NYSACDL SUPPORTS CALL FOR

# PAROLE REFORM

NYSACDL has joined a growing list of legal, advocacy and community organizations that have called for the reform of New York parole law. This diverse coalition supports the Safe And Fair Evaluation of Parole Act, also known as the SAFE Parole Act. The SAFE Parole Act would amend New York's existing parole statute, Executive Law § 259-i.

Under current law a parole applicant appears before the Parole Board and may be denied discretionary parole release based upon reasons she can no longer control, as the Parole Board looks back at the seriousness of the offense. The denial decision provides no indication of what she is expected to do to prove readiness for release at the next Parole Board hearing in two years. Under the SAFE Parole Act the release decision is based upon the parole applicant's preparedness for reentry and reintegration and a reasonable basis to conclude that if released, he or she will live and remain at liberty without violating the law. There are eight factors that the Parole Board must consider in order to make its determination. If parole is denied, the Parole Board is required to explain the reasons in detail and the specific requirements for actions to be taken, programs to be completed, and changes in conduct in order to qualify for parole release at the next parole appearance.

## WHY PAROLE REFORM NOW?

It might be asked why parole reform should be supported at a time when the newly appointed New York State Permanent Sentencing Commission seems poised to recommend adoption of a mostly determinate sentencing scheme for non-violent felonies, adding it to the determinate scheme already adopted for violent and drug felonies. The answer is simple. No matter how quickly the Sentencing Commission and the Legislature act, there will still be thousands of people in prison serving indeterminate sentences for decades to come who will face parole board appearances. For example, there is certainly no consideration being given to ending indeterminate life sentences for A-1 violent felonies, A-1 drug conspiracies and major traffickers or persistent felony offenders.

In fiscal year 2009-2010 the Parole Board conducted over 19,000 hearings for people who were serving indeterminate sentences.[1] It will take years for that number to diminish substantially. As of January 1, 2009 there were over 9,100 men and women in New York prisons serving life sentences for A-1 violent felonies.[2] With an initial parole release rate of just 8% for A-1 violent felons, and a subsequent parole release rate of 13%, the number of people requiring parole consideration will measure in the thousands for the foreseeable future.[3] The remarkably low release rate for this population reflects the Parole Board's aversion to parole release for applicants convicted of A-1 violent felonies. The Parole Board has chosen to focus on the "serious nature of the criminal offense" rather than looking at factors grounded in prison based performance, to determine if there is a reasonable basis to conclude that the individual will live a law abiding life if released. It is noteworthy that the recidivism rate for this group is significantly lower than any other group of parole releasees. According to the Division of Parole, of the 784 people serving life sentences for A-1 violent felonies who were released on parole during 2006, 2007, 2008 and 2009 the recidivism rate, measured by return to DOCS for a new felony conviction, was 1/4 of one percent.[4]

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1 Division of Parole Briefing Book, Legislative Hearings, February 8, 2010.

2 DOCS, Under Custody Report: Profile of Inmate Population Under Custody on January 1, 2009.

3 Office of Policy Analysis, 2008.

4 Division of Parole Briefing Book, Legislative Hearings, February 8, 2010.

It is both unfair and bad corrections policy to require such a significant number of people to continue to be subject to a parole release system so fundamentally flawed.

## JUDICIAL CONCERN ABOUT THE PAROLE BOARD

Most experienced criminal defense attorneys are familiar with the problem faced by many of their clients serving indeterminate sentences. Despite a stellar prison record, parole release is denied because the Parole Board determined that more punishment was necessary based on the "serious nature of the instant offense." For the past two decades New York courts have repeated their concerns about the malfunctioning of the Parole Board. Judicial alarm has focused on two key issues. First, courts have expressed disturbance that the Parole Board impermissibly engages in resentencing the parole applicant.[5] Second, there has been judicial distress that when the Parole Board unjustifiably relies solely on the "serious nature of the instant offense" it acts in excess of its administrative function.[6]

*The role of the Parole Board is to evaluate the likelihood that the parole applicant, if released, will live a law-abiding life, based on his or her "overall comportment during the period of incarceration" and "not to resentence the inmate by substituting its own opinion of the severity of the crime for that of the sentencing court."*[7]

The SAFE Parole Act provides the tools necessary for the Parole Board to perform its evaluative function.

## BRINGING PAROLE INTO ALIGNMENT WITH PENAL LAW § 1.05(6)

In 2006, Penal Law § 1.05(6) was amended to add a fifth goal to New York's penological model in addition to the four traditional goals of retribution, deterrence, incapacitation and rehabilitation. The fifth goal, reflecting our increasing awareness of the importance of reentry, requires promotion of successful and productive reentry and reintegration into society. Oddly enough, no legislative change was made to the parole process that would require the Parole Board to focus on this factor. The SAFE Parole Act will bring the parole statute, Executive Law 259-i, into alignment with the Penal Law amendment.

In order to modernize and revitalize the functioning of the Parole Board, reform of the applicable procedures is in order. At the core of this reform is redefining the role of the Parole Board as an evaluative one. The critical focus would become whether the parole applicant is ready for reintegration. Under this reform the Parole Board does not play a punitive role, leaving retribution solely within the purview of the courts.[8] The proposed amendments to Executive Law § 259-i provide the criteria and guidance to the Parole Board so that it can carry out its evaluative function with a more clear focus on its goals and objectives.

## A REVIEW OF SOME OF THE CHANGES PROPOSED BY THE SAFE PAROLE ACT

Seriousness of the crime will no longer be used as a basis to deny parole.

A decision to release a parole applicant to parole shall be based upon good conduct and efficient performance of duties while confined, and preparedness for reentry and reintegration into society, thereby providing a reasonable basis to conclude that, if such person is released, he or she will live and remain at liberty without violating the law.

There are eight factors to be considered by the Parole Board when making the release decision, some of which are new and some of which are carried over from the previous statute:

(i) readiness for reintegration as evidenced by the applicant's institutional record pertaining to program goals and accomplishments as stated in the facility performance reports, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and other sentenced persons, and other indications of pro-social activity, change and transformation;

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5 Division of Parole Briefing Book, Legislative Hearings, February 8, 2010.

6 Cappiello v. New York State Board of Parole, 6 Misc.3d 1010(A) (Sup. Ct. N.Y. Co. 2004).

7 Id.

8 Prior to 1980 it was necessary for the Parole Board to have statutory authority to consider the "seriousness of the offense" because the Board was empowered to set the minimum period of imprisonment (MPI) in the event that the sentencing court did not do so. Effective September 1, 1980, the authority of the Parole Board to fix MPI's was repealed and exclusive power for establishing MPI's was vested in the sentencing court (see L. 1980, ch. 873 amending Penal Law § 70.00). Since the Parole Board is no longer involved in a sentencing function, statutory authority to consider the "seriousness of the offense" is no longer appropriate.

(ii) performance, if any, as a participant in a temporary release program; (contained in existing statute)

(iii) release plans, including community resources, employment, education and training and support services available to the parole applicant; (contained in existing statute)

(iv) any deportation order...; (contained in existing statute)

(v) any statement, whether supportive or critical, made to the Parole Board by the crime victim or victim's representative to assist the Parole Board in determining whether at this time there is reasonable cause to believe that the release of the parole applicant would create a present danger to the victim or the victim's representative, or would assist the Board in determining the extent of the parole applicant's readiness for reintegration;

(vi) the length of the determinate sentence to which the parole applicant would be subject had he or she received a determinate sentence for a felony drug offense; (contained in existing statute)

(vii) participation and performance, if any, in a reconciliation or restorative justice-type conference with the victim or the victim's representative;

(viii) in the case of a reappearance, the progress made towards the completion of the specific requirements previously set forth by the Parole Board for the parole applicant.

In the event that parole is not granted, the Parole Board will be required to state in detail and not in conclusory terms the reasons for the denial and the specific requirements for actions to be taken, programs or accomplishments to be completed, changes in performance or conduct to be made, or corrective action or actions be taken, in order to qualify for parole release at the next Parole Board appearance.

The parole applicant must be informed of the reasons for the denial and the specific requirements within two weeks of the board appearance. Within 90 days of the hearing decision, the Department of Correctional Services must provide the parole applicant access to the program(s), activities and/or facilities needed in order to provide the opportunity to fulfill the requirements set forth by the Parole Board.

At the subsequent Parole Board hearing, if the requirements previously set forth by the Parole Board have been successfully completed and the parole applicant's institutional record has remained satisfactory, release shall be granted.

The parole hearing shall take place with the parole applicant and the Parole Board present in the same room.

The parole hearing shall be recorded audio/visually.

The parole applicant shall be entitled to full disclosure of all documents upon which the Parole Board may rely for its determination, except as provided by Mental Hygiene Law § 33.16 when disclosure can reasonably be expected to cause identifiable danger or harm to the applicant or others, and that the harm would outweigh the right to access to such records.

In order to provide the crime victim or the crime victim's representative with current information about the parole applicant's progress while confined, such person may request a copy of the Inmate's Status Report(s) and parole release plan, in the event that the parole applicant submits one. The Inmate Psychiatric Evaluation will be provided upon request, if one is available and if the parole applicant consents to its release.

## CONCLUSION

With the advent of a predominantly determinate sentencing model and criticism of the Parole Board on the rise, the future of the Parole Board may be in doubt. Although the Parole Board's implementation of discretionary parole release is not without it shortcomings, it can still be an effective and necessary complement to our new awareness of the importance of promoting successful and productive reentry and reintegration into society. Ultimately it is the purpose of the SAFE Parole Act to treat parole applicants with fairness and create a transparent process while maintaining and contributing to a high degree of public safety. The Parole Board should play an evaluative function not a punitive one. The SAFE Parole Act gives the Parole Board a roadmap to evaluate the rehabilitation, transformation and readiness for reintegration that will lead to successful reentry. This reform provides the Parole Board with the tools necessary to give parole applicants a clear expectation of what is needed in order to prepare for successful reintegration and to live a law-abiding life beyond the prison walls. If enacted, the SAFE Parole Act will help create a safer community. A