

## SENTENCING TIPS FOR NEW YORK LAWYERS

### SIGNIFICANT CHANGES IN NEW YORK CORRECTION LAW ACCELERATE RELEASE DATES AND REVISE METHOD OF RELEASE FOR SOME

*by Alan Rosenthal*

Several significant changes in the Correction Law will affect both release dates and the method of release. These changes are effective April 1, 2003.

#### A-1 Drug Merit Time

For prisoners serving lengthy mandatory sentences ranging from 15 to life to 25 to life for A-1 drug felonies, there is finally some relief in sight. Correction Law §803(1)(d) was amended to allow any person serving an indeterminate sentence for an A-1 drug felony to earn merit time allowance against the minimum term of her sentence. Prior to this amendment, those serving A-1 felony offenses were excluded from receiving merit time allowance. Significantly, the amount of merit time that is now allowed for an A-1 offense is one-third of the minimum term imposed by the court, while the merit time allowed for all other offenses remains at one-sixth of the minimum term.

Under the provision for merit time, early parole release may be granted as a result of deducting merit time from the minimum term. Now, in the case of a person serving time on an A-1 drug felony, she may receive merit time allowance equal to one-third of the minimum sentence. For example, if a person is serving 15 to life, the merit time allowance would equal 5 years. When this allowance is applied to the minimum term, the prisoner would be eligible for early release by the parole board after serving 10 years. Under the former law, the person would not have been eligible for parole release until 15 years had been served.

To qualify for merit time you must have successfully participated in the work and treatment program assigned pursuant to §805 of the Correction Law and have accomplished one of the following:

- earned a general equivalency diploma (GED)
- earned a vocational trade certificate after 6 months of vocational programming
- acquired an alcohol and substance abuse certificate (ASAT)
- performed at least 400 hours of community service as part

of a community work crew

Even if a person has accomplished one of the above, the statute allows merit time to be withheld for:

- any serious disciplinary infraction
- initiating a frivolous lawsuit as judicially determined
- having been sanctioned by a federal court pursuant to

Rule 11

Under the new law, a prisoner serving 15 to life for an A-1 felony who is eligible for merit time allowance and also meets the criteria for work release, could be eligible for work release after serving 8 years. ( Five years off for merit time and two years from their earliest release date for work release - 7 NYCRR §1900.4)

### **Earned Eligibility Program Expanded**

Correction Law §805 has been amended to expand the eligibility for a certificate of earned eligibility from any person serving an indeterminate sentence with a minimum term of not more than six years to any person serving a sentence with a minimum term of not more than eight years.

A certificate of earned eligibility is issued by the commissioner when a prisoner is within two months of parole eligibility or merit time parole eligibility, if the commissioner determines that the prisoner has complied with and successfully participated in the assigned program. The significance of the certificate of earned eligibility is that it is treated as a positive factor by the parole board and any prisoner who has been issued such a certificate "shall be granted parole release ... unless the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society." Of course, such determinations by the parole board have been known to occur.

The certificate of earned eligibility takes on much greater significance with the advent of the newly created form of release to be known as *presumptive release*.

### **Presumptive Release Program for Nonviolent Prisoners**

The legislature has created an entirely new form of release from prison to be added to the existing types of release which include parole release, conditional release, and post-release supervision. We now have the newly created *presumptive release* established by Correction Law §806.

Prisoners who are eligible for presumptive release will be automatically released when they reach their parole eligibility or merit eligibility date without the necessity of appearing before the parole board to receive approval for release.

The good news about presumptive release is tempered by the fact that so many prisoners are excluded. In order to be eligible for presumptive release a prisoner cannot have:

- (i) been convicted previously, or be presently serving a sentence for:
  - A-1 felony
  - violent felony offense as defined in Penal Law §70.02
  - Manslaughter 2<sup>nd</sup>
  - Vehicular Manslaughter 1<sup>st</sup> or 2<sup>nd</sup>
  - Criminally Negligent homicide
  - Sex offense (Penal Law Art. 160)
  - Incest
  - Sexual Performance by a Child (Penal Law Art. 263)
- (ii) committed any serious disciplinary infraction
- (iii) been the subject of a judicial determination of commencing frivolous litigation or a Rule 11 sanction by a federal court

The linchpin of presumptive release is the certificate of earned eligibility. Any prisoner who has been awarded a certificate of earned eligibility by the commissioner may be entitled to presumptive release at the expiration of her minimum sentence or at five-sixths of the minimum if she meets the criteria for merit time allowance.

Presumptive release takes the decision for discretionary parole release out of the hands of the parole board. It is, however, not automatic. The commissioner may deny presumptive release "whenever the commissioner determines that such release may not be consistent with the safety of the community or the welfare of the inmate."

Any prisoner eligible for presumptive release is required to apply pursuant to newly amended Executive Law §259-g. A person on presumptive release is supervised by parole and under the same conditions as she would if released by parole.

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