Cheryl L. Kates Esq.
Attorney at Law
PO Box 711
Honeoye, NY 14471
(585)820-3818
www.cherylkatesesq.com

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 existinguished 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; Stashenko, 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; Stashenko, 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 Rorscach 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 Rorscach 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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