual's sentence should include imprisonment.

As noted in the Institute's report, there is no question that diverting offenders to ATI programs is sound public policy because such diversion either increases public safety or, at the very least, maintains the status quo with respect to public safety and saves the state millions of dollars each year in incarceration costs.⁷ Accordingly, we agree with that portion of the Sentencing Commission's Preliminary Report that discusses alternatives to incarceration and we encourage this

⁶ Steve Aos, Marna Miller, and Elizabeth Drake. 2006) Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates. Olympia: Washington State Institute for Public Policy, The study can be found online at: <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>.

⁷ For example, the significantly lower recidivism rates associated with the Brooklyn District Attorney's DTAP program were achieved at about half the average cost of incarceration. "The average cost of placing a participant in DTAP, including the costs of residential drug treatment, vocational training and support services, was \$32,975 compared to an average cost of \$64,338 if the individual had been placed in prison." CASA, "Crossing the Bridge," at ii.

Commission to expand both the range of offenses in which sentencing judges have the discretion to impose a non-prison sentence and the available alternatives.⁸

ATI's are one way to avoid the criminogenic effect of incarceration; however, as we discuss more below, when incarceration is imposed, a sentencing policy that promotes reintegration and rehabilitation is absolutely crucial if we are to reduce the criminogenic effect of incarceration.

Sentencing Goals

When it costs so much more to incarcerate a prisoner than to educate a child, we should take special care to ensure that we are not incarcerating too many persons for too long. It requires one with more expertise in the area than I possess to offer a complete analysis, but it seems justified to say this: *Our resources are misspent, our punishments too severe, our sentences too long...* The debate over sentencing is a difficult one, but we should not cease to conduct it. Prevention and incapacitation are often legitimate goals... [and] ... [t]here are realistic limits to efforts at rehabilitation. *We must try, however, to bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must reach.*⁹

In 2006, New York made great strides toward bridging the gap Justice Kennedy describes by amending our Penal Law to include reintegration as a sentencing goal. Thus, Penal Law § 1.05(6), now defines the purpose of sentencing as follows:

To ensure public safety by preventing the commission of offenses through the deterred influence of the sentences authorized, the rehabilitation of those convicted, *the promotion of their successful and productive reentry and reintegration into society*, and their confinement when required in the interests of public protection.

Inexplicably, in recommending a shift to determinate sentencing for nearly all offenses, this Commission did not mention reintegration as a goal of sentencing. To the extent that this Commission's Preliminary Report discusses reentry, it does so only with regard to prison-based programming and ATI's. Genuine efforts at reintegration, however, do not limit reintegration and reentry to a "back-end" process; meaningful reintegration and reentry efforts begin at the point of

⁸ Creating a state-wide community based prosecution model and state wide mental health courts are just some of the alternatives that the Commission should consider.

⁹ Anthony M. Kennedy, Associate Supreme Court Justice, Address to the American Bar Association, August 9, 2003 (emphasis added).

arrest.

Accordingly, we ask the Sentencing Commission to recommend a sentencing model that incorporates the principles articulated in the New York State Penal Law – a sentencing model that makes reintegration meaningful by emphasizing rehabilitation. Put simply, we urge this Commission to consider rehabilitation as a sentencing goal from the outset.

It seems that the Commission's primary justifications for the recommended shift to determinate sentencing are simplicity, certainty, and the fact that this has been the recent trend. These justifications, however, have little to do with the sentencing goals articulated in Penal Law § 1.05. Nor is it evident that determinate sentences achieve these goals. For example, there is little certainty to determinate sentences given the various statutes and regulations that affect the actual sentence served, such as Post Release Supervision, conditional release, merit time, additional merit time, temporary release, and work release to name just a few.

Moreover, the Commission apparently believes that defendants prefer "the certainty of determinate sentencing" to the "vagaries of the parole process." Preliminary Report, at 16. We are compelled to emphasize, however, that this is not what we are hearing from our clients. Rather, the overwhelming majority of inmates who contact PLS want an end to, and not a wholesale shift toward, determinate sentences. To be sure, for two decades they have told us of their frustration with the Parole Board's failure to recognize their genuine efforts to rehabilitate themselves. They are frustrated that their release is measured primarily by the nature of the crimes they committed – something they cannot change. But from their perspective (and ours), doing away with indeterminate sentencing is not the solution. After all, indeterminate sentencing offers the best hope that genuine rehabilitation will be rewarded. Our clients, therefore, urge us to advocate for changes to parole, not to indeterminate sentencing. They ask decision-makers to do precisely what Justice Kennedy urged the American Bar Association to do – to remember that those who commit crimes are "human beings whose minds and spirits" must be reached – and *can be reached*. If we at PLS have learned anything in the 30 years that we have worked with inmates, it is just this – that most inmates *want to be*

rehabilitated.

We also remind the Commission that a sentencing model that encompasses rehabilitation as a goal is one that not only increases the use of community based ATI's and expands the range of offenses for which ATI's are available, but one that also provides inmates an opportunity to reduce the time they spend in prison if they demonstrate meaningful rehabilitation. There are a variety of ways to accomplish this. Requiring parole to focus on rehabilitation rather than the nature of the offense is the most obvious way and would accomplish much in terms of certainty if the Parole Board consistently honored genuine rehabilitative efforts.

We acknowledge that focusing on rehabilitation – and thus the individual offender – can mean less certainty and uniformity with respect to knowing the exact amount of time an individual will serve. However, certainty and uniformity do not in and of themselves enhance public safety. In fact, uniformity may very well result in jeopardizing public safety, as suggested by studies showing that lengthy prison terms actually contribute to recidivism.¹⁰ Additionally, uniformity in sentencing does nothing to improve the fiscal position of this State. It makes no sense to impose determinate sentences when individuals are different and may be rehabilitated – and thus, ready for release – at different times. Keeping individuals locked-up long after they are ready for release solely for the sake of certainty and uniformity is contrary to this State's public safety and fiscal goals. Meaningful rehabilitation means a decreased risk of re-offending, which, of course, means enhanced public safety and less money spent on re-incarceration.

Drug Law Reform

We are disappointed that the Commission did not address the need for comprehensive reform to New York's severe and anti-therapeutic drug laws. As discussed above, the best evidence shows that drug treatment rather than lengthy incarceration works well to reduce recidivism and enhance

¹⁰ See Lynne Vieraitis, et al., "The Criminogenic Effects of Imprisonment," supra note 2.

public safety.¹¹ While the drug law reforms of 2004 and 2005 were an encouraging first step, these reforms did not go nearly far enough in alleviating the counterproductive severity of New York's current drug law. It makes no sense to continue to impose lengthy prison sentences on those convicted of non-violent drug crimes when research shows that treatment is more effective at reducing recidivism and enhancing public safety.

This is even more true if one considers the high costs of imprisonment as opposed to treatment. It is critical that we focus our limited resources on the most cost-effective strategies available for reducing recidivism and enhancing public safety. As one commentator stated: "It is no longer sufficient, if it ever was, to demonstrate that prisons are better than nothing. Instead, they must be better than the next-best use of the money."¹² Lengthy imprisonment simply is not best use of money; treatment is.

Therefore, we agree with the many people and organizations who have urged this Commission to seek an alternative approach to sentencing for non-violent drug offenses or, at the very least, to extend the drug law reforms of 2004 and 2005.

Prison Based Re-Entry Initiatives

Re-entry and reintegration does not begin a month, or three months, or even a year prior to the inmate's release from prison.¹³ Reintegration is an ongoing effort that, in a prison setting, must

¹¹ In their comprehensive evaluation of the Brooklyn's Drug Treatment Alternative-to-Prison (DTAP) program, for example, the National Center on Addiction and Substance Abuse concluded as follows: "Findings to date from CASA's evaluation of DTAP are encouraging. Criminal justice programs can divert into long-term residential treatment high risk, serious felony offenders (including drug sellers), who would otherwise have been incarcerated, while holding them accountable for their crimes. Evidence accumulated thus far has demonstrated that this approach yields high treatment retention rates, improved employment, diminished recidivism and reduced costs." CASA, "Crossing the Bridge," at 12, *supra* note 4.

¹² Don Stemen, "Reconsidering Incarceration: New Directions for Reducing Crime," Vera Institute of Justice (January 2007), at 13.

¹³ Alan Rosenthal and Elaine Wolf. (2004) *Unlocking the Potential of Reentry and Reintegration: A Reintegrative Sentencing Model*. Available online at: http://www.communityalternatives.org/articles/unlocking_potential.html.

begin the moment of reception to succeed. In a prison setting, reintegration means rehabilitation, self-development, and preparation for release to the community. Given this, we suggest that DOCS work with the Office of Mental Health (OMH) and Office of Alcoholism and Substance Abuse Services (OASAS) in the following four-step process: First, as the Commission suggests in its Preliminary Report, a risk and needs assessment should be performed immediately upon an inmate entering DOCS's custody (if not already completed as part of sentencing). Second, treatment and programming should begin *immediately* upon identifying an inmate's needs. Third, DOCS should expand its rehabilitative and educational programs. Fourth, DOCS should develop a strategy for dealing with inmates who are confined to Special Housing (SHU) immediately prior to their release so that such inmates are not released directly from the SHU to the community.

A. Individualized Risk and Needs Assessment

As noted above, we are encouraged by the Commission's recommendation that each inmate's risks and needs be individually assessed. We are also encouraged that the Commission recognized that the Pre-Sentence Investigation Report (PSI), which is currently used to assess programming needs, is not an effective instrument for doing so and that the Commission recommends use of validated, evidence based approaches. Indeed, DOCS reliance on the PSI to assess inmates' programming needs¹⁴ is surprising given that the PSI has never been validated as an effective instrument for assessing risk and needs and that, as practitioners know, PSI's tend to be fraught with errors.¹⁵ Thus, for good reason, many inmates are not invested or engaged in the particular

¹⁴ According to Anthony Annucci, DOCS Deputy Commissioner and Counsel: "The single most important document is the presentence report. It is of enormous importance not only in making security and classification decisions, but also in terms of making programming assignments. This report follows the inmate throughout his incarceration." See NYSBA, Criminal Justice Section, October 6, 2006 Continuing Legal Education, "A Practical Knowledge of the State Prison System for the Court Practitioner: Presentation Outline," at 5.

¹⁵ By virtue of Criminal Procedure Law § 390.50(1), inmates generally do not have access to their PSI, and thus, are not able to identify and correct erroneous information it contains. See e.g., *Kilgore v. People*, 274 A.D.2d 636 (3rd Dept. 2000) (refusing to disclose PSI to inmate notwithstanding his assertion that errors in the PSI resulted in creation of incorrect DOCS programming assessment and security classification). Cf. *People v. Peetz*, 4 Misc.3d 597 (Sup. Ct., Queens Co. 2004) (releasing PSI to inmate, but holding that inmate's attempt to correct

programming DOCS and Parole requires.

In determining how best to assess inmate programming needs, we ask the Commission to recommend use of an assessment that is fluid, holistic, and multilateral. We explain this further below:

1) *Use a risk and needs assessment that is fluid.* The risk and needs assessment must take into account not only static factors, which the inmate cannot change, but dynamic factors that change over time. For example, an inmate may arrive at DOCS addicted to drugs. But over time with treatment, this inmate's needs and risk level will change. Initially, the inmate may need intensive substance abuse treatment, but as the intensity of the needed treatment decreases, so too will the inmate's risk of re-offending. Thus, risk and needs must be re-assessed to take into account that which the inmate has (or has not) achieved over time.

2) *Use a risk and needs assessment that is holistic.* Successful reintegration and reduced recidivism will work only if inmates' multiple needs are assessed and met. This includes: educational, vocational, medical and mental health, substance abuse, and family and legitimate community relationship needs.

3) *Use a risk and needs assessment that is multilateral.* Under the current prison-based programming and treatment model, DOCS dictates to inmates what programming they are required to take. Inmates are left in the dark as to the rationale for DOCS' programming mandates and recommendations, just as they are not given access to the PSI, which is the basis for this decision-making. Moreover, much of DOCS' programming decisions are based on DOCS-wide policies, rather than a genuine individualized assessment of need. It is no wonder, then, that many inmates are not invested in DOCS' programming mandates and recommendations. Inmates must be invited into the process, meaning that they must be intimately involved in all aspects of the risk and needs assessment and the programming recommendations. Doing so will enhance the likelihood that inmates will be invested and engaged in the recommended programming and treatment. It will also provide them an

errors it contained was untimely).

opportunity to correct any erroneous information that forms the basis of the risk and needs assessment, thereby increasing the assessment's accuracy.

B. Resulting Treatment and Programming.

Once needs are identified, it makes no sense to wait until an inmate is close to his or her release date to begin treatment and programming – an approach that DOCS currently takes far too often.¹⁶ This is particularly true for substance abuse and mental health treatment. For that reason, we will address these two treatment and programming needs first, and then turn to education, vocational, and family and community ties.

1) Mental Health Treatment.

Although OMH screens inmates upon their reception to DOCS, the screening relies almost exclusively on inmate self-reporting, and thus, is often uninformed and inadequate. The result is that OMH often delays providing mental health treatment until after the inmate has “acted out” and received a disciplinary ticket. Usually this ticket results in the inmates confinement to segregated housing (SHU) – which exacerbates the inmate’s mental illness and all too often results in downward spiral of more disciplinary infractions and long-term SHU confinement. This happens even though the inmate may have a proven course of treatment by a community-based treatment provider or county jail. It has been our experience that OMH seldom obtains these treatment records, and even when OMH does so, it is often too late.

Moreover, there are an insufficient number of treatment programs available for inmates with

¹⁶ Over the past several years, the Correctional Association of New York has documented these long waits for treatment and programming. In their report entitled *State of Prisons, 2002-2003*, for example, the Correctional Association found long waiting lists – often as long as six months – for educational and vocational programs in every facility visited. “In most prisons we visit, superintendents, correction officers and inmates cite program cuts and idleness as leading problems in their facilities.” Correctional Association of New York, *State of Prisons, 2002-2003*, at 7. There are similarly long waits for substance abuse treatment. See Correctional Association of New York, “Testimony of Shayna Kessler, Prison Visiting Project Associate, Before the Assembly Committee on Codes, the Assembly Committee on Alcoholism and Drug Abuse, and the Assembly Committee on Corrections,” at 2 (“It appears that many inmates in need of substance abuse treatment have to wait many years to receive it.”). The report and testimony are available at www.correctionalassociation.org.

mental illness.¹⁷ “[M]ost inmates with mental illness are housed with general population inmates in maximum security prisons, where mental health services are woefully insufficient.... [I]nmates with mental illness are often isolated, stigmatized and easily victimized by other prisoners (extorted, ‘set up’ or assaulted) in general population. Moreover, they receive little treatment beyond psychotropic medication.”¹⁸ Currently, the Intermediate Care Program is the only prison-based mental health program available for mentally ill inmates who are not in disciplinary housing. Yet, as of 2004, there were only 534 beds available for the 3,200 inmates diagnosed as suffering from a major mental illness.¹⁹ Thus, most mentally ill inmates are housed in general population and treated almost exclusively with medication, if they are treated at all.

Accordingly, we suggest that the Commission review the Correctional Association’s June 2004 report, which identifies many problems with mental health treatment in New York prisons and offers many solutions to these problems. At the very least, we recommend the following:

- OMH obtain records from other treatment providers so that the initial screening does not rely primarily upon inmate self-reporting;
- Immediately upon reception to DOCS, mental health treatment must begin for each inmate in need of such treatment; and
- Expand the program options for mentally ill inmates in general population so that treatment is meaningful and includes more than mere administration of psychotropic medication.

2) Substance Abuse Treatment (DOCS)

¹⁷ The recent settlement in Disabilities Advocates Inc. v. New York State Office of Mental Health et al., 02 Civ. 4002 (S.D.N.Y.) seeks to expand the number of treatment programs for seriously mentally ill inmates confined to the disciplinary housing. The settlement does not address, however, mental health programming and treatment for inmates not in disciplinary housing.

¹⁸ Correctional Association of New York, *Mental Health in the House of Corrections: A Study of Mental Health Care in New York Prisons*, June, 2004, at 1. This in-depth report is available at www.correctionalassociation.org.

¹⁹ *Id.* at 2.

Waiting lists are long for substance abuse treatment program, particularly the Alcohol and Substance Abuse Treatment (ASAT) program which is the largest DOCS treatment program. Inmates often wait years before their treatment needs are met.²⁰ The problem is even worse for the Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program, and currently DOCS, as a policy, waits until inmates are 6 to 12 months before their earliest release date to begin the CASAT program.

In addition, little is done to help inmates identify and connect with community-based treatment providers who can provide long-term treatment upon their release from prison, despite the research showing that such care is crucial to recovery.²¹ Indeed, the Stay'n Out program at Arthur Kill and Bayview Correctional Facilities and the CASAT program at five other facilities are the only programs that help inmates identify community-based care upon their release from prison. Yet, these two programs account for only 11% of all the substance abuse treatment provided. It is even more discouraging that enrollment in parts of CASAT – which includes a work release phase to help inmates transition to the community – has actually decreased in the past decade.²²

There are several obvious problems to this “wait-to-treat” approach. Waiting fails to take advantage of the time when inmates are typically most ready for treatment – their reception to DOCS. It also encourages them to continue their “bad habits” rather than using prison time to establish a course of effective treatment and thus, law-abiding conduct. Worse, this policy also fails to recognize

²⁰ Testimony of Shayna Kessler, Prison Visiting Project Associate, Correctional Association of New York, Before the Assembly Committee on Codes, the Assembly Committee on Alcoholism and Drug Abuse, and the Assembly Committee on Corrections, March, 2007, at 2 (available at www.correctionlassociation.org.)

²¹ “A considerable body of research has found that the long-term effectiveness of drug treatment is related to the length of time spent in treatment.” CASA, “Crossing the Bridge,” at 7, supra note 4 (citing numerous studies).

²² Correctional Association, “Testimony,” at 4, supra note 20. Enrollment in this critical transitional component of CASAT has decreased because laws and regulations have been promulgated that limit eligibility for work release.

that effective substance abuse treatment necessarily is long-term.²³

The problem is worse in those cases in which a sentencing court has ordered an inmate to participate in CASAT. Upon his reception, the inmate will discover that DOCS does not intend to immediately honor this court-order and that he must wait for the expected treatment. Thus, for example, an inmate sentenced to a 7-year determinate sentence and court-ordered to participate in CASAT will discover upon reception that he must serve at least four years of his sentence²⁴ before he is eligible for enrollment in CASAT. Not only will this inmate's treatment needs go unaddressed for years, but learning that a state agency feels free to ignore a court order contributes to a sense of disrespect for the law.

Accordingly, we urge this Commission to recommend the following:

- Substance abuse treatment must begin as soon as possible upon an inmate's reception;
- There must be increased efforts to connect inmates to community-based, long-term treatment. This can be done by expanding the Stay'n Out and CASAT programs or by creating additional programs;
- Work release eligibility must be expanded to enable more inmates to participate in CASAT, and thus meaningfully connect with community-based, long-term treatment providers;
- DOCS must be instructed to honor court ordered CASAT treatment immediately. At the very least, DOCS must be instructed to honor § 30(1) of Chapter 738 of the Laws of 2004, which provides for additional merit time, and consider this the inmate's earliest release date for CASAT participation.

²³ *Id.* at 4.

²⁴ This takes into account the possible 1/7 time an inmate can receive for good time as well as the additional 1/7 an inmate convicted of a non-violent crime can receive for merit time.

3) Educational Opportunities.

In May, 2006, the New York State Bar Association's Special Committee on Collateral Consequences of Criminal Proceedings ("NYSBA's Special Committee") issued its Report and Recommendations in which it found, among other things, that "while imprisoned, prisoners do not have the opportunity to develop the education and vocational skills necessary to securing employment upon release."²⁵ We ask this Commission to carefully review and consider the findings and recommendations of the NYSBA's Special Committee. With regard to education, we highlight the following points.

DOCS' current policy is to enroll inmates in educational classes if they have not yet attained their Graduate Equivalency Diploma (GED). Yet, because of funding and teaching staff cuts, there often are long waiting lists for these academic programs, and many inmates leave prison without obtaining their GED.²⁶ The situation is far worse for inmates who have attained their GED, as there are very few advanced educational opportunities available in DOCS. This is largely a result of the mid-1990's federal ban on Pell grants for inmates and New York's ban on inmate use of the Tuition Assistance Programming (TAP). These bans have significantly altered the landscape for inmates who wish to attain college-level education – prior to 1994, DOCS had 70 post-secondary programs; now there are just 4.²⁷

The failure to provide inmates sufficient educational opportunities makes no sense in light of

²⁵ "Reentry and Reintegration: The Road to Public Safety," Report and Recommendation of the Special Committee on Collateral Consequences of Criminal Proceedings, New York State Bar Association (May, 2006), at 107.

²⁶ These long waiting lists are due largely to programing cuts and a recent hiring freeze of non-essential staff recently imposed on DOCS. Thus, many DOCS facilities have several teaching and vocational staff vacancies. Correctional Association of New York, *State of the Prisons, 2002-2003*, at 8; "Reentry and Reintegration," at 114-115 ("As prison teachers have been classified as non-essential prison employees, the budget cuts have particularly affected educational and vocational programming by contributing to a dearth of teachers to educate the State's prison population.").

²⁷ "Reentry and Reintegration," at 116.

the plethora of research showing the relationship between education and recidivism.²⁸ Accordingly, we urge this Commission to follow those recommendations made by the NYSBA's Special Committee, including the following:

- In terms of funding, make education (and thus, teaching positions) a priority;
- Create opportunities for college education. This can be accomplished by restoring funding through the TAP, by providing inmates financial assistance to participate in self-directed study, such as the College Level Equivalency Program (CLEP), creating grants for colleges and universities interested in partnering with DOCS to provide college-level education, and mandating a steady stream of educational funding;²⁹ and
- Implement rules and policies that ensure that inmates are not unnecessarily removed from educational programming.³⁰ For inmates who must be confined to Special Housing, provide weekly tutoring to support their efforts at self-study.

4) **Meaningful Vocational Programming**

To be successful, reintegration efforts should encourage prisons to provide inmates marketable skills that will enable them to find meaningful employment upon their release. Currently, because of funding problems and a lack of thoughtfulness about job market realities, DOCS is failing in this regard. In fact, the NYSBA's Special Committee, in its Report and Recommendations, identified a crisis in both the *quantity* and *quality* of available vocational programming.

Funding cuts have led to long waiting lists for vocational programming and too many inmates

²⁸ "Reentry and Reintegration," at 122 (discussing several studies reporting the correlation between education, employment, and decreased recidivism). See also "Analysis of Return Rates of the Inmate College Program Participants," (NYS DOCS, August 1991) (finding that "Inmate College Program participants in 1986-1987 who had earned a degree were found to return at a significantly lower rate than participants who did not earn a degree. Of those earning a degree, 26% had been returned to the Department's custody by February 29, 1991, whereas 45% of those participants who did not earn a degree were returned to custody.")

²⁹ "Reentry and Reintegration," at 128.

³⁰ In their report, NYSBA's Special Committee found that many inmates are removed from educational programming mid-semester or reasons unrelated to their educational needs, such as transfers to other facilities. "Reentry and Reintegration," at 107-123.

sit idle. Indeed, “superintendents, correction officers, and inmates cite program cuts and idleness as the leading problems in their facilities.”³¹ Many facilities try to fill this void by assigning inmates to “porter patrol,” which requires inmates to perform basic cleaning and maintenance assignments throughout the facility. However, “these positions do not provide the inmate-worker with any training or development of skills that could be useful once released. Consequently, in many prisons assignment to a porter position represents placement in a meaningless job that involves little work, no training or skills development, and much idle time.”³²

Even inmates fortunate enough to be placed in a non-porter vocational program often find that the program provides only limited opportunities to develop marketable job skills. Much of DOCS vocational programming is too general and fails to help inmates obtain specific job skills. Too often, inmates are being trained for jobs that no longer exist, or they are trained on outdated equipment. Worse, they are often trained for jobs that require licensure, despite the fact that their criminal records impair their ability to obtain the required license.³³

Accordingly, we urge this Commission to follow those recommendations made by the NYSBA’s Special Committee, including the following:

- Increase funding so that all inmates may participate in vocational programming;
- Expand the range of vocational programming available;
- Conduct the ongoing research necessary, and work with private employers, to develop programming that teaches skills needed in the current job market; and
- Ensure that all facilities offer meaningful vocational programming.

5) Maintaining Family and Legitimate Community Ties

Imprisoning individuals strains – and all too often severs – their relationships with family

³¹ Correctional Association of New York, *State of the Prisons: 2002-2003*, at 7.

³² *Id.* at 8.

³³ “Re-entry and Reintegration: The Road to Public Safety,” Report and Recommendations of the NYSBA’s Special Committee on Collateral Consequences of Criminal Proceedings, May 2006, at 111-112.

Accordingly, we urge this Commission to recommend that maintaining family and community ties be a critical part of each inmate's program recommendations and that the following policies be adopted to further this goal:

- Provide additional funding for increased visitation between inmates and family members, particularly their children;
- Increase and expand school holiday visitation programs;
- Make meaningful efforts to house inmates as close to their homes as possible;
- Expand Family Reunion Programs;
- Increase visiting hours in medium-security prisons;
- Ensure that each facility's visiting room can accommodate families and children; and
- Train correctional officers to encourage visits by treating visitors with dignity.

C. *Step-Down Programs Alternative to Release from SHU*

Too often, inmates are released from long-term confinement in segregated disciplinary housing ("SHU") to the community. A rich body of research reveals that long term confinement to segregated housing has a devastating impact on an inmate's mental and emotional well-being.³⁵ There is no question that releasing such inmates directly to the community is a recipe for disaster. Nonetheless, DOCS continues to do so in an alarming manner, as the Correctional Association noted in its comprehensive report concerning disciplinary housing in New York State prisons:

Unlike some other states, New York does not routinely transfer inmates in disciplinary confinement to "step-down" facilities or re-orientation programs before their release date to help them re-acclimate to life in society or in general population. Inmates whose prison

³⁵ The Correctional Association discussed some of this research in their comprehensive report about disciplinary housing in New York State prisons. *See Lockdown New York: Disciplinary Confinement in New York Prisons*, (October 2003), at 25-27. In addition to reviewing the research, the Correctional Association discussed the results of their three year investigation into DOCS's SHU units, summarizing as follows: "On nearly every site visit and in some lockdown units more than others, we encountered individuals in states of extreme desperation: men weeping in their cells; men who had smeared feces on their bodies or lit their cells on fire; prisoners who cut their own flesh in a form of self-directed violence known as self-mutilation; inmates who rambled incoherently and paced about their cells like caged animals; [and] individuals with paranoid delusions..." *Id.* at 25.

sentences end while they are in lockdown are released directly to the community, regardless of whether they have lived in isolation for months or years.

At Southport Correctional Facility, inmates deemed too violent to walk the prison corridors unshackled are routinely escorted in handcuffs and waist chains on the day of their release – right out the front gate. A Southport correction officer told us that he sometimes violated policy and escorted inmates unshackled though the corridors on the day of their release. “If the guy’s going to stab someone I’d rather it be me than the first person he bumps into at the Elmira bus station,” he said.³⁶

There are, of course, several alternatives, many of which are discussed on the Correctional Association’s *Lockdown New York* report. We encourage this Commission to review this report. In addition, we urge the Commission to recommend the following:

- Adopt efforts to continue each inmate’s required programming (in accordance with the risk and needs assessment discussed above) as much as practical, using closed circuit television, video-programing, cell-study instructors, intensive facility library services, and group programming with other SHU inmates. There are already models for some of this in DOCS facilities, including the pre-Residential Substance Abuse Treatment program at Greene Correctional Facility and the cell-study/enrichment program at Shawangunk Correctional Facility; and

- Implement a “step-down” program for inmates who will be released from prison while in disciplinary housing. For example, a certain time period prior to their release, such inmates should be transferred from the SHU to keep-lock status and should receive transitional programing and opportunities to use the telephone to contact family members, treatment providers, and other legitimate people in the community who can help such inmates arrange for services following their release. Those inmates who demonstrate good behavior in the “step-down” keep-lock status should be rewarded with an additional step-down to general population.

³⁶ *Id.*, at 40.

D. *Prison-Based Programming and Treatment: Summary*

We recognize that the foregoing proposed prison-based programming and treatment will require a significant investment of money and resources. But the pay-off will be significant as inmates leave our prisons better prepared to face the challenges that re-entry poses. More and more ex-offenders will successfully reintegrate into our communities, thereby decreasing the number of people we must re-incarcerate each year. As set forth in the Executive Order that created this Commission, the goals of this Commission include enhancing public safety and making "the most efficient use of the correctional system and community resources." The programming and treatment discussed above is certainly a sound way to achieve these goals.

Conclusion

We have covered a lot of ground here today and we realize that all of the issues raised in our testimony and the testimony of others who appear here today require thoughtful consideration and dialogue. Prisoners' Legal Services is dedicated to assisting this Commission in any way it can. Because of our unique position as both a legal services and advocacy organization for prisoners and our extensive experience confronting the issues this Commission is examining, we offer to you our time and expertise in exploring the options that are available to attain its goals.

We thank you for the opportunity to present this testimony to you.

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GOOD AFTERNOON LADIES AND GENTLEMAN. MY NAME IS THOMAS GREEN. I AM THE DIRECTOR FOR ALTAMONT PROGRAM INC'S HOUSING SERVICES, A DIVISION OF PYHIT, WHICH STANDS FOR PETER YOUNG HOUSING INDUSTRIES AND TREATMENT. I'D LIKE TO TALK TO YOU TODAY ABOUT THE ENORMOUS NEED FOR HOUSING AND EDUCATIONAL/ VOCATIONAL EMPLOYMENT SERVICES FOR THE PRISON RE-ENTRY CLIENT. I STAND BEFORE YOU TODAY HAVING BEEN A PRODUCT OF THE SYSTEM, AND I'M PROUD TO SAY THAT I'VE BEEN RE-INTEGRATED BACK INTO SOCIETY SINCE 1991. I'M AN EX- OFFENDER AND A PERSON IN RECOVERY.

I DON'T MIND SHARING WITH YOU THAT I EXPERIENCED FEELINGS OF APPREHENSION, INTIMIDATION, AND ANXIETY UPON MY RELEASE. IT

SEEMED OVERWHELMING. THANKFULLY, THERE EXISTED PROGRAMS, AND THE UNDERSTANDING, COMPASSIONATE STAFF IN SUCH PLACES AS AN ALTAMONT PROGRAM. MEN LIKE FATHER YOUNG WITH THE MISSION AND VISION OF ASSISTING, AND ENCOURAGING PEOPLE LIKE ME,(PEOPLE IN CRISIS), WITH THE OPPORTUNITY TO SHARE IN THE VISION OF BEING A CLEAN AND SOBER, TAX PAYING CITIZEN; GUIDING AND PROVIDING A CLEAN, HEALTHY, THERAPEUTIC ENVIRONMENT, CONDUCIVE TO CHANGE. A PLACE WHERE I COULD RE-FOCUS MY LIFE AND CHANNEL MY ENERGIES IN A POSSITIVE DIRECTION. THE ENVIRONMENT MOTIVATED ME TO CHANGE IN WAYS I HAD NERVER THOUGHT POSSIBLE. I RETURNED TO THE EDUCATIONAL PROCESS AND I'M NOW A CASAC-T (COMPREHENSIVE ALCOHOL SUBSTANCE, ABUSE

COUNSELOR). I HOLD THE POSITION OF DIRECTOR FOR THE ALTAMONT PROGRAM'S HOUSING SERVICES AND SUPERVISOR FOR THE HOMELESS VETERANS PROGRAM SINCE 2002.

I'LL SHARE WITH YOU SOME OF THE BARRIERS AND CHALLENGES TO PROVIDING HOUSING FOR THE CRIMINAL JUSTICE CLIENT. I HAVE WORKED CLOSELY WITH THOSE INDIVIDUALS RETURNING TO SOCIETY THROUGH WORK RELEASE AND NOW PAROLE. SOME OF THE PRIMARY BARRIERS THAT EXIST IN THE HOUSING CONTINUUM, THAT CAUSE GAPS IN SERVICES ARE; THE NEED FOR ADEQUATE EMERGENCY SHELTERS, TRANSITIONAL HOUSING, PERMANENT SUPPORTIVE HOUSING, PERMANENT HOUSING, JOB READINESS, VOCATIONAL TRAINING/EDUCATION AND EMPLOYMENT OPPORTUNITIES, ALONG WITH SUPPORT SERVICES.

THERE ALSO EXISTS THE NEED FOR A SEAMLESS TRANSITION FROM ONE LEVEL OF THE PROCESS TO THE NEXT. WE BELIEVE IN THE THREE LEGGED STOOL CONCEPT, TREATMENT, HOUSING, ED./ EMPLOYMENT, IN ORDER TO BETTER EQUIPT THS POPULATION TO MAINTAIN PERMANENT HOUSING, AND IMPROVE THE QUALITY OF THEIR LIFE. FUNDING IS ALSO A MAJOR CONCERN FOR PROVIDERS; THE LACK OF ADEQUATE FUNDING CAN LIMIT SUCCESS, AND INCREASE THE CHANCES OF FAILURE FOR THE CLIENT.

THERE ARE AN INCREASING NUMBER OF HOUSNG ASSISTANCE PROGRAMS, AND THAT NUMBER HAS CONTINUED TO INCREASE SINCE THE 1980'S AND EARLY 1990'S, BECOMING A \$2 BILLION DOLLAR A YEAR ENDEAVOR TODAY AS QUOTED BY THE" NATIONAL ALLIANCE TO END HOMELESSNESS, 2000.

YET THE PROBLEM REMAINS A SERIOUS PROBLEM
IN MANY COMMUNITIES ACROSS THE COUNTRY.
SOME OF US BELIEVE WE NEED TO SHIFT TO NEW
APPROACHES. NOT SUGGESTING INNOVATION, BUT
RATHER RENOVATION.

LOOKING AT THE CHARACTERISTICS OF THE
CRIMINAL JUSTICE, RE-ENTRY CLIENT, IT IS
OBVIOUS THAT MOST HAVE SERIOUS MENTAL
ILLNESSES, SUBSTANCE ABUSE DISORDERS,
HIV/AIDS, OR PHYSICAL DISABILITIES. MANY HAVE
MORE THAN ONE OF THESE MAJOR PROBLEMS,
WHICH FREQUENTLY RESULTS IN THEIR BEING
TURNED AWAY FROM TRADITIONAL HOUSING
ASSISTANCE PROGRAMS. MANY OF THE CLIENTS
HAVE BEEN HOMELESS FOR A LONG TIME; MANY
HAVE NO TIES TO FAMILY, OR OTHER SUPPORTS,
AND LACK RESOURCES. THEIR SKILLS ARE

ORIENTED TOWARD SURVIVAL ON THE STREETS,
NOT LIVING IN HOUSING.

ANY EFFORTS THATS EXPECTED TO REDUCE THIS
HOUSING PLIGHT TO ANY SIGNIFICANT DEGREE
MUST ATTRACT, AND HOLD THIS TARGETED
POPULATION.

FIRST, THERE HAS TO BE AN EFFECTIVE WAY TO
CONTACT AND RECRUIT THESE INDIVIDUALS.

EQUALLY IMPORTANT, THERE MUST BE SOMETHING
TO OFFER THEM THAT THEY WILL TAKE. THE
PROGRAM NEEDS TO FIT THE PEOPLE, RATHER THAN
THE REVERSE.

OUTREACH, HOUSING AND SUPPORTIVE SERVICES
ARE OBVIOUS COMPONENTS OF A SOLUTION; IN
ADDITION JOB READINESS AND CONTINUED
EDUCATION WOULD BE POSITIVE ADDITIONS TO
ANY TRANSITIONAL HOUSING SOLUTION.

PREVENTIVE EFFORTS ARE ALSO INCREASINGLY BECOMING A PART OF THIS PICTURE. MORE AND MORE PROVIDERS HAVE RECOGNIZED THAT OUTREACH, HOUSING, SUPPORT SERVICES, DISCHARGE PLANNING, JOB READINESS SKILLS TRAINING MUST INCORPORATE THE FOLLOWING ABILITIES IN ORDER TO BE A VIABLE SOLUTION TO THIS PROBLEM.

1. WE MUST HAVE THE ABILITY TO ATTRACT PEOPLE WITH ADDICTIONS, AND ENCOURAGE WILLINGNESS TO SOBRIETY.
2. WE MUST HAVE THE ABILITY TO ATTRACT THOSE PEOPLE WITH SERIOUS MENTAL ILLNESS. THEY OFTEN FIND SHELTERS INTOLERABLE DUE TO OVERCROWDING, AND A SENSE OF VULNERABILITY. THEY FEEL THREATENED BY OTHER RESIDENTS OR THE

HOUSING PROVIDERS WON'T SERVE THEM
BECAUSE THEIR SYMPTOMS ARE TOO
DISRUPTIVE.

3. WE MUST HAVE THE ABILITY TO WORK WITH
PEOPLE WITH CO-OCCURRING DISORDERS. NO
LONGER CAN WE REMAIN SINGLE FOCUSED IN
OUR APPROACH TO THESE EVER INCREASING
PROBLEMS.

IN CLOSING, IT SHOULD BE SAID THAT THERE ARE
NO SINGLE ANSWERS TO THE PROBLEM. IT WILL
TAKE COLLABORATION, NETWORKING, AND
PARTNERING, IF WE ARE TO BE EFFECTIVE IN
PROVIDING VIABLE SOLUTIONS TO ADDRESS
THESE NEEDS. THANK YOU FOR YOUR TIME AND
CONCERN FOR THIS EVER INCREASING PROBLEM.

**Testimony of Nicholas T. Texido
Staff Attorney, Appeals Unit**

The Legal Aid Bureau of Buffalo, Inc.

to the New York State Commission on Sentencing Reform

**November 19, 2007
Buffalo, New York**

My name is Nicholas Texido and I am an attorney with the Legal Aid Bureau of Buffalo's Felony Appeals Unit. We handle appeals to the Appellate Division from Erie County felony convictions resulting from pleas, non-jury trials and jury trials, for a total of approximately 200 appeals per year.

Upon reading the Commission's preliminary report, we were pleased and excited that the entire realm of sentencing was to be reexamined. We would be remiss, however, if we were not to voice our hope regarding the maintenance or expansion of the discretion of trial judges at sentencing, as we are in the unique position of witnessing the sentencing work done by judges on each and every felony case. In addition, from a standpoint of judicial and prosecutorial discretion, respectively, we wish to comment on the Commission's recommendations of a shift from indeterminate sentencing and a relaxation of the current post-indictment plea restrictions.

Evidence-Based Sentencing Procedures and Judicial Discretion

As a part of our appellate representation, we become familiar with all of the facts of the case. Often, after reviewing the facts and the pre-sentence investigation report, we argue

that the sentence was unduly harsh and severe. Removing the hat of an advocate, however, and replacing it with that of an observer, we are compelled to state that trial judges do a remarkable job exercising their discretion in most cases.

Although our desire to maintain and expand judicial discretion flows mainly from our perception of the fairness, intelligence, and sound judgment of the trial judges, our presentation today will deal mostly in the negative—the risks, costs, and problems involved in employing an evidence-based sentencing model.

First, it is nearly impossible to create an exhaustive guideline system that accounts for all of the factors that judges use at sentencing.¹ An evidence-based system, however, would limit and proscribe these factors, thus reducing the role of advocacy and judgment from the equation. For instance, the federal guidelines make no allowance for education, vocational skills, mental and emotional condition, physical condition, drug or alcohol dependence, employment history, level of guidance as a youth, or charitable works,² all of which are presumably taken into account by a thoughtful and well-intentioned judge attempting to achieve a just result. For instance, a judge free from guideline restraints may wish to take the offender's age into consideration when determining a proper sentence in effectuating the goals of rehabilitation and successful reintegration into society. However, a statutory guidelines scheme that lists age as a factor may be challenged as constitutionally infirm.³

Although one could conceive of a guideline regime that took all of these specific factors into account, there will always be additional factors not taken into account by the

¹ See, the 1993 case of Wisconsin v. Mitchell, 508 US 476, 484 in which the Supreme Court of the United States stated that "sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant."

² Luna, Erik, "Misguided Guidelines—A Critique of Federal Sentencing," Policy Analysis, No. 458, November 1, 2002.

³ See, *eg.*, People v. Munoz, 22 Misc.2d 1078, (later reversed at 9 NY2d 51) in which the defendant unsuccessfully challenged an age-based restriction on the carrying of certain items.

guidelines. Moreover, a particularly compelling factor that impacts on sentencing, such as a physically or mentally disabled victim, may warrant more consideration in a certain case than a guideline system allows. Allowing the judge to take a holistic view of the offense, the offender, and the circumstances of the case is the only way to achieve fairness in sentencing for offenders, victims, and society as a whole. In addition, the likely effect of an evidence-based sentencing model on the current plea-bargaining practices could be catastrophic.

In New York State, plea-bargaining is mainly done by way of sentence bargaining. That is, unlike the practice in federal courts, defense counsel and the prosecutor bargain in the presence of the judge and come to an agreed-upon sentencing commitment as part of the plea bargaining process. As a result, an evidence-based sentencing model would either be circumvented in New York State courts or would result in a vast decrease in the number of cases disposed of by guilty plea, which would strain or even cripple the judiciary branch.

If criminal defendants are not offered a particular sentence as part of a plea, it logically follows that fewer defendants will avail themselves of plea offers. The likely response would be fact-bargaining, in which the prosecutors, defense attorneys, and judges would bargain on the assignment of points in order to determine an offered sentence.⁴ Researchers have found that the Federal Guidelines are circumvented in at least 20% of all federal criminal cases resolved by guilty plea.⁵ Not only would this practice circumvent any guidelines put into place, but it would also encourage dishonesty and be counterproductive to the pursuit of the truth, as officers of the court would be in a position where they were forced to nod and wink their way to a mutually-acceptable plea deal. This undesirable practice is preferable to the alternative,

⁴ Probation Officers Advisory Group, "Probation Officers Advisory Group Survey," Federal Sentencing Reporter, 8 (1996): 303.

⁵ Schulhofer, Stephen J. and Nagel, Ilene H., "Plea Negotiations under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-*Mistretta* Period," Northwestern University Law Review 91 (1997): 1284.

however, which is to reduce convictions by guilty plea to a point where the judicial system comes to a screeching halt, as defendants opt for a jury trial instead of a guilty plea with uncertain results.

In addition to the risk of creating a Hobson's choice between circumventing statutory guidelines or adding unnecessary trials to already-full court dockets, guidelines, even if only advisory, will face an array of constitutional challenges. The United States Supreme Court's decision in Blakely v. Washington, (542 US 296), which prohibits judicial fact-finding as a violation of the right to a trial by jury, has resulted in endless litigation in states using evidence-based sentencing practices.⁶ In fact, Minnesota has been forced to use a jury interrogatory to determine whether certain defendants awaiting sentencing are a danger to public safety, which is an aggravating factor warranting an upward departure under the Minnesota sentencing provisions.⁷ Minnesota was also forced to revise its dangerous offender statute in order to comply with the mandates of Blakely.⁸

Moreover, the Supreme Court of the United States has held that a fact used to enhance a sentence must be included in the indictment upon which the defendant was charged.⁹ This prohibition has also caused an array of litigation in states using evidence-based sentencing procedures.¹⁰ Because the New York Constitution often offers greater protection to individuals accused of crimes than does the United States Constitution, the viability of any evidence based sentencing procedure, particularly when conducted without a jury, is questionable. Thus, the risk exists that numerous legislative and commission hours will be wasted in fashioning an

⁶ See, eg., State v. Chauvin, 723 NW2d 20 (Minnesota Supreme Court, 2006).

⁷ State v. Kendell, 723 NW2d 597 (2006).

⁸ State v. Fairbanks, 688 NW2d 333, 336-37 (Minn. App. 2004).

⁹ Apprendi v. New Jersey, 530 US 466.

¹⁰ State v. Allen, 615 SE2d 256 (N.C. Supreme Court, 2005); State v. Mills, 109 P3d 415 (Wash. Supreme Court, 2005).

unconstitutional sentencing scheme. The better course would be to create an unquestionably constitutional sentencing scheme that maintains judicial discretion while advancing the various goals and concerns of the Commission.

While the aforementioned factors all weigh against any evidence-based sentencing model, the only factor that weighs in favor of such a model is uniformity in sentencing. While achieving uniformity in sentencing is a laudable goal, the effect of a guideline or evidence-based procedure in promoting uniformity is not proven. Researchers have found that non-uniformity in sentencing persists under the Federal Guidelines, which is the most stringent guideline scheme of any jurisdiction in the nation.¹¹ For instance, sentence severity under the Federal Guidelines and departures therefrom have been linked with the race, ethnicity, and/or citizenship of the defendant, and the particular district court of conviction.¹²

Any gain in uniformity as a result of an evidence-based model must be weighed against the corresponding costs and risks. If New York State were to adopt an evidence-based model of sentencing, it would do so at a cost of judicial discretion, and at a risk of reducing the number of guilty pleas and having a disastrous effect on judicial economy. Furthermore, the constitutionality of such a sentencing scheme is questionable, and even if the scheme is ultimately held constitutional, it will be the subject of endless litigation.

While we recognize the potential benefits of evidence-based practices in a correctional setting and in determining rehabilitative services, we respectfully recommend that no such model be used in meting out sentences upon those convicted of crimes.

¹¹ Albonetti, Celesta A., "Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes For Drug Offenses," *Law and Society Review*, 2002.

¹² *id.*

The Proposed Shift From Indeterminate to Determinate Sentences

Many of the same concerns apply to the Commission's proposed move from indeterminate to determinate sentences. In abandoning indeterminate sentences for all but the most heinous of crimes, the Commission may be seen as abandoning the rehabilitative model. If the Commission does recommend that existing indeterminate sentences be converted to determinate, care must be taken to allow for broad ranges of legally permissible sentences, particularly at the lower-end of the sentencing range. Doing so will allow a judge to impose a short sentence when rehabilitation and subsequent reentry so dictate, and thus, will not return New York State to the 1970's punitive model of sentencing that is linked with determinate sentencing.

Post-Indictment Plea Restrictions

Another aspect of the Commission's Preliminary Report that compels comment is the recommendation that restrictions on post-indictment pleas be relaxed, which recommendation we support. The heart of this matter from a practitioner's perspective is the same as the crux of our argument against evidence-based sentencing: If New York State allows judges and prosecutors to exercise their discretion free from undue legislative restrictions, justice will be achieved in an overwhelming majority of criminal cases. We therefore agree with the Commission's preliminary recommendation that the restrictions on post-indictment pleas be relaxed and/or abandoned.

As the Commission rightly notes, the plea restrictions in many cases either frustrate a mutually-desired outcome or are easily evaded. The argument in support of plea restrictions is that the restrictions are necessary to limit the ability of the parties and the court to engage in inappropriate pleas. However, this argument neglects the role of judges and prosecutors in our criminal justice system, as those figures have been and must be trusted to exhibit commitment to the pursuit of justice.

The net result of a legislative restriction on post-indictment pleas is a decline in the number of indictments, as many defendants plead guilty prior to indictment so that they do not lose the ability to accept the same offer later on. However, in a pre-indictment stage, the defendant has not had any suppression hearings, and is not in a position to effectively bargain for a satisfactory result. For example, a defendant who has a colorable claim of unlawful interrogation must forego a favorable plea offer in order to litigate the lawfulness of the interrogation. As the Commission also notes, nothing prevents a District Attorney's Office from establishing its own plea guidelines.

There are many reasons why a prosecutor may wish to offer a favorable plea, even in a post-indictment stage. One can envision a situation in which the defendant was indicted for a class B violent felony, which would enable the parties to plead down only to a class C violent felony.¹³ Suppose, however, that after the indictment, the prosecutor receives an unfavorable suppression ruling or learns that her star witness has been arrested for fraud on an unrelated matter. Even worse, imagine that both of these events occur post-indictment. The defendant knows of this, and will not accept a plea that does not reflect his newfound likelihood of a not guilty verdict. The prosecutor is now in a situation where she wishes to extend a plea offer that will entice the defendant to accept, because she knows that her likelihood of success at

¹³ CPL 220.10[5][d][i].

trial has diminished. However, she is constrained by law to either go to trial or circumvent CPL 220 by dismissing the indictment and offering a pre-indictment plea, which practice is not uncommon in the criminal courts. A more efficient, logical, and rational approach would be to allow the prosecutor to offer the appropriate plea, in the interest of justice, without circumventing the system. This would also allow the defendant to eliminate the risk of going to trial in cases where the proof is questionable by allowing for more favorable plea offers in troublesome cases.

In order to ensure that the goals of the criminal justice system¹⁴ are achieved in each case, plea offers and sentencing must be done on a case-by-case basis. Allowing professionals, namely judges and prosecutors, the ability to exercise their discretion on an ad hoc basis is the only way to ensure that each victim, each offender, and society as a whole is treated in a way that comports with the recognized goals of criminal law.

Although it is not our chosen topic, we must also express support for the Commission's notion to expand educational opportunities for prisoners in an attempt to promote rehabilitation and reduce recidivism.

¹⁴ These goals are societal protection, rehabilitation, and deterrence. People v. Farrar, 52 NY2d 302. In addition, a new and emerging goal of criminal law is re-entry into society.

Statement of Leigh Kwiatek

It has been more than 30 years since New York passed the "Rockefeller Drug Laws," (RDL) which mandate long prison sentences for drug offenders – most commonly for possession or sale of small quantities of illicit drugs. [FN1]

Over 90% of drug cases are plea bargained directly with the prosecutors and do not involve jury trials to determine guilt or innocence. Once the amount of drugs and prior record have been determined, the sentencing rules do not permit judicial discretion that would allow judges to take extenuating circumstances into account in determining the length of sentences on a case by case basis.

The Rockefeller Drug Laws are unfair, unjust and cruel. They destroy lives rather than rehabilitate them. They are enforced with blatant racial and ethnic bias.

Since the inception of RDL in May of 1973, over 150,000 New Yorkers have been imprisoned for nonviolent drug offenses helping to fuel an unprecedented rise in the state's prison population. In the period between 1974 and 2002, the NY State prison population rose by almost 500% - from 14,400 to 70,700 inmates, reaching a rate of 375 / 100,000 – the highest incarceration rate in the state's history. [FN2]

The demographic characteristics of the RDL population are distinctive and significantly different from those of the general population of NY State as a whole, or even those of the rest of the NYS prison system. The drug offense population incarcerated under RDL are overwhelmingly composed of young minority males from New York City. [FN3]

Because the demographic characteristics of the RDL population are skewed relative to the State population as a whole, the impact of RDL incarcerations is not evenly distributed over the general population of NY State.

The highest rates are seen in the age 21-44 for all groups, which constitute > 80% of the total RDL prison population. Within this age range, Black males have the highest rates (1516/100,000 vs. 34/100,000 for White males) and White females the lowest (6 /100,000 vs. 109 /100,000 for Black females). The racial disparities are seen at every age and for males and females – most strikingly the ratio of Black to white males (age 21-44) is 40:1, for male Hispanics to Whites the ratio is 30:1. While Blacks and Hispanics represent only 33 % of the NYS population, over 94% of the RDL inmates are from these minorities and (based on arrest data) approximately 78% come from NYC. [FN4]

As the numbers of prisoners rose under RDL over the last three decades, the racial mix of those incarcerated for drug offense has grown progressively more disparate relative to the state population. In 1980, one third of the 886 new commitments for drug offenses were white. By 2000, of 8227 new drug commitments, only 6% were white. And as this balance shifted, the average time served by drug offenders almost doubled - from 18 to 32 months for those released in 1980 and 2000 respectively. [FN5]

In an "Analysis of RDL and Years of Life Lost," The New York Academy of Medicine suggested that thirty years of forced removal to prison of 150,000 young males from particular communities of New York represents collective losses similar in scale to the losses due to epidemics, wars, and terrorist attacks - with the potential for comparable effects on the survivors and the social structure of their families and communities. Such high rates of actual mortality or large scale Years of Life Lost due to imprisonment, whether concentrated in a brief period (as in the WTC attack) or spread out over many years (as with AIDS deaths and RDL incarcerations), may have similarly profound effects on the populations most affected.[FN6]

For example, the impact of 325,000 Years of Life Lost RDL incarcerations includes "collateral damage" to its own set of "innocent victims" - e.g. more than 125,000 children have been separated from an imprisoned parent in the 30 years of RDL.[FN7]

And there are other ways in which the effects of mass incarceration have an adverse impact that extend well beyond the prison walls and long sentences. In the US, approximately 40% of young black men 20-44 are currently under criminal justice control at any given time i.e. in prison or jail, or on parole or probation. [FN8]

This status includes felony disenfranchisement i.e. the loss of the right to vote. In the US an estimated 1 million Americans convicted of drug offenses have temporarily or permanently lost the right to vote. [FN9]

Further, drug felony convictions mean loss of drivers license and the many job opportunities that require one; loss of eligibility for military service; and disqualification for many professional licenses (e.g. beauticians and barbers), as well as some Federal benefits e.g. home and school loans. [FN10]

The cumulative impact of these extensions of incarceration therefore reach far into the lives of the most heavily affected communities and may well account for the intergenerational persistence of violence, crime, and widespread family and social dysfunction.

The striking racial and ethnic disparities so apparent in RDL incarceration rates have helped sustain a bitter sense of injustice in the minority community. It is imperative to note that illegal drug use is ubiquitous in America and there is no evidence of great differences in drug use rates between different racial and ethnic groups in this country. [FN11]

Unlike deaths due to illness, natural disaster or terrorist attack, where public sympathy typically flows to the survivors and promises of community support are the norm, the "losses" associated with large scale incarceration under the drug laws are largely unrecognized – either as losses or as collective events.

On an individual basis, each family affected by a drug incarceration must carry its own burden of stigma and compensate for the loss on their own. And the collective stigmatization and fear of criminalized young black men continues to be a core element of racism in American society.

The problem of inequality in today's criminal justice system requires a three-fold response.

First, we must acknowledge the problem by recognizing that we have built the current system on a fiction – that all are equal before the law.

Second, we must seek to restore the legitimacy that the system's double standards have forfeited by adopting measures that extend the same rights and protections to all.

Third, we must identify and develop community-based responses to crime, both at the preventative and punitive stages.

David Cole, professor of law at Georgetown Law School, wrote that

When the effects of criminal law reach the sons and daughters of the white majority, our response is not to get tough, but rather to get lenient. Americans have been able to sustain an unremittingly harsh tough-on-crime attitude precisely because the burdens of punishment fall disproportionately on minority populations. The white majority could not possibly maintain its current attitude toward crime and punishment were the burden of punishment felt by the same white majority that

The Rockefeller Drug Laws make a mockery of equal protection and due process. This modern day version of Jim Crow must stop. We hear a lot these days about an era of reform in Albany. Reform of the state's drug laws is a good place to start.

[FN1] Human Rights Watch (US). *Cruel and Usual: Disproportionate Sentences for New York Drug Offenders*. A Human Rights Watch Report. New York: March 1997:0/2)

[FN2] New York State Department of Correction. *Reports of the Superintendent of State Prisons*. Albany (NY); 1880, 1890, 1900, 1910, 1920, 1930, 1940, 1950, 1960. *New York State Department of Correctional Services: Annual Reports of Inmate Population at End of Year*. Albany (NY); 1970, 1980, 1990, 2000.

[FN3] U.S. Department of Commerce, Bureau of the Census. *Census 2000: Summary File 1*. Washington, DC; 2002. *New York State Department of Correctional Services: Unpublished Report to Correctional Association of New York*; May 2001.

[FN4] New York State Department of Correctional Services. *Unpublished Report to Correctional Association of New York*; April 2001.

[FN5] New York State Department of Correctional Services. *Number of Total Drug Releases, Average Time Served in Months*. Unpublished Report to Lindesmith Center; April 27, 2001.

[FN6] *Journal of Urban Health: Bulletin of the New York Academy of Medicine* Vol.79, No. 3 September 2002, The New York Academy of Medicine

[FN7] Human Rights Watch (US). *Collateral Casualties: Children of Incarcerated Drug Offenders in New York*. A Human Rights Watch Report. June 2002;14(3/6)

[FN8] Mauer, Marc. *Race to Incarcerate*. New York. The Free Press; 1999

[FN9] Mauer, Marc. *Felony Disenfranchisement, Report of the Sentencing Project*. Washington, DC; May 2000.

[FN10] Mauer, Marc. *Race to Incarcerate*

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[FN12] Cole, David. "No Equal Justice" The New Press, New York 1999

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TESTIMONY BEFORE SENTENCING COMMISSION

NOVEMBER 19, 2007

BUFFALO, NY

Opening Remarks

My name is Craig Schlanger. I am an attorney in private practice in Syracuse, New York. I have been a criminal defense lawyer since 1978, representing clients in state and federal court. I am Secretary of the New York State Association of Criminal Defense Lawyers, and I am appearing on behalf of that organization, representing upwards of 900 members.

Need for Sentencing Reform

It has become almost axiomatic that the so-called Rockefeller Drugs Laws were a disaster, not just because of the draconian results of the laws themselves but because of the role that they played in setting the national trend toward divesting trial-level judges of their traditional discretion and transferring that discretion to prosecutors. However, even as we acknowledge that, like Prohibition, it is an experiment that failed, this is of no consolation to the thousands of people whose lives were destroyed over the past three decades. The recent amendments were a step in the right direction, but there is a long way to go.

First, New York's sentencing laws are in need of a major overhaul, if only because they have become almost incomprehensible. But clarity alone will not solve the problems.

Sentencing Commission

One of the most worthwhile recommendations of the Preliminary Report is the creation of a permanent sentencing commission to advise legislators. Under the current system, it appears that legislators react, rather than act, on the basis of tragic events that

make the headlines. A state's sentencing scheme should be comprehensive, not *ad hoc*, and it should be the result of appropriate study and consideration. A permanent sentencing commission can play an important role in that regard.

Ideally, such a commission should be comprised of qualified members representing a true cross-section of the state, geographically and racially, including representatives from the judiciary, the defense bar and community-based organizations as well as prosecutors, law enforcement and victim advocacy organizations.

Determinate or Indeterminate Sentencing?

Determinate sentencing is a result of the desire for what is often called "Truth in Sentencing", arising from the perception that defendants who are sentenced to indeterminate terms of imprisonment will be released by the Parole Board prematurely. The traditional argument in favor of indeterminate sentencing is that it provides an incentive for prisoners to rehabilitate themselves by availing themselves of opportunities for education, vocational training and self-improvement, and making plans for employment and stable living arrangements on the "outside", in order to qualify for release to parole supervision. The reality is much different: The Parole Board has almost unfettered discretion to deny applications for release, and they exercise that discretion at an alarming rate.

Assuming that determinate sentencing is here to stay, it is not necessarily undesirable; in fact, it may be more fair than the traditional parole system, as long as it provides incentives for rehabilitation, such as:

- Earning eligibility for early release by completing educational and program requirements (this is already part of the system, but it should be expanded);

- Earned reduction of security designation; and
- Earned additional privileges while incarcerated.

Alternatives to Incarceration

All of this begs the question of whether it is necessary or desirable to continue to incarcerate the number of people who are presently incarcerated. As expected, we join with the many voices who say that the public would be far better served by providing for alternatives to incarceration for those defendants who do not pose an immediate threat to society, with an emphasis on the need for rehabilitation in order to prevent recidivism, while allowing those non-violent offenders to remain with their families and continue to be husbands and fathers, wives and mothers, and hopefully, breadwinners, while undergoing rehabilitation. Those alternatives should be provided in community-based programs that provide the opportunities for education, substance abuse counseling, vocational training, anger management training, and other life skills and self-improvement programs.

Re-Entry Into the Community

To the extent that it is deemed necessary to impose prison sentences, those sentences should not be any longer than necessary to achieve the purposes of imposing a prison sentence on a particular individual. In the long run, the overwhelming majority of people who do time will be released. It does the public no good, therefore, to warehouse people for a number of years and then return them to the community—often one from which they have been alienated—with the stigma of a felony conviction and without the skills or the opportunities to be productive and law-abiding members of that community. As *The New York Times* recently stated (Editorial, *A Second Chance for Ex-Offenders*, November 7, 2007):

Newly released inmates are often driven right back to prison by difficulty in obtaining jobs, education and housing, as well as by the social stigma that comes from having been in prison. In addition, many of these people suffer from mental illnesses but have no access to treatment. Some states have begun offering assistance in these areas, but much more needs to be done.

Any discussion of sentencing policy would be incomplete without discussing what happens after the sentence is imposed and after the sentence has been served. A fair and equitable sentencing scheme, therefore, would place an emphasis on re-entry. One example is the Second Chance Act, which is the subject of that *New York Times* editorial. However, New York State should not wait for Congress to act, nor should it rely on the federal government to fill this need in today's political climate. The state should look at successful programs, such as those implemented in Michigan and Wisconsin, as well as the Western District of Michigan's Accelerated Community Entry Program for federal prisoners. [See, for example, *The Doing Time Times* (Federal Defender Services of Wisconsin, Inc.), Summer 2007, Issue No. 8, http://www.fdswi.org/bop_newsletter/BOPSummer2007.pdf]

Expungement

With certain exceptions—most notably in regard to truly violent criminals and sex offenders—there is a widespread belief that someone who has “paid his debt to society” and is attempting to lead a law-abiding life should be given a second chance. One of the most effective ways to afford such a person that second chance is to remove the greatest obstacle to successful reintegration into society: the stigma of a conviction. This is especially true in today's security-obsessed environment, where prospective employers run criminal background checks for an ever-increasing variety of jobs, even semi-skilled and unskilled labor.

There is a widespread misconception that convictions, like traffic offenses, will be deleted from one's record after a certain period of time, such as ten years, if one stays out of trouble, and I routinely have to give the bad news to clients that such is not the case in New York State. The time has come for New York State to join many other states that have some kind of provision for expungement of convictions as a reward for good behavior.

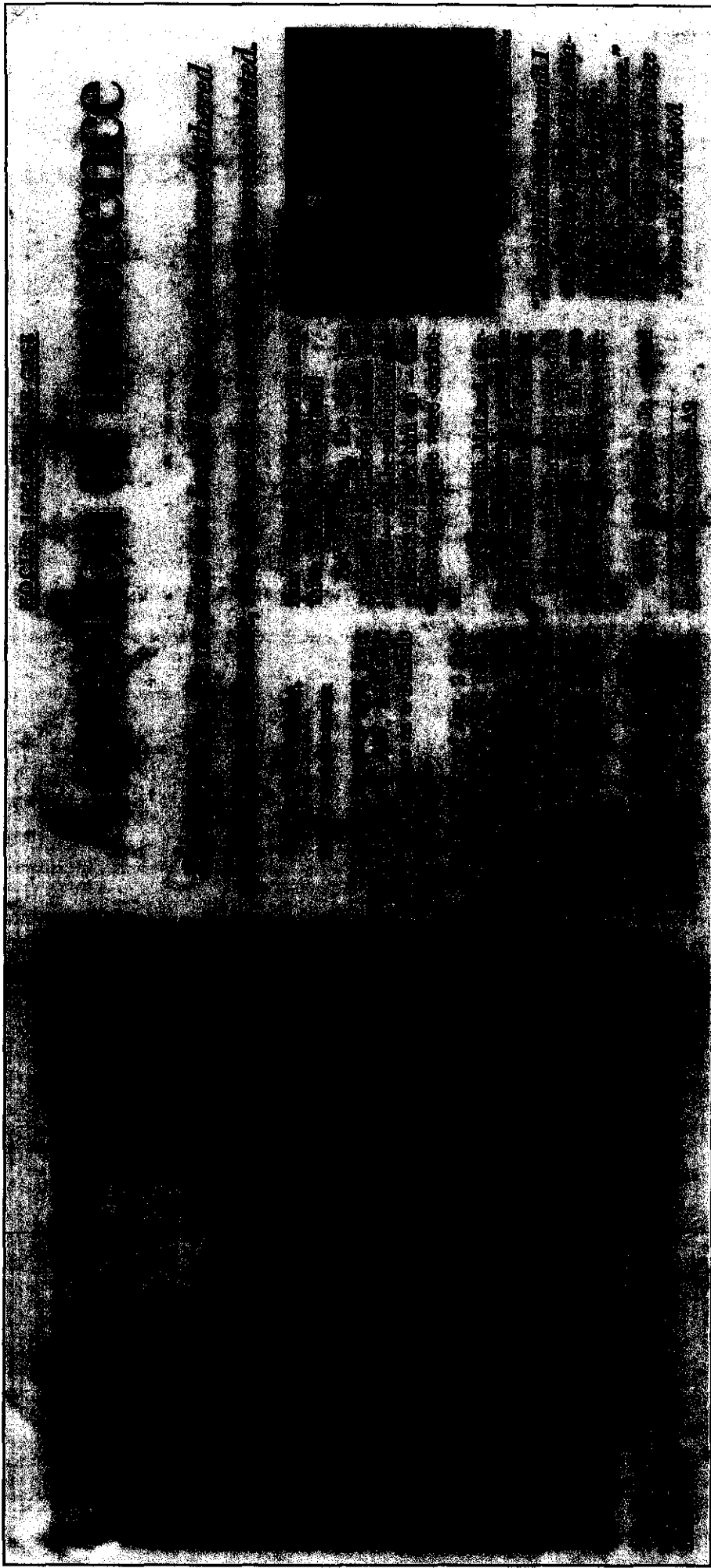
Conclusion

On behalf of the New York State Association of Criminal Defense Lawyers, I would like to thank the Commission for this opportunity to be heard. We hope that this is only the beginning of the opening of the lines of communication between the Commission and the criminal defense bar. We understand that the Commission has heard from, and will continue to hear from, a broad spectrum of interests, including but not limited to prosecutors, law enforcement, and victim advocacy organizations, as well as organizations that represent individuals who are incarcerated and their families. We believe that we, too, as the professionals who represent the only persons who are directly affected by sentencing laws and policies, have a great deal to add to the decision-making process. Accordingly, we encourage the Commission to reach out to our Association, as well as other criminal defense bar associations, as it continues to study the future of sentencing in New York State.

Respectfully submitted,
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Indictment #41-413

For information call 578-5128



4 teens charged in murder; 3 convicted, jailed

MURDER • from A1

16½ years in prison, then five more in a work-release program. He's now on lifetime parole.

Darryl A. Boyd served a similar sentence.

Darryn Gibson remains in Altona Correctional Facility, near Plattsburgh, for a crime he, his family and McLeod all insist the group never committed.

McLeod said thorough work by Buffalo police, including crime-scene photos, shows conclusively one person, not four, beat Crawford. Other physical evidence also shot huge holes in the prosecution case against the four teens, he said.

"They didn't do it, and I say that without hesitation or reservation, based on the evidence," McLeod said.

A Walker family member brought the case to The Buffalo News, insisting that Walker never committed the killing.

Walker, now 45, was reminded that Attica is filled with convicted murderers who maintain their innocence. He noted he's already served his time. Why, he asked, would he want more publicity about his murder conviction unless he were innocent?

"I could go right up to (district attorney) Frank Clark and say 'I killed the man. I did the time, and there's nothing you could do to me.' But I would never say that, because I didn't have a thing to do with his murder."

Floyd T. Martin was McLeod's client, the only teen acquitted.

"It was never true," Martin said of the case. "It was like something out of the Twilight Zone."

Dian Cole, the mother of the still-imprisoned Gibson, is a minister who, after her son's arrest, went door-to-door after work to find someone who could prove his innocence. "My son has always maintained his innocence. He's said he didn't do it, with tears in his eyes, more than once. He said that's one of the reasons he's never been paroled, because he won't admit that he did it."

The crime

On his first night out early in 1976 following his surgery, William Crawford, a retired construction engineer, walked directly across Fillmore Avenue to the Golden Nugget tavern at about 8:15 p.m.

Shortly before 11 p.m., his wife Margaret heard a noise but found nothing and went back to watch the TV news. Awakened after 1 a.m., she looked down the driveway and saw nothing.

Then she looked back.

"That's when I saw my husband's shoes in the driveway," she testified at Walker's trial. "They were sticking up. He was lying there."

Crawford was dead on arrival at Sisters Hospital, from blows from a blunt instrument.

Within days, detectives rounded up five suspects, charging four with murder and robbery.



"Today there would be a jury of peers. There would not be a jury of all white people."

Dian Cole, right, a co-defendant's mother, shown with John H. Walker Jr., center, and Floyd T. Martin, left.

It's not hard to see why detectives zeroed in on the five young men, including Tyrone Woodruff, 17, who was granted immunity in exchange for becoming the key prosecution witness.

They frequently hung out together, not far from where Crawford was killed. At least four had previous records for robbery and other violent crimes.

After their arrests, television cameras caught the four teens laughing and mugging for the cameras.

"Being 18 years old, we didn't know how serious it was," Walker says now. "We knew we didn't do it. We all knew we were coming back home. We didn't know they were going to turn the smiles upside down and use them against us."

The trials

The four young men were tried separately, early in 1977.

There was one common thread: All four African-American youths were tried in front of all-white juries.

No physical evidence was presented at the trials, according to yellowed court papers in the bowels of County Hall.

The four cases were built on the testimony of three witnesses:

- Woodruff told all four juries that he watched Gibson beat Crawford with a 1½-inch pipe at the bottom of the driveway. Then, with Woodruff watching, the other four teens dragged the beaten man up the driveway and stole his money.

- Andre Hough, a friend of the group, testified he had been with the teens earlier that night and heard Gibson say, "I'm gonna get me some money tonight."

- Joseph Tator testified that while playing cards in the Holding Center in September 1976, he heard Gibson ask Gibson, "Why did you hit the man so hard in the head, you know? We've been in here all summer."

Three witnesses, with corroborating stories, convicted Gibson, Boyd and Walker — without any blood, fingerprints, hair fibers or DNA evidence.

But the jury in the final trial, Floyd Martin's, felt otherwise.

McLeod, Martin's attorney, used the police department's thorough work to tear down the case against his client.

The police photos showed only one set of footprints in the snow (Crawford's) leading up to the driveway door and another set (the killer's?) leading from the back yard to that door. There were no drag marks in the driveway. And no trail of blood leading up the driveway.

McLeod concluded that Crawford wasn't dragged up the driveway; instead, the evidence shows he was attacked at the driveway door.

How about the testimony of Woodruff, the key witness?

"The evidence shows he was lying, as clear as day," McLeod says now. "Either he was lying, or the police doctored the photos. The jury decided he was making the whole story up."

Tainted testimony

Since the trials, both Woodruff, the key witness, and Hough have recanted their testimony, although one judge claimed there's nothing as unreliable as a witness later recanting.

Walker and his co-defendants also have pointed out that the third witness, Tator, the Holding Center inmate, made a deal in return for five years' probation on an 11-count indictment.

Still, several key questions remain for the convicted killers who claim they were framed.

- Whodunnit? Testimony showed that a neighbor helped an intoxicated Crawford out of the bar, then hit him outside the tavern, after

seeing his own house door ajar.

At trial and now, McLeod speculated that this man could have gone home, circled behind his house and approached Crawford from the back of the driveway. That would have been consistent with the evidence.

- Why would Woodruff, the key witness, turn on his friends, if they were innocent?

"They took him into the room, and from what he told me, they scared him," Walker said. "They told him that if he wouldn't say what they wanted him to say, one of the other four would get immunity and he'd go to jail. It was a scare tactic."

Cole, Gibson's mother, doesn't believe her son would be convicted today with the flimsy evidence presented at his trial.

"Today there would be a jury of peers," she said. "There would not be a jury of all white people."

Erie County Judge Timothy J. Drury, the key prosecutor in the case, doesn't remember that there was "anything wrong or tainted about the process."

Asked about McLeod's claims that the teens were innocent, Drury replied, "You've got to put some weight on what Jim McLeod said, because I have the utmost respect for him."

Twenty-nine years later, Walker talks desperately about all he's lost from his early adulthood, including any chance of being a father or grandfather.

Standing in the driveway where Crawford was killed, he says simply, "I've never been in this driveway in my life."

He wonders whether Crawford can remain at rest, with his killer never apprehended. And he ponders the fates of the four murder suspects.

"It's the state of the dice. I could still be in prison, like Darryn. Or I could have been acquitted like Floyd. There's no rhyme or reason to it."

All four men have struggled, in different ways, since they were implicated in the killing, although the three who were convicted all earned college degrees in prison.

Walker admits what McLeod has said, that these teens clearly were on a bad path when they were arrested for murder. At age 15, he committed a robbery where a man was shot, although he wasn't the shooter.

Walker served 10½ years in Attica, Elmira and Corlies.

"It didn't make me bitter, even though I served all that time," he said. "I could be mad at the prosecution or the defense lawyer. A lot of people tell me I should be bitter. I need to tell myself, maybe I served this time for other things that I did with my life. That was the only justification I could have."

McLeod wonders about the actual killer.

"I'd like to think it has gnawed on (him) all these years, because this was such a cold, vicious act. You'd like to think this person was in a living hell all these years, not only for Mr. Crawford, but for these other families. They've destroyed six families."

"That's a big debt."

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Testimony of Susan Wright
Before the New York State Commission on Sentencing Reform
November 19, 2007

My name is Susan Wright and I am probably different from most people who have testified before you as I am an advocate, the president and a founding member of the Coalition for Parole Restoration, a grass roots organization formed to educate families about issues dealing with the criminal justice system and more importantly parole. I am also the wife of a person in prison convicted of an A1 violent felony offense and denied parole six times, and the family member of two people murdered in the past 11 years in the state of New York.

In 1980 I fell in love with and married Jerome Wright a childhood friend serving 18 ½ years to life for second degree murder. To date, Jerome has served 28 ½ years in prison and appeared before the parole board six times. Following each appearance, the only exception being the first, he was held for an additional 18 months with the nature of the crime being the primary reason given each time. Although the Legislative Commission on Expenditure Review published in 1983 in its findings state "an applicant held for 23 months or less has a "contract" or tentative release date implied, and the inmate generally will be released upon reappearance if he has maintained good behavior in prison and followed the board's recommendation", Jerome remains incarcerated.

Together we have raised four children, one of whom recently graduated from the University at Buffalo Law School and passed the New York State Bar Exam. Through the years I have watched Jerome grow from a teenager headed down the path of destruction into a man, who I am proud to call my husband, eager to help anyone who crosses his path. A major part of the change that I have seen in him comes from his dealing with the impact of his crime on the family of his victim and the community.

Currently located at Collins Correctional Facility Jerome is the lead facilitator in the Youth Assistance Program, a program designed to assist at risk youth in Erie and the surrounding counties. On any given Wednesday you can find him working with adolescents, many of whom are referred by the court, in an effort to prevent them from spiraling out of control. Due to his work at Collins he has two solid offers of employment in Erie and Chataqua counties respectively.

In 1996 my cousin and my aunts only son, Christopher Goodman, was murdered, shot in the back while interceding in a domestic abuse situation; this was the first time my family experienced a loss of this nature, but it would not be the last time we were victimized. Throughout the judicial process we were sold a bill of good and after numerous court appearances where the family packed the court room we were left out of the plea negotiations and then bullied into agreeing with the offer under the fear of his murder going free. The district attorney in the case who had appeared concerned and compassionate throughout turned into someone whose only concern was disposing of the case. After the day of sentencing the first time we heard from the DA's office was one year later when she called my aunt for a victim's impact statement, again not showing any compassion she came to us using scare tactics, "this is necessary to keep him in jail, he might hurt your family or hurt someone else". However, this man was a stranger, not only to my cousin but to the rest of us so we had no fear of him. Little did she know my aunt had just died and the responsibility rest me, my response was one that shocked not only me but my entire family. We did not get the justice we were looking for in court, Christopher's murderer received 15 years to life, and now she wanted us to do the job that she failed to do when given the chance.

This young man was offered and excepted a deal, after the initial shock I realized that no matter what happened the one thing we wanted most could not be returned to us, no matter how long he served in prison Christopher would still be dead. I advised the DA that our impact statement would be written at a more appropriate time, we still had 14 years until his initial appearance and we would deal with it then. It is my prayer that in that time given the opportunity he will no longer be the person who took so much away from us but rather someone who learned how to give.

In November 1999 I was apart of a group of family members and attorney's who called a meeting at the Legal Aid Society. What was suppose to be a meeting of 30 people to brain storm about the state of parole turned into a rally attended by 3 to 4 hundred people, mostly family members hopeless over repeated parole denials received by their loved ones and desperate for answers. The Coalition for Parole Restoration (heretofore CPR) was born on this day and as its current president I am charged with its mission to educate families about the parole process and their role in a successful release and reentry plan. CPR travels across the state holding workshops to educate families about their role in the rehabilitative process and how important it is that they hold their loved ones accountable for their actions. With accountability comes understanding and with that hopefully insight into the crime and its impact on the victim and the victims family.

In March 2005 my nephew Jalen Robinson, 6 months shy of his second birthday was tortured and murdered by his babysitter. An arrest was made immediately and before arrangement the district attorney's office advised us of the 9 charges and the sentence they would be seeking on each. Later in the process we were told they would be seeking a cumulative sentence of 54 years to life with all sentences running consecutive and no plea deal. By this time I was well versed in the workings of the system and able to prepare the rest of my family for

what was to come, we were left out of the plea negotiations and the final outcome was that Jalen's murderer received a 17 year determinate sentence. Jalen's murderer has the potential to be released in 14 years; her conditional release date is 6 days before what would have been his sixteenth birthday.

I stand before you today with a wish list, as someone personally affected by every aspect of the sentencing structure you have been appointed to evaluate. As a wife, I would like to see a division of parole and department of corrections that is as good as its promise, i.e. returning to wounded communities men and woman who are truly community ready and not just parole eligible. People fortified with rehabilitative programming, enhanced education, therapeutic treatment and successful transitional planning and opportunities for a smooth reintegration.

As the family member of two murder victims I would like to see a judicial system, particularly a prosecutorial system that is built on honesty, fairness and promotes healing and not just the acquisition of a victims impact statement to the exclusion of what we really need; an honest assessment of the situation with inclusion in the disposition and not just disposal of the case. We want indeterminate sentencing where applicable to allow for discretionary release and a panel of commissioners willing to apply the spirit of Executive Law 259i as it was intended.

As an advocate I would like to see a marriage between corrections and parole, I would like to take this opportunity to acknowledge and congratulate Commissioners Alexander and Fishers on their new found courtship and the transparency with which each of these agencies have begun to operate under their administration. I would like to see a division of parole whose legacy is founded on principles of logic and not opinion and emotion; consistency and not what has amounted the lottery in recent years, public safety and not political pandering.

I have also attached to my written testimony a copy of "Recommendations for Parole Reform in New York State," put together by a number of stakeholders in creating a justice society. This issued through an Ad Hoc Committee on Long-Term Incarceration, of which I am a member.

I would like to thank the Commission for allowing me this opportunity and for hearing me on these issues that are, for some, matters of life and death.

Sentencing Commission Hearing
Buffalo, NY 11-19-07

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Submitted on behalf of -:

George Eng and
Lawrence Bartley
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Sentencing Commission Hearing

Buffalo - 11-19-07

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When we consider the need for sentencing reform we must consider it as a need that impacts victims and offenders in a cycle of crime and punishment, recidivism and punishment, and continued suffering and hopelessness to all parties involved. Sentencing and criminal justice reform must be designed to ameliorate the harmful impacts of unequal and unjust sentencing and legally and socially deficient criminal justice practices. Only then will we address the problem appropriately as an issue of social responsibility and not just a problem that is limited to some subclass of social deviants.

If we accept the reality that there are systemic inequities and injustices in the criminal justice system that begins with arrest and continues into the sentencing process, then we must also accept the reality that race is a major factor in the imposition of injustice and inequity in the application of criminal justice.

Throughout the Country, and for the purposes of this conference, particularly in New York State, all data and statistical evidence reveals that the majority of people entrapped in the cycles of despair referred to above are people of color. Of course, non-blacks, sometimes do get collaterally caught up in a system where inequity and injustice has become the norm. However, in those cases, though remedies must be sought for those people, we must be clear that the inequities in the application of criminal justice and the disparities in sentencing have been intentionally made systemic because it is not only well known, but even expected that the majority of people who come through the system will be people of color, primarily African Americans. African Americans are the majority of those convicted and sentenced to prison terms in the State of New York. Also, the majority of victims of these convicted offenders are either African American or other people of color.

Therefore, any meaningful reform of the criminal justice system, that includes sentencing provisions and practices, must be two pronged. One prong involves the legislation of reform in the laws, ie, sentencing guidelines and the overseeing of practices throughout the Criminal and Supreme Court systems. The other involves a focus on programs/initiatives to prevent delinquency and criminal thinking/behavior in the African American community.

In terms of legislation there needs to be a reformulation of sentencing guidelines that give judges both the discretion and instruction to actually make the punishment fit the crime. This must be based on a full consideration of the full circumstances of each offender which would require full psychological and social work evaluations, and not just the perfunctory "criminal history summaries" that are usually compiled by the department of probation in what are called pre-sentence reports that are supposed to help judges make determinations in deciding appropriate sentences.

*Submitted on behalf of George Eng and Lawrence Bartley
- Auburn C. F. -*

The purposes of sentencing must also be stressed in these new guidelines with a focus on the rehabilitative component. Sentences must allow for that aspect of sentencing because that aspect of the sentencing intent has been neglected in the last forty years as Blacks became the dominant group being processed through the criminal justice and prison systems. When whites were the majority of the prison population during the 60's there was an emphasis on rehabilitation. That legal practice must be reinstated. A sentencing review board should be assembled, composed of legislators and judges, to review any alleged inequities that may continue by judges who do not comply with the new legislation. Judges have authority that must be respected, but there must be accountability and oversight.

Prosecutors must also somehow be brought in line with the law. Prosecutors have enormous authority that is often abused when prosecuting defendants of color. The mentality is one of thinking only of gaining advantage and obtaining as many convictions as possible, no matter what the degree of guilt, or even innocence actually are.

Instead of following the edict of The Supreme Court of The United States in rathering that a hundred guilty men go free than convict one innocent man, prosecutors function on the philosophy of rathering that a hundred innocent men be imprisoned than one guilty man going free. That is niether the moral nor legal position that should be allowed in an enlightened, humanistic society.

Finally, our responsibility, as a society of people wounded by crime, social inequity and even terrorism, is to focus our human resources on developing programs and practices that promote healing among victims and offenders, and make provisions for past inequities that have harmed and/or caused any American citizen to be wrongfully harmed or denied the God given right to develop our greatest potential contribute the best that is within us to a society that embraces and benefits us all.

If requested, the staff of Prisoners are People Too will provide detailed positions on recommended sentencing guidelines and amendments, as well as programs and intiatives developed to prevent deliquency and criminal thinking/behavior in the African American community.

Respectfully,

George BaBa Eng
Prisoners Are People Too

11/07

Sentencing Commission Hearing
Buffalo - 11-19-07

FUTURE SENTENCING IN NEW YORK STATE

Sentence Reform:

The previous and current sentencing trends are indicative of a criminal justice system out of touch with the characteristics of each particular offender. Previous cases have shown that the characteristics of each particular offender should play a part in his/her adjudication. See People v. Hemel 49 A.D.2d 769; People v. Diaz 686 NYS 2d 595; People v. Martinson 35 A.D.2d 521; 312 NYS 2d 281.

"Youthful offenders" between the ages of 14-21 are being prosecuted and sentenced to exorbitant prison terms for crimes they committed when they were adolescents. Yet they aren't legally allowed to drink alcohol, smoke cigarettes, receive a driver's license, vote, join the military etc.. **Why the stark contrast?**

Instances such as these cry out for change. Sure it is necessary to punish any individual who commits a crime, but the sentence must fit the individual as well as the crime. See Human Rights Watch report entitled For the Rest of Our Lives: Life Without Parole For Child Offenders in the U.S. Although said report documents cases of life in prison without parole for child offenders, the sentences apply for New York's indeterminate sentences (e.g. 25 years to life etc...) for child offenders as well. Since George Pataki took office in 1994 only roughly 3% of violent felony offenders were released on parole after serving their minimum (i.e. 25 years).

This Commission should explore creating a committee in each Correctional Institution to evaluate each inmate that was sentenced to a lengthy term of imprisonment due to a crime he/she committed when they were under 18 years old, then adjust their accordingly.

Good Behavior:

At minimum New York State should afford all felony offenders (violent and indeterminate sentences included) an opportunity to earn time off their sentences for good behavior. See Senator Montgomery's Bill # S03578.

If rehabilitation is truly an integral part of the New York State Criminal justice System, an inmate that proves he's ready to be a productive member of society by exhibiting good behavior, program completion and overall effort to being conducive in the prison setting, should be issued merit time, as explained in Senator Montgomery's Bill. Said Bill and or its logic should be adopted by this commission.

Parole Board:

A change in the farming crop of the Parole staff is in order. The Parole Board should take on the likeness of a jury in the sense that it should be made up of the subjects peers. Said peers should be members of the community in which the crime was committed secondarily, but primarily be comprised of members of the community in which the subject is to be potentially paroled to. Those people are the ones who should have the ultimate say on whether or not the prisoner before them should be able to enter their communities.

Rehabilitation Programs:

1. Re-institute College for inmates.
2. Institute RTA (Rehabilitation Through the Arts) in all institutions.

LAWRENCE BARTLEY
Auburn Corr. Facility