New York State Commission on Sentencing Reform

NYC Public Hearing

Association of the Bar of the City of New York

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Compilation of Written Testimony

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Testimony of Marsha Weissman
Executive Director, Center for Community Alternatives
before the
THE NEW YORK STATE SENTENCING COMMISSION

New York, New York
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Introduction

Good morning. I would like to begin by thanking you for holding these hearings on the preliminary report issued by the Commission and your willingness to carefully and thoughtfully consider opinions on the recommendations offered in the report. I would also like to acknowledge the hard work of the Commission, its subcommittees and staff.

My name is Marsha Weissman . I am speaking this morning as the Executive Director of the Center for Community Alternatives, also known as CCA. CCA is a not-for-profit agency that has worked for more than 25 years to reduce national and state reliance on incarceration in ways that promote public safety. Since 1981, the work of CCA has demonstrated the potential of what we call reintegrative justice. To this end, our practice exemplifies that reentry begins at arrest, through alternatives-to- detention at the pre-trial stage, alternatives-to-incarceration at the sentencing stage, and through crafting sensible sentencing recommendations for those people who would be incarcerated and providing transitional planning and reentry services to prepare and support release from prison and jail. CCA's work involves direct services, as well as research and training.

This is an opportune time to reform New York State's sentencing laws. We have the energy of a new administration, a rich body of research on what kinds of responses to crime are most likely to promote public safety, community well-being and individual rehabilitation. New York has renowned practitioners and scholars from the Vera Institute of Justice, to the John Jay College

of Criminal Justice now under the leadership of Jeremy Travis, to nationally recognized Alternative-to-Incarceration programs of which CCA is but one. We have the incredible work of Eric Cadora and Justice Mapping that visually demonstrates on the one hand, the community costs of policies that have overrelied on incarceration and on the other, the opportunities that exist were we to invest in communities in ways that promote safety, health and opportunity. New York State has a new legal framework that promotes sentencing reform. Penal Law §1.05(6) was amended on June 7, 2006 to include "the promotion of their (defendant's) successful and productive ***reentry and reintegration into society*** . . . " among the goals of sentencing goals alongside the more traditional goals of deterrence, rehabilitation, retribution and incapacitation (Chapter 98 of the Laws of 2006). Finally, we have the articulate voices and examples of formerly incarcerated people and their families, people like Eddie Ellis, Devine Prior, Glen Martin, Emani Davis, who provide the living examples of the need for sentencing reform.

Our primary recommendation to the Commission is a rather bold one, and we offer this with all due respect to the expertise and hard work that went into the initial report. In short, we urge the Commission to revisit its recommendations in light of the broader context of what is known about our sentencing policies and practices and specifically consider what the impact of the over reliance on incarceration has done to communities and families as well as the people convicted of crimes and those who have been victimized by crime. We urge the Commission to spend much of its efforts in the period between the issuing of this preliminary report and the final report assessing its recommendations based upon research and evidence that has documented the disintegrative consequences of mass incarceration.

Current sentencing laws in New York State, like the nation as a whole, have been heavily tied to the use of incarceration to respond to anti social behaviors. Even though the number of people in New York's prisons has declined from a high of over70,000 to 63,000, that number remains astonishingly high. It translates to a rate of 326 people per 100,000 people. While slightly below the national average, the incarceration rate in New York, which views itself as an international as well as national leader, dramatically exceeds the incarceration rates in other countries in the developed world. The incarceration rate in England, for example, is 148 per 100,000 and the incarceration rate in Canada is 107 per 100,000.

Recognizing that sentencing laws in New York have created state-level mass incarceration should prompt a review of sentencing reform in light of the consequences on communities, families, victims, and issues related to racial fairness that are described below. My remarks this morning will focus on 8 overarching issues that we would urge be considered in making revisions to the Preliminary Report.

1. Evidence-Based Sentencing

The preliminary recommendations of the Commission promote the use of science and evidence in criminal justice practice. We appreciate the recommendations that go to the expansion of the use of alternatives-to-incarceration for people who can benefit from drug treatment, and as a means to address technical parole violations. However, the recommendations do not speak to evidence on fundamental questions of the use of incarceration, how many people are subject to prison, the length of incarceration and the efficacy of expanding alternatives-to-incarceration for people who are now subject to prison sentences. The Commission's report also did not consider

the change in the penal law that added a fifth goal of reentry and reintegration to the traditional goals of sentencing. This change makes NYS a true pioneer in integrating reentry into sentencing practice, and provides a critical opportunity for the Commission to consider policies and practices that will best operationalize the new law.

The new law opens the door to "evidence-based sentencing" that is consideration of what sentence will best promote reintegration and public safety. Multnomah County Oregon has adopted this approach and uses data and analysis to answer such questions as : Which sentences reduce recidivism? Which sentences are most likely to result in the defendant gaining employment? What kinds of sentences best promote family stability? What recommendations will help a person convicted of a crime resume his or her civic responsibilities including voting? What type of sentence best promotes public safety now and in the future?

We urge the Commission to make use of the revision in the penal law to institute similar policies and practices in New York State and establish sentencing laws based on their ability to achieve crime reduction, rather than their ability to inflict punishment.

2. Sentencing Reform, Racial Disparity and Community Impact

We were most surprised that the Commission did not address the critical issue of racial disparities in sentencing and particularly as this relates to drug law violations. Sentencing policies and practices that result in the disproportionate incarceration of people of color have profound effects on communities and families, undermining public safety, civic participation, family functioning, public health, just to name a few.

In 2007, any sentencing reform efforts ought to take into consideration the impact of

sentences, and particularly the overuse of incarceration on the communities and families from which prisoners come. Bruce Western's research shows that the concentrated use of incarceration that affects poor, black communities and families undermines their future prospects of economic well-being as a prison sentence reduces post release employment, and earnings. Such a permanent underclass has a destabilizing effect on the families of formerly incarcerated people and their communities and in this way undermines public safety. Given the concentrated nature of incarceration, political disenfranchisement has a community-level effect as well as individual impact.

Racial disparities in the criminal justice system undermine people's confidence in and ability to participate in the democratic life of society. There are deep differences in perceptions of fairness in the criminal justice system by race: a 2002 Gallop poll found that 62 percent of blacks answered no to the question of whether their civil rights were respected by the criminal justice system, whereas only 27 percent of whites had such a concern.

Finally, the combination of racial disparities in the criminal justice system and pervasive collateral consequences threaten to undermine the gains made through the civil rights struggles of the 1950s and 60s. Each year sees another law that bars people with criminal convictions from particular jobs. State universities and colleges are adding questions about criminal convictions shut the door to higher education. These records are readily accessible through state and private sources and are used to bar people with criminal records from obtaining employment, housing and even the chance to volunteer with community organizations.

There is a growing interest in the creation of criminal justice social impact panels to assess the impact of sentencing laws on communities with particular focus on disparities. Bruce Western

recommended this approach in his October 4, 2007 testimony to Congress. Among the responsibilities of such panels would be to identify and take steps to eliminate disproportionate incarceration in poor and minority communities and assessing the extent to disparities may arise under any proposed sentencing reform. A similar recommendation for racial impact panels was offered by Marc Mauer, Executive Director of the Sentencing Project, in his June 22, 2007 testimony before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security.

CCA strongly recommends that some form of social impact panels be implemented, and believes it should be part of any permanent sentencing reform commission. Moreover, we would urge that the Commission begin this assessment as part of its work toward a final report and recommendations and ensure that any recommendations made begin to ameliorate, and certainly do not exacerbate, racial disparities in New York's criminal justice system. We would hope that social impact panels would look at fiscal implications and/or opportunities of sentencing reform including justice reinvestment in urban neighborhoods that have been harmed by crime and the criminal justice system as well as economic development strategies that will help poor rural communities that have become dependent on prisons, transition to a non prison economy.

3. Reentry, Reintegration and Determinate Sentencing

Evidence-based sentencing has implications for the Commssion's recommendations regarding judicial discretion and determinate sentencing. We believe that more important than the question of determinate or indeterminate sentencing are questions of how effective a particular sentence is in promoting reintegration and public safety. The newly amended Penal Law (§1.05(6)) offers an opportunity to reform indeterminate sentencing, by requiring that even where a defendant

will be imprisoned, the term of incarceration focuses on preparing for reentry and reintegration. The sentence becomes a road map for the individual, correctional officials, family and community supports and parole to guide the service of the sentence. Policy makers and correction officials have the responsibility to make evidence-based programs, such as higher education in prisons, available and the incarcerated person has the responsibility to make use of these programs. Indeterminate sentencing can become a tool to evaluate the extent to which the incarcerated person made use of rehabilitative programs and has amassed a positive record. The Commission itself recognized this in its recommendation that indeterminate sentences remain in place for people serving life sentences. If we think we can reform parole practices for the most serious crimes, then we ought to be able to do so for less serious crimes.

However, if the Commission continues to support determinate sentencing, we would urge that the recommendations ensure that the revision to this type of sentence does not increase sentence length and in fact reduces sentence length, and that the system be consistent. Even under a determinate sentencing framework, there remains considerable uncertainly as to the actual release date when one takes into account merit time, the date for conditional release, the maximum lease date, work release date, in addition to the uncertainly of how violations while under post-release supervision can extend a prison sentence at the back end.

4. Sentencing Reform and Attending to Victims

Surprisingly, the Preliminary Report's discussion of victims contained no mention of restorative justice, despite a considerable body of research and practice that shows that the needs and interests of victims go far beyond retribution and revenge. Restorative justice puts victims at

the center and does not pre determine their needs or response to crime. It focuses on the key questions of who was harmed; what is needed to repair the harm; and who is responsible to repair this harm? Research has shown that restorative justice approaches increase victim satisfaction with the criminal justice system, reduce fears about revictimization, increases offender accountability. The previously-cited Hart poll found crime victims to be even more supportive than the general public to rehabilitation rather than incarceration and long prison sentences. We urge the Commission to consider the role of restorative justice in its final report and ensure that elements of this approach be incorporated in sentencing reform efforts in New York State.

5. Length of Sentence and Mandatory Sentencing

The Commission's preliminary report spends considerable time on the need to simplify New York's sentencing structure, but did not discuss length of sentence, save to suggest that existing length of time served be used to calculate determinant sentence lengths and considering increasing the length of sentences for Youthful Offenders. With all due respect, the need to simplify NY's sentencing laws pales in comparison to the need to think about how long sentences affect defendants, their families and their communities as well as victims. During the preparation of the Preliminary Report, the Commission heard from Jeremy Travis and Michael Jacobson both of whom have illustrious careers in law enforcement as well as scholarship, who stated that we incarcerate too many people for too long.

Research shows that prison sentences are not effective in reducing crime. The Commission's report notes that recidivism rate for people leaving New York State prisons is 39 percent within three years of release. Research studies including those conducted by the Vera

Institute and by the Criminal Justice Agency show that recidivism rates for ATI participants are better than comparable populations released from incarceration. Other research, including the *Confronting Confinement* report by the Commission on Safety and Abuse in America's Prisons, shows that confinement in prison exacerbates factors associated with recidivism, delaying family formation and entry into the labor market, worsening mental health and fraying ties with communities. Finally, mandatory sentencing erodes the ability of ATI programs to serve people who might best benefit from evidence-based interventions, and encourages instead these programs to be used to widen the net of social control.

We urge the Commission to review the length of sentences and mandatory sentencing with an eye to reducing counterproductive, prison sentences that serve to increase public safety risks.

6. Sentencing Reform and Youth

We appreciate the Commission's recommendation to extend Youthful Offender protection to young people up to the age of 20. However, in light of the considerable body of evidence that has been developed about adolescent development since New York first required 16 years to be treated as adults, the preliminary recommendations do not go far enough. New York State is but one of two states that treat 16-year-olds in the adult criminal justice system. Most states define the age of majority as 18 years, a definition that comports with international human rights standards. Behavioral science shows that adolescents are developmentally different in ways that affects their competence, culpability and prospects for change. Through their early to mid twenties, young people are still learning to modulate their impulses, consider long-term consequences, delay short-term gratification and reduce risk taking behaviors. Research by Jeffrey Fagan of Columbia

University compared recidivism rates for youth in New York, where 16-year-olds are in the adult system and New Jersey, where they remain in the Family Court system and found significant differences in outcomes, with New Jersey youth having lower recidivism rates overall and by each type of crime (violence, property and drug).

Based upon the science of adolescent development, CCA recommends that the Sentencing Commission reconsider its recommendations regarding the treatment of young people and consider raising the age of majority in New York to 18. We support the affording of Youthful Offender treatment to persons through the age of 20. However we disagree with the proposal that the benefits of YO status be taken away if someone subsequently gets convicted of a new crime. That recommendation does not sufficiently account for the trajectory of adolescent/young adult behavior, and moreover it does not take into account the nuances of recidivism. For example, if someone is convicted at age 18 but subsequently is re convicted of another crime at 35 years of age, why would we not continue to view the crime committed at 18 as a reflection of youthful indiscretion? There would seem to be little connection between the behavior at 18 and the behavior at 35. Youthful offender status should not be termed a "free pass." Such inflammatory language makes it difficult to engage in a reasoned, science-based discussion of how to consider a YO conviction in any subsequent convictions. We also disagree with proposals that would increase sentence lengths for young people afforded YO treatment.

7. Sentencing Reform and Financial Penalties

CCA supports the recommendation that financial penalties be organized in a single section of the Penal Law, but reformatting the location does not go far enough. We ask that the

Commission make some recommendation about standards guiding the imposition of financial penalties, given what the data tells us about the people in the criminal justice system. We know that most of the people in New York's criminal justice system are poor. Under current policies, financial penalties and restitution accumulates in such a way that they are unrealistic and set people with criminal records up for failure and victims for disappointment. Simply recommending that these penalties be paid via credit card belies the reality of the economic circumstances of people with criminal records. Instead the Commission should consult the Report of the New York State Bar Association, the recent report by the Council on State Governments and CCA's report on financial penalties that all offer additional substantive recommendations on how to reform financial penalties. These include prioritizing restitution to the victim, using restorative justice approaches to set realistic restitution standards that will bring some measure of satisfaction to the victims, expanding the State's role in restitution to ensure that victims are adequately compensated when the poverty of defendants will not realistically allow for full compensation by the victim. State action should ensure that financial penalties are realistic, do not shift public responsibilities for public goods such as the cost of probation to people unable to afford these responsibilities, and that financial penalties are not so onerous so as to undermine reentry and reintegration goals.

8. Drug Law Reform

We were also greatly surprised that the recommendations regarding drug law reform were largely to suggest continued study. I will not speak at any length on this issue, as I expect that there will be ample comments made by colleagues on this matter. However, there is a plethora of research that shows that incarceration is an ineffective response to drug-driven crime, that

treatment is a far more effective means of addressing drug crime and finally the most egregious examples of racial disparity in the criminal justice system are associated with the application of drug laws.

Conclusion

In closing, there are terrific opportunities to do real, comprehensive sentencing reform in New York State. We have a new Penal Law that has introduced reintegration as a sentencing goal. We have unmatched excellence in ATI programming. We have a new administration that is committed to introducing best practices in corrections and parole processes. What we lack is an overarching framework that brings together the knowledge developed over the past two decades that decisively points to the need to unravel the sentencing practices that have contributed to mass incarceration. It is my hope that over the next months, the Commission subject each recommendation to an assessment of whether the recommendation will actually help undue the harm of mass incarceration. If the recommendation does not achieve this goal, it is not worth pursuing. We simply cannot wait another 40 years to dismantle a system which does not respond to victim needs, harms communities and families, and undermines long term public safety.

Thank you for this opportunity to appear before you today.

STATEMENT

OF THE

OFFICE OF THE APPELLATE DEFENDER

PRESENTED TO THE

NEW YORK STATE
COMMISSION ON SENTENCING REFORM

November 13, 2007

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The Office of the Appellate Defender (OAD) respectfully presents this statement to the New York State Commission on Sentencing Reform, in response to the Commission's Preliminary Proposal for Reform.

OAD is a private, non-profit indigent defense office that provides high quality, client-centered appellate and post-conviction representation in cases arising in the First Department. Created in 1988, OAD is the oldest indigent defense organization in New York City other than The Legal Aid Society.

As an appellate and post-conviction office, OAD has a unique insight into the intricacies and inequities of the sentencing laws and the state prison system. Our clients have all been convicted of felonies and, in most cases, are serving state prison sentences. Countless appeals we file raise issues concerning the legality and fairness of sentences. Moreover, as a client-centered office, we routinely visit our clients in prison, and we often advocate for them in parole proceedings and prison disciplinary matters. And, in connection with our Social Work Re-entry Program, launched eight years ago, we work extensively with clients both before and after release to assist them in transitioning back into their communities. Last year, our Social Work Re-entry Program also instituted a series of workshops, under DOCS auspices, within the prison system to further foster re-entry preparation.

We commend the Commission for the serious work it has already undertaken and we are pleased to see that the Commission has preliminarily recommended a number of important reforms designed to redress inequities in the sentencing laws, bring rationality to our sentencing policies, provide greater opportunities for treatment and other alternatives to incarceration, strengthen and expand re-entry programs, and reduce the size of our prison population. Because the scope of the Commission's preliminary report is so comprehensive, we will address just a few areas.

Determinate Sentencing

The Commission has proposed to complete the transition, begun in 1995, to a nearly entirely determinate sentencing system. We agree that the piecemeal sentencing system that has developed, with its mixture of indeterminate and determinate sentencing, is so confusing and byzantine that it has become virtually incomprehensible to most lay people and even to many criminal law practitioners. As the Commission has noted in its review of the history of sentencing in New York, the preference for a determinate or indeterminate sentencing scheme has shifted over time, as the pendulum of public opinion, social science, and sentencing policy has likewise shifted. Because there are pros and cons of either system, we believe that

the *type* of sentences – indeterminate or determinate – is perhaps less critical than the method of imposition and fairness in the determination of sentences, the realistic opportunities for reduction of time actually served, a commitment by the State to rehabilitation, and an emphasis on re-entry preparation and resources.

Assuming that the Commission will propose that all sentences (with the exception of class A felonies and persistent violent felony offenders, who are subject to indeterminate terms with a maximum of life) become determinate, we respectfully submit the following recommendations.

Length of Determinate Terms

When sentences for violent felony offenses became determinate, the removal of the possibility of release on parole after as little as one-half the maximum term and the inclusion of harsh minimum determinate terms resulted in longer terms of incarceration. Moreover, the addition of post-release supervision (PRS) – *above and beyond the maximum determinate term* – meant that individuals were subject to even longer terms under state control. For example, a ten-year determinate term, with five years PRS, is essentially a fifteen-year term.

Our experience is that such lengthened prison terms do not serve a valid policy purpose. We have found that individuals – even those convicted of serious crimes, and even those with prior records – generally begin to reflect on their crime, accept

responsibility, demonstrate remorse, and seriously endeavor to change their lives to avoid returning to prison, relatively early in their periods of incarceration. Warehousing an individual convicted of armed robbery for, say, fifteen or twenty years, for example, is usually both unnecessary, inhumane, and unsound policy. After a much shorter time in prison, that individual may be well on the road to redemption and rehabilitation. Such a lengthy period of incarceration, without even the possibility of earlier release on parole, can foster bitterness and hopelessness. Moreover, such lengthy terms can be detrimental to the individual's growth and ability to readjust to society once released, as they result in a greater likelihood of family ties being adversely impacted and, thus, make re-entry much more difficult.

We therefore urge the Commission to seriously consider reducing the minimum permissible determinate terms, and reducing the maximum possible determinate terms for all offenders, and particularly for first felony offenders.

Use of Risk and Needs Assessment Instruments at Sentencing

Implicit in the Commission's proposal to move towards "evidence-based practices" in sentencing, involving the use of Risk and Needs Assessment Instruments, is an acknowledgment that the current reliance on the pre-sentence report (PSR) is misguided. We agree.

Our experience in reviewing hundreds of PSRs is that they are generally very cursory, highly subjective, evince no independent investigation, are frequently filled with erroneous information and unfounded hearsay allegations of uncharged crimes, and almost always ignore any mitigating factors or other grounds for leniency. In short, they are virtually useless in assisting a court in making sentencing decisions.

Worse, because in most instances defense counsel does not see the PSR until the day of sentencing, it is often difficult, and sometimes impossible, to verify or contest information contained in the report. In our experience, when defense counsel does object to a portion of the PSR, at best the court will "note" counsel's objections, but will rarely, if ever, order a new investigation report. Once the individual is sentenced, appellate authority makes it virtually impossible to later correct any errors. Unfortunately, this can have grave consequences for the accused, as the report follows him or her to state prison and forms the basis for critical correctional and parole determinations.

For these reasons, we support the Commission's proposal to implement utilization of Risk and Needs Assessment Instrument, provided it is based on sound scientific principles and administered fairly. With respect to the latter concern, we would urge the Commission to insist that any such instrument be administered by a "neutral" agency, such as Vera Institute for Justice. Removing the task of preparing

this instrument from the Department of Probation will ensure that the instrument is treated with the seriousness it deserves, that sufficient resources are made available to provide a thorough evaluation, and that the instrument will not be infected with institutional bias.

Ideally, the defense should be afforded an opportunity for input in the preparation of the assessment instrument *before* it is completed. In this way, there is a greater likelihood of accuracy in the instrument. At the very least, it is essential that there be an opportunity, consistent with due process, for the defense to review the instrument prior to the sentencing date, raise objections to any perceived inaccuracies or omissions, and litigate, to the extent necessary, any unresolved objections. We would expect that, in most cases, and particularly if the defense is permitted to participate in the preparation of the instrument, there will not be the need for an evidentiary hearing or protracted litigation.

Mid-Point Review in Long-term Sentences

Consistent with the goal of releasing individuals from incarceration at the earliest time without contravening the objectives of sentencing, we propose that there be an opportunity in cases involving longer determinate terms, to update the Risk and Needs Assessment instrument and return to the sentencing court for re-evaluation of the sentence at some point during the incarceration. For example, the Commission

could recommend that, in cases involving determinate sentences of eight years or more, a review is conducted at or near the midpoint of the sentence to determine whether subsequent factors – most notably a prisoner's extraordinary institutional record – should militate in favor of a sentence reduction. While this proposal might, at first blush, seem radical, it is better viewed as a sensible suggestion, one that is entirely consistent with the Commission's overall vision.

Today, when an individual is sentenced to a determinate term of, say fifteen or twenty years, that sentence is determined by the court based on fairly limited information, and at a time when it is difficult, if not impossible, to predict the future course of that individual's progress. Some prisoners might continue to act in an anti-social manner while incarcerated, fail to take advantage of available programming, or simply fail to demonstrate a serious commitment to rehabilitation. Others, however, might view their incarceration as a wake-up call to redeem themselves and commit themselves to their educational, vocational, and spiritual growth. After five or more years, that individual might well be a different person, truly deserving of a second look. Indeed, the Commission's observation, in connection with parole supervision, that "'dynamic' factors routinely change," The Future of Sentencing in New York State: A Preliminary Proposal for Reform ("Proposal") at 37, is just as applicable to the evolution that can occur during a lengthy period of incarceration.

In the same vein, when the recent reforms to the Rockefeller drug laws were enacted, permitting those serving A-I and A-II life sentences to seek resentence, the Legislature specifically envisioned and dictated that judges would review that person's institutional history. Even if a more scientific risk and needs assessment is performed, as the Commission contemplates, there is simply no way to gauge which individuals will flourish, and who will not, so many years down the road. In those cases where an individual has unquestionably demonstrated the motivation to change and has proven that he or she is well on the way to achieving the rehabilitative goals of sentencing, it makes eminent sense for a court to review the sentence, both because the individual may have "earned" a sentence reduction and because the State can save much needed resources by reducing the prison term.

Ameliorate Punitive DTAP/ATI Contracts

The Commission laudably urges statutory changes to "legitimize" the dismissal of charges when a defendant successfully completes a DTAP program. Proposal at 24-26. However, we urge reform of a common feature of DTAP contracts that often lead to an unfair outcome – the contractual consequences of failure in a drug program.

As appellate practitioners, we do not see the successful cases – those in which the individual completes the program and has her charges dismissed (or reduced to a misdemeanor). Rather, we are frequently confronted by cases in which, despite her

best intentions and efforts, the individual was unsuccessful in completing a DTAP program and ends up sentenced to state prison. In most cases, the outcome is predicated on a DTAP contract, in which the individual "agrees" to a pre-determined sentence in the event of failure. Often, these sentence provisions provide for much harsher prison terms than the individual would have likely received had they not even attempted treatment. Presumably, the rationale for such provisions is based on the carrot and stick approach – the drug program "carrot," with its possibility of avoiding conviction and prison, is paired with the "stick" of severe penalties for failure. This approach, while superficially sensible, can lead to unjust results.

An example of such an outcome is demonstrated by a case being handled by our office now. The client, "Mary," a teenager with a promising future in the arts, became pregnant as a result of being raped while in high school. She gave birth to the baby and endeavored to support her child while attending school. After graduating high school, Mary attended college, but struggled. She incurred arrests for marijuana possession and shoplifting. Then, a few months later, she was arrested for selling a small quantity of crack cocaine on behalf of another person – her first and only felony arrest. Mary pleaded guilty to a superior court information, and was permitted to enter a program pursuant to an "ATI" contract. Nearly two years later, after a number of setbacks, including several minor rules infractions, a change of

programs, and a second contract, but also after a substantial period of genuine progress, Mary absconded and was arrested for marijuana possession. An intelligent and insightful young woman, Mary took full responsibility for her failures. Nevertheless, she was sentenced in accordance with the terms of her contract to an indeterminate term of three to nine years.

While Mary ultimately failed in her program, the fact that she made serious, sustained efforts to address her problems, and that she committed no serious crimes, was meaningless in the face of a contract in which she "agreed" to the lengthy prison sentence she ultimately received. Yet, had Mary never sought treatment, given her young age, lack of any serious criminal record, and the fact that she was a talented, educated single mother, with substantial mitigation as to her own circumstances and those pertaining to the crime, she would likely have received a sentence of probation or a short jail term, and perhaps youthful offender treatment. Instead, *because* she took the difficult (and ultimately unsuccessful) step of trying to deal with her substance abuse issues, and despite her serious efforts over a nearly two year period, she received an exceedingly harsh sentence.

We believe that, just as in many drug courts around the state, those who choose to address their problems, and who make serious attempts to do so, should not be penalized with harsher sentences than they would otherwise have faced in the event

they are not ultimately successful. We therefore urge the Commission to recommend that any legislation in this area include a provision specifying that DTAP and ATI contracts must be structured to permit a court to impose a lesser alternative sentence than otherwise called for where circumstances warrant them.

Persistent Violent Felony Offender Sentences

In 1995, when New York began imposing determinate sentences for second violent felony offenders, it also doubled the minimum permissible terms for persistent violent felony offender ("mandatory persistent") indeterminate sentences. Thus, the minimum term for a mandatory persistent offender convicted of a class D felony went from six to life to twelve to life; for a class C felony, from eight to life to sixteen to life; and for a class B felony from ten to life to twenty to life. These draconian minimum sentences should be repealed or modified.

While it may be superficially appealing to assume that for individuals convicted of their third violent felony offense, such long sentences are warranted, in many cases these sentences are wholly unjustified. For one thing, New York's Penal Law designates a number of offenses as "violent" even where no violence is used or injuries sustained. For example, a residential daytime burglary where no one is home is a "violent" felony. While such conduct is not to be condoned, one must question

whether such conduct should result in a sentence of at least sixteen years to life.

More importantly, however, such exceedingly long mandatory minimums do not provide for consideration of mitigating circumstances – either with respect to the offense or the offender – and thus do not allow sufficient judicial discretion in sentencing. Inasmuch as these terms are indeterminate, with a maximum of life, the parole board retains discretion as to when to release an individual. Thus, a shorter minimum term will permit such review at an earlier time, when the parole board can consider the nature of the offense, the circumstances of the offender, *and* the person's institutional adjustment, remorse, acceptance of responsibility, and rehabilitation. With shorter mandatory minimums, those cases in which the current minimums are patently unfair can be ameliorated, while still permitting the parole board to deny release as to those for whom a longer term may be warranted.

Thus, we strongly urge the Commission to give serious consideration to reducing the mandatory minimum terms for mandatory persistent felony offenders, either by restoring the pre-1995 minimums, or by other means.

Incarceration: Encouraging Rehabilitation and Redemption, and Preparing for Re-entry

As an appellate provider, we work extensively with an incarcerated population. And, we do much more than litigate an appeal – we routinely visit our clients in

prison, advocate on their behalf before DOCS to help them receive needed medical or mental health treatment or to contest disciplinary charges, assist them in preparing for an appearance before the parole board, and provide an array of re-entry services. Thus, we have an insight into the prison system that other practitioners might not have. While we appreciate the efforts DOCS has made to provide appropriate programming, most would agree that much more can be done.

Programming

Unfortunately, many of DOCS' most effective programs are not available in every facility and, even when available in a particular facility, there is often a long waiting list. Indeed, certain facilities within the system offer a wide variety of programs designed to meet the needs of the individuals who are incarcerated there, while other facilities offer few rehabilitative programs. We have seen numerous situations where a program, such as ASAT, that might be required in order for a prisoner to earn a certificate of earned eligibility or merit time, is not available to that inmate within a time frame that would enable him to reap those benefits. Thus, those programs that have proven to be successful should be expanded so that more prisoners can avail themselves of them.

We fully support the Commission's proposal to increase coordination between DOCS and the Office of Alcohol and Substance Abuse Services (OASAS) so that the

treatment programs offered by DOCS will comport with a "best practices" approach. As the largest substance abuse treatment provider in the State, DOCS' programs (whether run by DOCS or by outside providers) should be certified by OASAS.

In addition, as the Commission has noted, while GED programs still exist, higher educational opportunities for inmates have been all but eliminated. Proposal at 49. Starting in 1994, when Congress rescinded inmate eligibility for Pell grants, most college programs in state and federal prisons vanished. And in 1995, public funding for college education in New York State prisons was entirely eliminated. The devastating consequences of these misguided actions cannot be overstated. It certainly cannot be seriously disputed that providing educational opportunities for those prisoners who wish to avail themselves of them can only enhance the prisoner's rehabilitation, assist in her re-entry, and make for a safer and more rational correctional system. And, as the Commission recognized, higher education programs have been shown to significantly reduce recidivism. Proposal at 49. We strongly endorse the Commission's proposal to expand financial assistance to eligible prisoners, and we urge the State to subsidize a long-term investment in meaningful educational opportunities in each of its facilities.

Work Release, "Step-down Facilities," and Regional Incarceration

We also strongly support the Commission's proposals to expand work release programs and the use of "step-down facilities." Proposal at 47-49. Our experience with clients in work release programs has been extremely positive. And, when an inmate in a work release program has access to a social worker, counselor, or other service provider, the chances for a successful transition are increased.

With respect to the use of "step-down facilities," we agree with the Commission's observation that an inmate's transition to the community is hindered by the significant distance between transitional facilities and the communities to which they are returning. Indeed, we would go one step further and note that, in our experience, one of the most vexing problems in keeping families involved in their incarcerated loved one's life – which is clearly a critical component of successful re-entry – is the fact that the majority of prisoners from New York City are incarcerated in prisons far upstate, often hundreds of miles from home. An individual's incarceration in a distant prison is a particularly cruel aspect of our penal system and poses a significant impediment to keeping families together.

Currently, DOCS uses a complex movement and classification system to determine where inmates are housed and when they are eligible for transfers closer to home. While recognizing that legitimate security concerns might otherwise come

into play, we would strongly recommend that, to the extent feasible, prisoners be incarcerated in prisons as close to their home communities as possible. By enabling more frequent family visits, such a system will be more humane; impose less of a burden on poor families; enable parents, siblings, spouses, and children to maintain meaningful family ties; and increase chances for successful re-entry.

Re-entry Programming and Resources

Successful re-entry, a vital component of any progressive criminal justice system, is a multi-faceted process. Some individuals need a great deal of help to have a realistic chance of a successful re-entry. While DOCS does provide Phase III programming designed to assist prisoners in their preparation for release, we know that this program is simply not enough. We know from our own experience that the more DOCS can partner with other agencies and organizations, the better the prisoner population will be served.

Last year, OAD was fortunate to receive a social work/re-entry grant from the New York Community Trust. Part of our proposal was to expand our re-entry services beyond merely serving our own clients by creating and running re-entry workshops within the prison system. Our social work staff created a comprehensive workshop, with accompanying written materials in both English and Spanish, and we submitted a proposal to DOCS. We were pleased that DOCS was receptive to the

plan. After receiving all of the necessary approvals, we were permitted to begin implementing the workshop. Although we had proposed to run the workshop in several facilities, we were initially permitted to do so only in Greene Correctional Facility, in Coxsackie, New York. This prison has a younger population, which was conducive to the goals of re-entry.

Our social workers and assistants ran the two-day workshop for several groups of incarcerated men who were within one year of release, and who were participants in DOCS' Phase III program. We have repeated the workshop for additional groups and have now already reached several hundred individuals, with additional workshops expected to continue in the new year. The workshops include segments on preparing for a parole hearing or re-entry through outreach to community agencies and family members, tasks that can be done now to begin to plan for re-entry, family communication, a mock job interview, expectations for release, and much more. The workshops have been a resounding success.

Post-workshop evaluations completed by the participants included the following comments:

- "This information will help me out in life."
- "This is all information that I really need."
- "This workshop is very helpful to those who are lost and need guidance in life."
- "It is nice to know that someone cares about us."

In response to the evaluation question: "What, if anything, was new information?" participants gave such answers as:

- "All of the things were new."
- "Some of the chances and resources we have available to reintegrate."
- "Re-adjusting to society."
- "Parenting information."
- "The interview and employment information."

The information that our social work unit presented to even a very small portion of the incarcerated population was new, helpful, and a uniformly positive experience for those who took part. Indeed, one of the most moving results of the workshops was the palpable sense of self-esteem that so many of the participants developed. Workshops such as this should be available to all incarcerated individuals at some point during their confinement. Providing those who are currently incarcerated with the tools to live a law-abiding, productive life will undoubtedly decrease recidivism rates considerably.

We urge the Commission to recommend steps to increase this kind of collaborative partnership between DOCS and community-based agencies to help expand the availability of informational and rehabilitative workshops without additional cost to the State. By building closer relationships with community service providers, DOCS will be able to enhance its delivery of re-entry preparation, planning, and assistance. And, prisoners will learn about additional services that

might be available and, most importantly, will build self-esteem from the respect and compassion provided to them by the providers.

Documentation

One of the early impetuses for the creation of our social work/re-entry program was the need our clients faced when they were released on parole without a home, a job, money, or even the documentation necessary to pick up the pieces of their lives. Our attorneys would spend their days accompanying clients to the Department of Health, so that they could obtain a birth certificate, which would enable them to obtain other forms of identification, which would then allow them to apply for government benefits. The time spent on such endeavors was not the best use of attorney time and, even when such documents could be obtained, there were usually long waiting periods until benefits would be received.

The Commission's recognition of the dire need to make benefits available at the earliest time to individuals who are about to leave prison is enormously significant, and its entreaties to DOCS and the Division of Parole to take steps to help solve this problem is welcome.

Merit Reductions

Under current law, prisoners can earn merit time by earning a GED, participating in and successfully completing a substance abuse or vocational program,

or by performing community service on a work crew. However, only individuals serving indeterminate terms or determinate terms on a drug conviction are eligible for merit time reductions. A merit time reduction entitles an individual to a 1/6 reduction in the minimum term of an indeterminate sentence, thus making the person eligible for parole at an earlier time. Those serving determinate sentences in drug cases are eligible for a 1/7 merit reduction of their sentence. For those serving pre-Rockefeller reform indeterminate sentences in drug cases, an additional 1/6 for supplemental merit time is available for successful completion of two programs.

The Commission is considering whether to expand eligibility for merit time reductions to those serving determinate sentences for violent felonies, and is studying how merit time will be applicable in the event that determinate sentences are instituted for (non-drug) non-violent crimes.

For much the same reason that we have proposed the possibility of a mid-term review of certain determinate sentences – i.e., to allow for a sentence reduction for those who perform extraordinarily well in prison – we strongly urge the expansion of merit time reduction opportunities. To the extent that incarceration is imposed, in large part, to encourage offenders to modify their behavior, successful completion of meaningful institutional programs, coupled with positive disciplinary records, should earn an individual the possibility of earlier release. Moreover, with the elimination

of indeterminate sentencing and its possibility of early release on parole, there should be avenues for early release from determinate sentences.

While one of the purposes of moving from an indeterminate to a determinate system is to eliminate parole board discretion in release decisions and, as the Commission proposes, to rely on more objective sentencing and release criteria, the expansion of merit time will comport with this principle. As noted, the certification of merit time is based on program completion and institutional record, and is therefore objectively-based. Moreover, permitting the accumulation of credits towards earlier release on a larger scale will engender a more motivated and release-ready prison population.

Alternatives to Prison for Technical or Minor Parole Violations

The Commission proposes a number of alternatives to prison for those who commit relatively minor parole rules violations. Among the proposals under consideration are a system of graduated sanctions, the use of re-entry courts, and the use of "revocation centers." We fully support the Commission's efforts to create alternatives to reincarceration for technical or minor parole violations.

Many, if not most, individuals re-entering society face significant problems in readjusting. Often, they have no home to return to, and when there is a home, it is not

always in a setting most conducive to successful re-entry. Especially for those who have been incarcerated for many years, the adjustment from institutionalization to the community, with the concomitant pressure to find suitable housing, earn income, engage in treatment (medical, substance abuse, psychiatric), resolve family issues, resume education, and make frequent reports to a parole officer, is a daunting process. For many individuals, the restrictions imposed by the conditions of parole can add to anxiety and stress. While supervision may be necessary, so too must there be understanding on the part of the State that full compliance with all conditions of release may sometimes be an unattainable goal – particularly in the early stages of release.

Thus, the Commission's suggestions for dealing with technical violators appear to properly balance the needs of the State to monitor released offenders with an understanding that not all violations are so serious as to warrant reincarceration. We therefore urge the Commission to follow through on its commitment to studying and recommending alternatives to reincarceration for technical or minor violations.

Permanent Sentencing Commission

One of the most important proposals being considered by the Commission is the creation of a permanent Commission on Sentencing. As the Commission

correctly notes, the complexities of New York's sentencing scheme, and all of the related issues, make it not feasible for a short-term temporary commission to adequately and thoughtfully address all concerns. Given the extraordinary importance of sentencing, corrections, parole and re-entry, it would be unrealistic to believe that true, lasting, and comprehensive reform can be accomplished in a short time. Moreover, those reforms that are adopted as a result of this Commission's work will need time to be tested and evaluated. Further revisions and reforms are inevitable and desirable if our sentencing laws are to be both humane and effective.

Thus, we fully support the creation of a permanent Sentencing Commission to evaluate reforms made now and to suggest further reforms as circumstances change or as new data dictates.

Conclusion

True sentencing reform can only be achieved when government and those who are charged with implementing and effectuating our laws view defendants and prisoners as worthy human beings capable of rehabilitation and redemption, deserving of our resources, and having the potential to contribute to society and live fulfilling, law-abiding lives. Sadly, too many of our institutions and officials have

for some time treated those caught up in the criminal justice system as nameless, faceless, and worthless criminals.

This Commission has demonstrated, through its painstaking work and thoughtful preliminary proposals, that it seeks to change that culture. We at OAD applaud the work of the Commission and urge it to continue on its mission with the same sense of fairness, hope, and mercy.

New York, New York
November 13, 2007

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Testimony on Behalf of the New York City Bar Association
Before the New York State Commission on Sentencing Reform
Daniel R. Alonso, Chair, Council on Criminal Justice
November 13, 2007

Thank you for this opportunity to present the views of the New York City Bar Association on the important issue of criminal sentencing. My name is Dan Alonso, and I currently serve as Chair of the Council on Criminal Justice, which is the Association's coordinating body for the development and implementation of criminal justice policy. The Council also conducts the Association's biannual Criminal Justice Retreat.

The Council is composed primarily of experienced criminal justice practitioners, and we welcome the Commission's efforts to address what everyone agrees is an unnecessarily complicated and convoluted system of criminal sentencing. As prosecutors and defense attorneys, Council members constantly grapple with the complexity of New York's sentencing system as they work to do justice on behalf of the public or their clients. We applaud the Commission's decision to address these issues now, at a time when the Association is itself in the midst of a wide-ranging examination of issues relating to the collateral consequences of criminal conviction, including issues relating to re-entry, parole, drug treatment, and rehabilitation in general.

The views I present today are those of Association generally and the Council in particular. I would like to divide my testimony into two parts. First, I will discuss the Association's general and longstanding support for expanded determinate sentencing. Second, I will explain why we must condition this support on the development of appropriate sentencing

ranges. The Commission's preliminary report is quite recent and the Council has not had sufficient time to address each sub-issue it discusses. For this reason, I will limit my statement to the subject of determinate sentencing generally.

Support for Determinate Sentencing

As the Commission is well aware, New York has been moving towards an entirely determinate sentencing scheme for many years. In 1977, the Executive Advisory Committee on Sentencing, chaired by New York County District Attorney Robert M. Morgenthau, declared indeterminate sentencing a failure and recommended a determinate sentencing scheme that provided for good time and fixed periods of post-release supervision.[1] Since then, other committees and panels have echoed the conclusions of the Morgenthau committee, and determinate sentences have been instituted for an increasing number of offenses.

The New York City Bar Association has been on the record as supporting determinate sentencing for many years. In 1985, my predecessor John Doyle endorsed determinate sentencing in his testimony before the New York State Committee on Sentencing Guidelines.[2] More recently, in response to this Commission's preliminary report, the Council once again considered the question of whether New York should move to a wholly

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[1] N.Y.S. Comm'n on Sentencing Reform, *The Future of Sentencing in New York State: A Preliminary Proposal for Reform*, at 9 (Oct. 15, 2007).

[2] Ass'n of the Bar of the City of New York, Council on Criminal Justice, *Testimony Presented on Behalf of the Council on Criminal Justice, Regarding Proposed Sentencing Guidelines*, The Record of the Ass'n of the Bar of the City of New York, Vol. 40, No. 3 at 258 (1985).

or largely determinate system, and again agreed that it should, with one caveat that I will discuss in a moment.

We recognize this issue has not been free from controversy and that lawyers of good will, both inside and outside the Association, support retaining the indeterminate sentencing system. However, the following factors underscore the Association's support for moving to a determinate sentencing approach:

First, determinate sentencing promotes certainty in criminal sentencing, which is lacking in New York's current system: The current mix of determinate and indeterminate sentencing creates an unhealthy confusion that affects everyone who participates in our criminal justice system as well as the public at large. Attorneys cannot advise their clients effectively without knowing how much time their clients face. Similarly, potential violators cannot be deterred by sentences they do not understand. Lastly, victims will not believe that justice has been done, nor will they be able to make effective plans for their future safety if they do not know how long a defendant will be imprisoned and when he or she will be released. Additional determinate sentencing is a step towards clarifying how much time will be served for each crime, which will improve the workability of our system across the board. An interesting anecdotal note is that Council members working regularly with criminal defendants have reported that even certain clients would be in favor of determinate sentencing, despite the fact that it could result in longer sentences. It seems that everyone takes comfort in greater knowledge of the future.

Second, the Association has long believed that the courts, not the Parole Board or any other institution, should be primarily responsible for making decisions with regard to sentencing, and the Association's recent focus on the collateral consequences of conviction has provided us with an opportunity to examine critically the parole system. At a Council-sponsored forum held just last year here at the Association, various experts discussed the system in depth and identified several serious problems, including the difficulty in recent years of obtaining parole under any circumstances for entire classes of offenders. One recent example is the reversal of the denial of parole to Dr. Charles Friedgood, New York's oldest inmate, who had abused his medical license to murder his wife and cover up that murder more than 30 years ago. What was astonishing was that the original panel of commissioners had found that the 89 year-old inmate was likely to violate the law again, forcing the conclusion that the chance assignment of parole panels may at times serve to impose a life sentence.[3] While we recognize and support the Commission's recommendation that second-degree murder and other similar offenses continue to be indeterminate, we use this as an example of the vagaries of parole determinations.

We note that the Commission's recommendation that "good time" be preserved is crucial to our support of determinate sentencing. For many years, the Council has approved of good time and its ability to encourage prisoners to behave while they serve their sentences.[4] It provides the incentives inherent in an indeterminate system without the

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[3] Sam Roberts, *State's Oldest Inmate is Granted his Freedom by Parole Board*, N.Y. Times, Nov. 8, 1997, at B1.

[4] Ass'n of the Bar of the City of New York, Council on Criminal Justice, *Testimony Presented on Behalf of the Council on Criminal Justice, Regarding Proposed Sentencing*

vagaries of Parole-Board-driven back end determinations. Good time has worked effectively in the federal system, with which many Council members are intimately familiar, and it has worked well in new York since 1995.

Third, we agree with the Commission that determinate sentencing has a much greater tendency to promote uniformity than the present system. After all, a system where all participants have a very good idea at the outset about how much time an offender will serve allows greater transparency and reduces the possibility that similarly situated offenders will be treated differently.

Finally, determinate sentencing is a "truth-in-sentencing" measure that will help promote public confidence in our system of criminal justice. All of us who are involved in the criminal justice system are well familiar with the cynicism in the average member of the public over the discrepancy between pronounced sentences and time actually served. Victims, their families and members of the public deserve to know, in plain English, the length of the time defendants will serve. And, additional clarity with regard to sentencing, including the recommended elimination of "back door" sentence-reduction mechanisms, will greatly improve accountability and restore public confidence.

The four factors I've just discussed are all clearly interrelated. In the end, additional determinate sentencing simply makes sense as a means of streamlining New York's

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Guidelines, The Record of the Ass'n of the Bar of the City of New York, Vol. 40, No. 3 at 273-74 (1985).

confusing mix of determinate and indeterminate sentences. It will improve fairness, workability and public confidence in our criminal justice system as a whole.

Sentencing Ranges

As the Commission noted in its report, the appropriateness of determinate sentencing is predicated upon the adoption of appropriate sentencing ranges.[5] If these ranges set out unduly harsh penalties or excessively restrict judicial discretion by, for example, limiting alternatives to incarceration or having excessively narrow sentencing ranges, than we would simply trade one set of problems for another. For this reason, the Association conditions its endorsement of determinate sentencing on its future review of the actual sentencing ranges developed by the Commission.

As I've noted, the Association firmly believes that judges are the best-situated decision-makers with regard to criminal sentencing. In general, judges are privy to all relevant information at sentencing, and are charged to consider both the offense and the offender. Consistent with this belief, the Association has repeatedly defended the discretion of judges to tailor their sentences appropriately to the facts and circumstances of each individual case.[6] For example, when asked for comment, the Association spoke out against the certain aspects of the federal sentencing guidelines when they were in draft

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[5] N.Y.S. Comm'n on Sentencing Reform, *The Future of Sentencing in New York State: A Preliminary Proposal for Reform*, at 17 (Oct. 15, 2007).

[6] Letter from Evan A. Davis et al. to Governor George E. Pataki, at 2 (Aug. 1. 2001); Ass'n of the Bar of the City of New York, Comm. On Criminal Law, *Report on Proposed Legislation to Mandate Determinate Sentencing for First-Time Violent Felons and to Make Adjustments in the Rockefeller Drug Laws*, at 4 (1998).

form more than 20 years ago.[7] And, the Association has repeatedly called over the years for reform of the harsh mandatory minimum sentences set out in New York's "Rockefeller" drug laws, as well as for increased drug treatment and alternatives to incarceration.[8] We believe the Commission should be careful to avoid the flaws of previous determinate sentencing schemes.

The Association recognizes, however, that determinate sentencing need not result in longer or less flexible sentences.[9] If sentence ranges are broad enough and set at appropriate levels, the advantages of determinate sentencing can be gained while preserving judicial discretion. We look forward to working with the Commission in this area.

In conclusion, we thank the Commission for undertaking this important and necessary task. We endorse the Commission's recommended expansion of determinate sentencing, subject to our review the Commission's actual recommended sentencing ranges. Thank you again for providing the Association with the opportunity to share its views with you on this important topic.

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[7] Ass'n of the Bar of the City of New York, Council on Criminal Justice, *Comment on Draft Sentencing Guidelines* (1986).

[8] Letter from Evan A. Davis et al. to Governor George E. Pataki (Aug. 1. 2001); Ass'n of the Bar of the City of New York, Comm. On Criminal Law, *Report on Proposed Legislation to Mandate Determinate Sentencing for First-Time Violent Felons and to Make Adjustments in the Rockefeller Drug Laws* (1998), among others.

[9] Ass'n of the Bar of the City of New York, Council on Criminal Justice, *Sentencing Guidelines: the Search for Fairness*, The Record of the Ass'n of the Bar of the City of New York, Vol. 40, No. 2 at 106-07 (1985).

Testimony of

The Legal Aid Society

at a public hearing on

The Future of Sentencing in New York State

Presented to:

New York State Commission on Sentencing Reform

Presented by:

Shreya Mandal, JD, LMSW
Mitigation Specialist
Criminal Appeals Bureau, Criminal Defense Division, and Special Litigation Unit

November 13, 2007

Good morning. My name is Shreya Mandal. I am employed as an in-house sentence mitigation specialist for The Legal Aid Society, Criminal Appeal Bureau. I hold a Juris Doctorate in Law and am a Licensed Master of Social Work in New York State. In addition, I have had extensive training in the field of psychotherapy for the past ten years.

The Legal Aid Society welcomes the opportunity to testify before the New York State Commission on Sentencing Reform. Since 1876, The Legal Aid Society has provided free legal services to New York City clients who are unable to afford private counsel. Annually, through our criminal, civil and juvenile offices in all five boroughs, our staff handles more than 275,000 cases for poor families and individuals. The services we provide reflect the entire gamut of the needs of our clients, from immigration representation for the newest arrivals, to health care benefits for the oldest New Yorkers.

As you know, by contract with the City, the Society serves as the primary defender of poor people prosecuted in the State court system. In the last fiscal year we handled some 225,000 criminal cases in the trial courts. In this capacity, the Society is in a unique position to testify about sentencing reform in New York State.

Following the passage of the Drug Law Reform Act of 2004 and continuing with the 2005 amendment allowing the re-sentencing of A-II drug offenders, The Legal Aid Society recognized that it was important to identify and address the needs of clients who had the opportunity for re-sentencing. In spite of the fact that no resources were legislatively allocated, the Society asked me to create a re-sentencing project centered on developing sentence mitigation and clinical assessments, which could bring client stories to the courts through both written and oral advocacy. During the course of this project I have used the mitigation process

This re-sentencing project allowed me to expand the range of our post-conviction services that are desperately needed by long-term drug offenders. Most of my clients have had long battles with substance abuse—and have taken on the challenge of recovery and healing their addictions while in prison. The problem of substance abuse is rarely an isolated experience and is often preceded with significant mental health issues. But treatment of such mental health illness is hardly ever effective in prisons. My clients have been largely misdiagnosed, misunderstood, and often times mistreated as a result. In my experience, most drug offenders have also been profoundly isolated from their loved ones as a result of their prison terms and they have been in desperate need of family reunification. Most of this population almost always needed some form of transitional housing assistance, food, clothing, and public assistance that gave them a solid start to a second chance in life. And for those who have been successfully re-sentenced and released, most of them wanted to pursue a higher education to ensure that they would meet their personal goals and rebuild healthy lives.

After the passage of the Drug Law Reform Act, many community based organizations providing housing, employment, mental health, and substance abuse treatment voluntarily grouped together in an informal coalition to fill the critical need to build linkages between re-entry providers. I am certain that these supportive re-entry networks will be available to support additional community-based drug treatment.

Based on my experience, it is in everyone's interest that we develop new ways to place additional drug offenders into community based programs. If it is done correctly, sentencing reform can make all of our communities safer and more productive places in which to live.

Consideration of Further Drug Sentencing Reform

There are many praiseworthy policy recommendations in the Commission's Preliminary Proposal. Many of them would be a real step forward for New York practice. Re-entry courts for high risk offenders, restricting confinement for those parole violators who commit a new felony or rule violation that threaten public safety, greater use of graduated sanctions for parole violators, aligning community supervision with the offender's risk level, expanding YO eligibility, expanding merit time, enhancing transitional employment opportunities, offering assistance with essential identification are but a few. Many of these sound policy proposals are within the discretion of the Executive Branch and can be implemented quickly, as early as the next budget cycle, without the need of additional legislation.

For our community, the recommendations regarding further drug law reform are vitally important. To a significant degree, the work of the Commission will be judged by the quality of its drug law reform proposal. In our view meaningful drug law reform is an essential part of the Commission's mandate to "ensure the imposition of appropriate and just criminal sanctions, and to make the most efficient use of the correctional system and community resources." Executive Order No. 10, March 5, 2007.

The Commission is aware of the research which shows that there is a nationwide trend among the states toward greater use of diversion away from prison and into community-based treatment, greater use of community corrections for nonviolent drug offenders, even repeat offenders, and a trend toward procedures that allow judges to depart from mandatory minimum sentences. (See "Draft Working Paper #1: Overview of Sentencing Structures and Trends Nationwide") The trend is motivated by the fact that community-based treatment has been

shown to be far less expensive and at least, if not more, effective than prison. The obvious policy choice for the Commission is to follow this trend and expand the available procedures for more effective and less costly community treatment.

If New York is to join the trend, the Sentencing Commission has to create additional ways to place offenders into diversionary programs, increase the number of the programs, and create a way to assess the quality of the program performance. Until now the District Attorneys, through their control of the indictment and plea process, have had almost exclusive control over admission to alternatives to prison. This near control over the use of alternatives is a product of the discredited Rockefeller Drug Laws. While some District Attorneys created high quality alternative to prison DTAP programs to alleviate the harshness of those laws - the Commission report cites the success of the Brooklyn DTAP program - many did not. Many of those programs that were established have very restrictive eligibility criteria. This has to change. Because it is a recipe for continued inaction, the Commission proposal to allow judges to impose alternative sentences – but only with the consent of the District Attorney - is inadequate.

We should have more uniform policies statewide and judges, as the sole neutral party in the case, should have the authority to place offenders into treatment. Our judges have proven to be very good at responding to community needs. The District Attorneys insist, however, that they should retain the role of the judge and determine who enters a treatment program. This role is a distortion of our justice system. One party to the criminal case should not be in a position to determine the outcome.

The District Attorneys assert that mandatory minimum sentences played a role in crime reduction. We think this is an over-simplification of the facts. The key mandatory minimum laws were passed in the early 1970's, well before crime rates began to drop. In any event,

research now tells us that there are more effective ways to deal with drug abuse. It would be foolish to remain mired in the ways of the past when today there are more effective options available.

The District Attorneys also assert that the mandatory minimum laws encourage cooperation and encourage people to participate in DOCS treatment programs. They have presented similar arguments to oppose each phase of drug law reform. Just a few years ago they told us that the life sentences of the Rockefeller Laws were necessary to encourage pleas and to get people into treatment. Yet we see no fundamental change in the practice after the 2004 sentence reductions. In fact, more drug offenders are going to prison now than several years ago. The argument ignores all of the research evidence and the experience from an increasing number of states that community-based treatment is more effective and less costly in terms of future crime prevention. When properly operated, the cost effective community-based treatment alternatives can give us even safer communities than mandatory minimum sentences. Those people who do not successfully complete community based treatment will still face the threat of a prison sentence.

The social and economic cost of a mandatory minimum prison policy is enormous. The costs go beyond the cost of imprisonment. Such a policy removes potential sources of support and income from our communities and thereby increases the cost of our social support network. It also carries a high humanitarian cost as it separates families and increases the burden on our foster care system. Community-based treatment can reduce the impact of these unintended consequences.

In light of the compelling public safety, fiscal, and humanitarian reasons to expand the use of treatment alternatives, it would be a great mistake to allow opposition to prevent the

Commission from completing its mandate to explore the just and efficient use of correctional system and community resources. It will take executive leadership to fulfill the mandate, but it can and should be accomplished. Judges should be empowered to sentence first time "B" felony offenders, as well as those predicate felony drug offenders whose addiction is a primary cause of the crime, into a treatment program. Allowing a prosecutorial veto over this necessary power would render the reform illusory.

As we did with the Drug Law Reform Acts, The Legal Aid Society is fully prepared to devote its time, energy and resources to work with the executive, the judiciary, the District Attorneys, and other members of the criminal justice system to make the expansion of community-based treatment alternatives a success. We have valuable experience and a proven track record of success. It can be done. We ask that you demonstrate the courage and the wisdom to work with us to ensure that it is done well.

KINGS COUNTY DISTRICT ATTORNEY'S OFFICE

CHARLES J. HYNES

District Attorney

TESTIMONY PRESENTED TO

THE NEW YORK STATE COMMISSION ON SENTENCING REFORM

November 13, 2007
New York City Bar Association
42 West 44th Street
New York, New York

Prepared by:

Anne J. Swern,
First Assistant District Attorney

THE DRUG TREATMENT ALTERNATIVE-TO-PRISON (DTAP) PROGRAM AND THE ComALERT RE-ENTRY PROGRAM

ANNE J. SWERN,
FIRST ASSISTANT DISTRICT ATTORNEY, KINGS COUNTY

Good morning. I'll be focusing today on two topics—(1) drug treatment diversion for non-violent offenders, and (2) recidivism reduction through effective re-entry—both of which this Commission, in its preliminary report, discussed as possible areas of sentencing-related reform. More specifically, I will talk about DTAP, a treatment diversion program with which I know this Commission is familiar, and about ComALERT, a prosecution-run re-entry program. Notably, both these programs were created under the current sentencing structure. To the degree that the Penal Law and its sentencing provisions aim in part to ensure public safety,[1] these two programs, which have proven effective

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[1] See P.L. § 1.05(6) (one of the general purposes of the Penal Law is to "insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection").

at reducing recidivism, should be given careful consideration by this Commission.

A. DTAP

In an effort to break the cycle of substance abusers committing crimes, going to prison, and re-offending upon release to support their drug habit, District Attorney Hynes has been in the forefront of instituting prosecutor-run drug treatment alternatives to prison. His DTAP Program, which launched in 1990 and which has been evaluated extensively by the National Center on Addiction and Substance Abuse at Columbia University, boasts a recidivism rate for graduates that is approximately half the rate for comparable defendants who served state prison sentences. As of November 1, 2007, 2,550 offenders had been accepted in Brooklyn DTAP, of which 1,044 have graduated and 377 are currently in treatment.

During the course of both this pioneering treatment effort and his many years combating violent drug-related crime in Brooklyn, DA Hynes has come to certain conclusions about how

DTAP can most effectively reduce recidivism without jeopardizing public safety in the process. There are *five* key elements to accomplishing this goal.

First, it is essential that diversion into treatment be reserved for those who <u>are</u> truly addicted. As a number of studies have now shown, treatment can reduce criminal recidivism and can do so in a more cost-effective way than incarceration. However, spending treatment dollars on those who are <u>not</u> addicted is not just a waste of money but it also compromises the treatment of those who <u>are</u> addicted. Treatment diversion should not be automatically offered to a defendant based solely on a charge; treatment diversion should be offered based on an evaluation of the individual — the defendant's addiction, his or her criminal and personal history, and the facts of the case.

Not all of those arrested for drug offenses are addicted. A number of offenders peddle drugs out of greed, sometimes engaging in violence to protect their turf, placing their desire to make money over the welfare of those communities so adversely

affected by the drug trade within their midst. By the same token, some defendants who have been arrested for non-drug offenses are nevertheless drug addicts who were motivated to commit their crimes by their addiction. In 1998, Brooklyn DTAP began accepting addicted defendants who were facing non-drug charges (larceny, burglary, etc.). Since then, 297 such defendants have entered DTAP. Although the graduation rate for these non-drug charge defendants has been lower than for drug-charge offenders, nevertheless, 69 have graduated the program and 83 are currently in treatment.

An effective drug treatment program, like DTAP, must engage in the careful screening of program candidates, with regard to both the facts surrounding the defendant's criminal activity and the defendant's clinical suitability for treatment. If the latter is not conducted by qualified clinicians who have an expertise in clinical and forensic evaluations, valuable treatment funds will be wasted on offenders who won't receive an intervention that will change their behavior and thereby prevent

recidivism. In short, treatment works for the addicted, so let's make sure it's the addicted that get treatment.

Second, violent individuals should not be diverted into community-based treatment, and cases should be carefully screened so that public safety—the safety of non-forensic clients of the drug treatment program, of the treatment provider staff, and of the public at large in the event that the diverted offender absconds from treatment—is not jeopardized by an offender's diversion.

Again, it's important to look beyond the charges on an offender's rap sheet. A DTAP candidate may have serious violence issues that don't appear in his or her criminal history—for example, a history of domestic violence or gang-related violence. That is why our Warrant Enforcement Team does a background check on each candidate. At the same time, we will not disqualify a candidate merely because they have a technical VFO (violent felony offense) on their rap sheet. For example, a candidate may have a prior second-degree burglary conviction. Closer

investigation reveals that the defendant had burglarized his own parents' house, and it is those same parents who are now pleading that we agree to divert their drug-addicted son into DTAP. If a background check reveals no other violence in connection with this defendant, we would offer him DTAP.

By allowing offenders to remain in the community to receive treatment instead of incarcerating them in a secure facility, we are assuming the risk that they might re-offend while released. To minimize the danger that such new offense might involve violence, diversion should be extended only to non-violent individuals.

The ***third*** key element to DTAP is the use of long-term residential treatment for predicate felons, and more specifically, the effective therapeutic community (TC) model.[2] Defendants with extensive drug histories who have repeatedly engaged in

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[2] See Faye S. Taxman, *Unraveling "What Works" for Offenders in Substance Abuse Treatment Services*, 2 NAT'L DRUG CT. INST. REV. 91, 108, 112 (1999) (in assessment of various therapeutic approaches, noting that research has found the "therapeutic community" to be "successful").

criminal activities to finance their drug habits, i.e., DTAP's target population, require intensive intervention and rehabilitation to support re-integration into society. For many DTAP participants, the environment in which they were living (the people with whom they were associating and the places that they frequented) bolstered their drug addiction. The participants need to be removed from that environment for a significant length of time to begin the process of recovery and re-socialization. Moreover, many participants need a range of supportive services in addition to substance abuse treatment—services such as medical care, educational and vocational training, parenting training, and HIV education, testing, and counseling. The TCs associated with DTAP provide those additional services and the supportive and structured environment that these chronic addicts need in order to begin the process of recovery and resocialization.

Fourth, residential treatment beds must be readily available and accessible in all jurisdictions. The crisis moment of an arrest can motivate an offender's swift engagement in the treatment

process, and delayed placement means that we lose that additional impetus towards recovery. In addition, if defendants have to wait months in county jails before they can be placed in a treatment facility, the savings on prison-incarceration costs begin to evaporate. It's important, too, that the residential treatment facility be able to accommodate offenders with special needs. Treatment beds must be available for the many offenders, who, for example, don't speak English, are HIV positive, or who have a co-occurring mental illness. Furthermore, treatment facilities should be readily accessible from different counties to minimize the costs associated with periodic court appearances for treatment updates.

Fifth, the final key element that I want to mention is that the use of a deferred sentencing model has contributed significantly to DTAP's effectiveness. DTAP began as a deferred prosecution model, i.e., charges were held in abeyance until treatment completion or failure. DTAP now uses a deferred sentencing model. Participants are required to plead guilty to a felony prior to

program admission and the plea agreement includes a specific prison term which will be imposed in the event of treatment failure. Thus, the risk associated with failure shifted from a strong probability of a prison sentence under the old model, to a virtual guarantee of a prison term under the new model.

In 1998, after conferring with the defense bar in Brooklyn, we adopted the deferred sentencing model with the initial goal of extending treatment to a greater number of offenders. DTAP originally targeted only defendants who were facing class B felony drug charges pursuant to "buy-and-bust" undercover operations. We focused on these cases because the strength and availability of the evidence (police testimony and recovered drugs and pre-recorded buy money) would usually remain unaffected during the period that the defendant spent in treatment. Thus, under the old deferred prosecution model, a successful prosecution could still be undertaken in the event that the defendant failed DTAP.

We realized that if we expanded the pool of diverted offenders beyond those charged in basic buy-and-bust cases (as

the defense bar was urging us to do), both our ability to obtain a conviction in the event of treatment failure and the concurrent threat of incarceration as a motivating factor to enter and stay in treatment would be severely undermined. It would be very difficult to prosecute a non buy-and-bust case that had been delayed for months and months while the defendant underwent treatment, especially if the defendant had periods of relapse and readmissions. Thus, we adopted the deferred sentencing model.

We found that the switch in models in 1998 significantly increased treatment retention rates. For those defendants admitted to DTAP under the deferred-prosecution model, the one-year treatment retention rate was 64%. Under the deferred sentencing model, the current one-year retention rate as of November 1, 2007, has risen to 76%.

Why is this substantial increase in the one-year retention rate so important? Because research shows a positive correlation between the length that a defendant stays in treatment and the likelihood of that individual not re-engaging in drug use and

criminal activity. That is, if an offender stays in treatment for at least 12 months, there is a greater likelihood that drug treatment will be effective in the long term.

In short, certainty of punishment plays a crucial role in a drug-addicted defendant's successful rehabilitation. Although we recognize that relapse is part of the recovery process, and evaluate applications for readmission on a case-by-case basis, every DTAP participant knows that he or she faces a sentence of imprisonment if, after being given a reasonable chance to succeed he or she absconds from treatment or fails to complete the program. The prison alternative—the external motivation—is the extremely valuable incentive for defendants to enter and stay in drug treatment. As Michael Rempel, research director at the Center for Court Innovation, and his two co-authors noted in an article about the evaluation of New York State's drug courts:

> As to who reaps the most benefit from drug court, the study suggests that participants facing more serious charges and a longer sentence in the event of program failure are more likely to succeed. . . . [G]reater legal

coercion increases the chances that an addicted person will succeed in treatment.[3]

B. ComALERT

Just as diverting addicted offenders from prison into drug treatment can be an effective means of reducing recidivism and thereby promoting public safety, so too can making sure that ex-offenders receive substance abuse treatment and transitional employment and other social services once they return to the community. Because successful re-entry can have such a positive impact on an individual's and, by extension a community's, well-being, DA Hynes created ComALERT (Community and Law Enforcement Resources Together)—in close collaboration with Counseling Service of EDNY (an out-patient drug treatment provider), the Doe Fund (a provider of transitional employment and housing), the Division of Parole, and numerous community-based social services providers.

[3] Michael Rempel, Dana Fox-Kralstein, and Amanda Cissner, *Drug Courts an Effective Treatment Alternative*, 19 CRIMINAL JUSTICE 2, 34-35 (summer 2004).

ComALERT is not a re-entry court. It is a re-entry partnership for Brooklyn residents who are on parole and who have been mandated to engage in substance abuse treatment.

The program started in 1999, but underwent several changes, until it assumed its present structure in October 2004. In 2006, the Kings County DA's Office received a grant from the Division of Criminal Justice Services to enlarge ComALERT's space and enhance on-site services, and thereby enroll a greater number of parolees. There are currently approximately 150 active participants in ComALERT. For most clients, the program lasts three to six months. From October 1, 2004, to October 1, 2007, 446 clients graduated the program, and the program graduation rate is 53%.

Most ComALERT clients are recently released from prison and are referred to the program by Parole. At ComALERT's downtown Brooklyn location in the Municipal Building, ComALERT clients receive outpatient substance abuse treatment from the OASAS licensed counselors of Counseling Service of

EDNY. Each week, clients attend one individual counseling session and one or two group sessions. They are regularly tested by for drug use. Once drug testing results verify that a ComALERT participant has been drug- and alcohol-free for at least 30 days, he or she can begin engaging in other services, and, per the referral of the primary counselor, will meet with ComALERT's Community Resources Coordinator, an employee of the District Attorney's Office.

Approximately one-third of ComALERT clients receive a referral to, and preferential placement in, the Doe Fund's Ready Willing & Able (RWA) program, which provides transitional employment, transitional housing (if needed), job skills training, 12-step programs, and courses on financial management and other life skills. RWA participants work full time in manual labor jobs, primarily street cleaning, and are paid $7.50 per hour. A portion of the salary is deposited directly into a savings account for the client. They receive meals and other services in a Doe Fund facility. After nine months of transitional employment,

participants begin the search for a permanent job. During this process, they continue to receive a stipend. Once RWA participants secure permanent employment and housing, they graduate from the program, and the Doe Fund continues to provide them with $200 per month for five months. ComALERT's weekly individual and group counseling sessions, and periodic drug testing help clients maintain sobriety and their enrollment in RWA, which enforces a zero-tolerance policy for drug and alcohol use.

In addition to providing referrals for RWA and other transitional employment, ComALERT's Community Resources Coordinator also links participants to a wide range of other social services offered by community-based providers, such as transitional housing, vocational training, GED test preparation, family counseling, and job readiness programs. Service referrals are specifically tailored to meet the needs of the individual clients.

On site, at the ComALERT Re-Entry Center in the Municipal Building, ComALERT participants may attend HIV/STD/Hepatitis

workshops led by the Brooklyn Plaza Medical Center. ComALERT also has an on-site doctor who conducts physical health assessments and provides referrals as necessary. ComALERT participants who need mental health treatment, but only at a moderate level, may receive such treatment from their ComALERT primary counselor. If the client has a serious and persistent mental illness and needs treatment involving medication, the primary counselor or the on-site doctor will refer the client to an outside mental health treatment provider. ComALERT plans to augment, in the near future, the range of wraparound services offered on site.

Professor Bruce Western, formerly of Princeton University and now at Harvard, recently completed research evaluating ComALERT. Professor Western has analyzed the recidivism rates of ComALERT graduates from July 2004 to December 2006, and compared those rates to all ComALERT attendees for that period (i.e., for all participants regardless of whether they graduated or were discharged) and to those of a matched control

group of Brooklyn parolees who did not participate in ComALERT.[4] Outcome percentages for ComALERT graduates were *substantially* better in all categories when compared to those of a matched control group. One year after release from prison, parolees in the matched control group (who did not have the benefit of ComALERT) were over twice as likely to have been re-arrested, re-convicted, or re-incarcerated as ComALERT graduates. Even two years out of prison, ComALERT graduates showed far less recidivism than the parolees of the matched control group. Twenty-nine percent of ComALERT graduates were re-arrested, 19% re-convicted, and only 3% re-incarcerated for new crime.[5] By contrast, 48% of the matched parolees were

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[4] Erin Jacobs, ComALERT's Research Director, is collaborating with Professor Western on this research. A final report of their findings and evaluation will be completed before the end of the year.

[5] Although the comparison is imperfect, the recidivism rates of ComALERT graduates were dramatically lower than for prisoners released from state prisons in general. A study conducted in 2002 of inmates released from state prisons in 1994, concluded that, two years after release, approximately 59% had been re-arrested, 36% re-convicted, and 19% re-incarcerated for a new crime. P. Langan & D. Levin, RECIDIVISM OF

re-arrested, 35% re-convicted, and 7% re-incarcerated on a new crime. Even re-incarceration based on parole violations occurred much less frequently for ComALERT graduates (16%) than for parolees in the matched control group (24%).

As to employment, ComALERT graduates were nearly four times as likely to be employed as the parolees in the matched control group, and they also had much higher earnings than parolees in the control group.

These results validate ComALERT as an effective collaborative model for ensuring that ex-offenders make a successful transition from prison to the community.

PRISONERS RELEASED IN 1994 at 3, table 2 (U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 193427, June 2002).

TESTIMONY OF NEW YORK CITY SPECIAL NARCOTICS PROSECUTOR BRIDGET G. BRENNAN

BEFORE THE NEW YORK STATE COMMISSION ON SENTENCING REFORM

TUESDAY, NOVEMBER 13, 2007

Good morning.

Thank you for the opportunity to address the Commission at this public hearing. I commend Commission members for synthesizing a tremendous amount of information and identifying critical issues for further study. I support the Commission's mission to make our sentencing laws more coherent, consistent and transparent. I also agree with the proposal to convert to determinate sentences for all crimes.

I am Bridget Brennan. I have been the Special Narcotics Prosecutor for the City of New York since 1998. My office prosecutes felony narcotics offenses and related cases throughout New York City. We handle every level - from international importation rings to deeply entrenched neighborhood organizations that hold their communities hostage.

For thirty-five years, my Office has been a leader in the field of narcotics prosecutions - we were instrumental in prosecuting kingpins like Nicky Barnes and Frank Lucas during the heroin epidemic of thirty years ago. We worked tirelessly with the New York City Police Department to stem the burgeoning crack trade and soaring violence during the eighties and nineties. In this decade, we have continued to target drug infested areas around the city and try to respond to

community concerns about neighborhood trafficking. We have earned national recognition for our investigations into international narcotics importation and money laundering rings.

My agency has over three decades of experience with New York's drug laws and has developed familiarity with federal statutes and the drug laws of neighboring states. So we are uniquely qualified to analyze the consequences, intended or unintended, of changing the current drug laws. My testimony today will focus on an area marked for study in the Commission's preliminary report: whether there is a need for further reform in our current drug laws.

Right now in our city, we are tightening the noose around the drug trade. We have put out of business countless open-air drug markets that used to be the defining factor in many neighborhoods. As a result - the rates of homicides, shootings and violent crime that were such a part of street-level dealing have reached historic lows. And, through vigilant and effective narcotics enforcement, we continue to maintain that low rate. Every community in this city has benefited - perhaps none more than those previously home to open-air drug bazaars. Neighborhoods where people once huddled in their homes, fearing the drug dealers on the corner, dodging bullets whizzing past their windows, are now enjoying a renaissance. But our work is not over - there are still far too

many neighborhoods plagued by drug dealing and related violence.

I have been puzzled by pervasive language in the Commission's preliminary report referring to "nonviolent drug crimes". Although drug crimes are categorized as nonviolent for sentencing purposes, the link between drugs and violence is indisputable. Drug dealers hoard a precious commodity - and theirs is a cash only business. Drug dealers rely on brutality and intimidation to maintain their turf, keep order in their own organizations, and prevent any one who might not like what they are doing from complaining about them. Hardly a nonviolent business. As an assistant district attorney handling homicide cases in the 1980s, I can tell you that two thirds of my homicides were drug related.

There are other crimes classified as "nonviolent" like categories of burglary, manslaughter, and grand larceny, which will just as surely result in a prison sentence for the second felony offender, but they are not addressed in the Commission's report at all.

The drug laws are not monolithic. There are probably a couple hundred sections and subsections - and before the Commission recommends changing them, I hope you will become as familiar with their nuances as I am. B felonies in particular address a huge range of

criminal behavior. Every day in this city, dozens of undercover officers put their lives at risk making purchases of drugs at locations where complaints are running high- that is what typically sparks a police operation. The complaint goes like this: A guy has just moved into Apartment 5B and there are drug sales 24/7. An undercover officer is sent inside the apartment to investigate and buy narcotics - resulting in a B felony sale case.

But that is not the only criminal conduct that rises to the level of a B felony. Keep in mind the effect of drug law changes enacted in 2004 - B felonies now cover the possession of hundreds and even thousands of vials of crack or glassines of heroin. Late last week, we indicted a search warrant case where we recovered a large amount of ketamine, 167 ecstasy pills, four large bags of methamphetamine, an ounce of crack, a money counting machine and $6000. The highest count in that case was a B level offense, demonstrating once again that a B felony offender can capably run a complex, sophisticated and profitable drug business.

The majority of the drug dealers we prosecute are not addicts. Felony narcotics crimes involve the sale of drugs or the possession of more than personal use amounts, in our cases substantially larger amounts. These are pretty sophisticated operations - even at the street

level. The majority of our felony narcotics defendants are in the drug trade to make easy money. An addict is the last person a drug organization would trust with a substantial amount of drugs or cash - or even information. For those who are addicts, we do offer treatment programs as an alternative to incarceration and Rhonda Ferdinand, from my office, will detail them before the commission later today.

Often I am asked why it would not be better to give judges total discretion to decide a sentence in a drug case. In the first instance, judges already have substantial discretion - guided by a statute which determines the maximum and minimum sentence for a crime. Secondly have we forgotten our history? Forty years ago, judges did have complete sentencing discretion. The result was chaos - the outcome of a case depended far more on the whims of the judge deciding it and the pressure of their court calendar than on facts of the specific crime. The then Chief Judge of the Court of Appeals recommended taking the job of sentencing away from judges entirely. Judges should have discretion - and they do - but the parameters of that discretion must be defined.

Our drug laws were comprehensively revised just three years ago. A revision that was long overdue. Life sentences for top offenders were eliminated and sentences were rolled back significantly for all offenders.

Already, the overall number of drug offenders in state prison has decreased markedly - down ten percent since 2004, and 28% since 2001. The Drug Reform Act also increased amounts of narcotics necessary to prosecute top offenses and expanded judicial discretion and treatment options. Taken as a whole, New York's drug laws and sentencing statutes are now the most lenient in the tri-state area (New Jersey/Connecticut).

We should give careful review to any proposal that aims to further reduce sentences in this state.

There are several areas in our current drug laws that I strongly believe need to be addressed:

- We need an effective Kingpin Statute. New York is a national and international center for narcotics distribution. Yet we have no current statute which adequately addresses that crime. My office has made proposals in the past and I believe the Commission has those proposals.

- Enhance penalties for gun possession while committing a

controlled substance or marijuana offense. Year-to year we recover hundreds of weapons during search and arrest operations.

- We should enhance penalties for repeat marijuana sellers, marijuana sales on school grounds and in parks. Most of the youngest dealers we place in treatment name marijuana as their drug of choice. They are selling crack to pay for the marijuana the smoke.

Again, I thank the Commission. For the past few years, the debate over the drug laws has drowned out the voice of people who feel themselves trapped by drug dealers. I urge this commission to reach out broadly to hear the concerns of these people – who write me letters all the time – usually anonymously – requesting help. I'd like to read an excerpt from one I recently received:

"Much of Harlem has been overrun with drug dealers for many years. We see arrests of drug dealers and users taking place regularly, but are very frustrated to see the same individuals back on the streets in a short time. We also see these very same drug dealers move from street corner to street corner to avoid the police. Numerous areas also suffer from many serious crimes, including break-ins, strong arm robberies ... (continues) ... Many people are afraid to come out of their houses because of the drug activity going on day and

night. It is dangerous for children to play in front of our houses. We are concerned about the example being set for the children who have been drawn into this criminal lifestyle. All these negative impacts are directly related to the drug activity taking place on a daily basis in our community."

As you consider proposals to change the drug laws, keep in mind the concerns of all the people in this city... like the author of this letter... too fearful of drug dealers to sign a name... and certainly too intimidated to testify at a public forum.

For the sake of people like the writer, go to places like Precinct Community Council meetings where you can hear their concerns and feel their fears... fears about drug dealers on the stoops and the short sentences they get. Those are the voices that I fear are not being heard today, and have been muted as the reform debate has heated up.

Thank you.

TESTIMONY PRESENTED TO

THE NEW YORK STATE COMMISSION ON SENTENCING REFORM

by

NORMA FERNANDES

November 13, 2007

New York City Bar Association
42 West 44th Street
New York, New York

Testimony of Norma Fernandes

The youngest of three children, I grew up in a dysfunctional environment. When I was eleven, my mother passed away from cirrhosis of the liver. At age fifteen, I dropped out of high school because I was addicted to heroin. The foundation of my teenage years revolved around jail and the street corners of Brooklyn . . . either selling drugs or, at a more desperate time, robbery. Because of my addiction, I didn't care who I hurt. After many attempts to get sober through 30-day detoxification, as well as time in jail, these experiences did nothing to keep me off drugs. Although time in jail prevented me from committing crimes while I was there, it gave me only the opportunity to clean out my system, rest, and time to think about how I would become a better criminal when I would eventually be released. This was the cycle of my life until when, at age twenty-two, I decided to enroll in a methadone program.

At the time of my final arrest, I was on ninety (90) milligrams of methadone and charged with felony-level criminal sale of a controlled substance. I knew I had effectively outgrown my "status" with the New York City Department of Corrections, and would soon find myself in an upstate prison. Fortunately for me, the Brooklyn D.A Charles J. Hynes believed in substance abuse treatment alternatives instead of prison, and for this I'll always be grateful to him. I never thought I would ever be able to live my life without getting high and committing crimes; however, I was given the opportunity to participate in DTAP. I was diverted into a program of long term residential drug treatment instead of going upstate to prison.

Detoxifying off the methadone at Rikers Island was a nightmare. I lost 45 pounds in less than two (2) months, and felt like I was going to die. I had no appetite, nor was I able to sleep as my body reacted violently and painfully to the awful withdrawal from methadone. It was an

agonizing process that included many fights with fellow sufferers, undoubtedly because I was still a sick, suffering, and very angry person during this period.

I was later mandated to Samaritan Village, a therapeutic community located in Ellenville, NY. My time spent there will never be forgotten. It wasn't easy adjusting to a structured environment and sitting in groups, and when I arrived to Samaritan Village, I was scared, angry, and lonely. As time went on, however, I began to learn a lot more about myself, the real me, and I can proudly say that Samaritan Village helped me to grow up. I obtained my GED while there, learned how to live life soberly and responsibly, and learned how to set short and long-term goals. These experiences empowered me and encouraged me to strive hard so I could accomplish anything I want to achieve in life.

Today I'm a college graduate, and owner of a four (4) family building in Brooklyn. I'm also a proud single parent with a very intelligent, level-headed daughter. I love the person I am today. I have no doubt that had I not been offered the chance to enter long-term residential treatment, I would not have set any positive goals nor accomplished them, and definitely would not be here today sharing this story. The only choices guaranteed me in the future I would've faced back then were pretty grim: either become a recidivism statistic in prison with an even higher sentence, or a death statistic buried in a cemetery somewhere. Instead, I have accomplished every goal I've set for myself, and will continue to be prosperous in everything I do. Is this an individual with high self esteem or what?

I am now employed by the Kings County District Attorney's Office as Community Resources Coordinator for the ComALERT reentry program, assisting individuals paroled to Brooklyn in obtaining vital supportive services. The services include outpatient drug treatment, job placement, vocational training, free GED courses, health benefits, and VESID entitlements.

The fact that ComALERT is sponsored by the Kings County District Attorney's Office plays an essential role and has a positive impact on each agency providing supportive services to our ComALERT clients. And even though there are clients that walk into ComALERT initially resistant because it's a program sponsored by the DA's office, once they become engaged by the re-entry program and involved in the different services provided at ComALERT, they're anxious to come back.

I know how imperative it is for a formerly incarcerated individual to have these essential supportive services in order to successfully reintegrate back into the community. Supportive services are particularly important for a population that is highly at risk to recidivate because they don't have access to effective substance abuse treatment, or have no marketable skills to secure employment. As a former client, and now as a productive community member and a social services professional, my personal experiences have shown me in a number of ways that programs like ComALERT and DTAP aren't only effective at restoring lives. Thanks to the enlightened thinking of civic leaders like Brooklyn DA Charles Hynes, I've now also seen how these programs have solid economic and public safety benefits that each and every one of us can all enjoy.

The Correctional Association of New York

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Testimony to New York State Commission on Sentencing Reform to Recommend Rockefeller Drug Law Repeal

By Robert Gangi, Executive Director of the Correctional Association of NY

November 13th, 2007

CORRECTIONAL ASSOCIATION STATEMENT

We were disappointed that the New York State Commission on Sentencing Reform did not include recommendations for meaningful reform of the Rockefeller Drug Laws in its preliminary report. We now urge Sentencing Commission members to maintain their focus on this issue and to take advantage of the historic opportunity given them to propose a long overdue improvement of New York's penal code in their final report: Repeal of the notorious Rockefeller Drug Laws.

BACKGROUND

Enacted in 1973, when Nelson Rockefeller was Governor of New York, the Rockefeller Drug Laws require harsh prison terms for the possession or sale of relatively small amounts of drugs. The penalties apply without regard to the circumstances of the offense or the individual's character or background. Whether the person is a first-time or repeat offender, for instance, is irrelevant.

It is important to note that changes to the laws passed in December 2004 and August 2005 do not amount to meaningful reform. The severe aspects of these laws are still on the books: Mandatory sentencing provisions remain intact, meaning that judges still do not have discretion in deciding whether to send someone to prison or to an appropriate alternative-to-incarceration program. Prison terms, though reduced, remain unduly long – for example, under the new system, instead of 15 years to life, the most serious provision of the drug laws carries a determinate (or flat) sentence of between eight and 20 years for first-time, non-violent offenders. The main criterion for guilt remains the amount of drugs in a person's possession at arrest and not a person's actual role in the drug transaction. As a result, the major profiteers who rarely carry drugs will continue to escape the laws' sanctions. Finally, the vast majority of drug offenders in prison remain outside the pool of people affected by the retroactivity provisions included in the legislative changes enacted in 2004 and 2005. As of March 2007, of the more than 1,000 inmates eligible for re-sentencing under the drug law reforms, only 296 people had actually been released following their re-sentencing.

Despite the claims made for these laws when they were enacted nearly 35 years ago – that they would break the back of the drug trade and related criminal activities – there is widespread consensus today that these statutes have caused rather than solved problems.

THE PROBLEMS

The Waste

As of January 1st, 2007, there were over 13,900 drug offenders locked up in New York State prisons: 943 were women (33% of the total female prison population) and 12,985 were men (21% of the total male population.) It cost the state about **$1.5 billion** to construct the prisons to house drug offenders. And the operating expense for confining them comes to over **$510 million** per year.

Current trends, moreover, indicate that taxpayers will have to continue footing the bill for these high numbers. For example, notwithstanding the recent drug law modifications, more people were sent to state prison for non-violent drug offenses in 2006 – **6,039** – and in 2005 – **5,835** – than in 2004 – **5,657**. And, in 2006, **36%** of the people sent to state prison were drug offenders. In 1980, the figure was only **11%**.

In addition, many of the state's imprisoned drug offenders cannot be considered, by any applicable standard, either dangerous or predatory. Here are several key facts supporting this analysis:

- About **39%** of the drug offenders in New York State prisons, more than **5,400** people, were locked up for drug possession, as opposed to drug selling.

- Of all drug offenders sent to New York State prisons in 1999, nearly **80%** were never convicted of a violent felony.

- Nearly **54%** of the drug offenders in New York State prisons were convicted of the three lowest level felonies – Class C, D, or E – which involve only small amounts of drugs. For example, only **½ gram** of cocaine is required for conviction of Class D felony possession, and **1,316 people** are locked up for that offense.

Skewed Law Enforcement

As the above statistics demonstrate, the Rockefeller Drug Laws often result in the arrest, prosecution, and long-term imprisonment of addicts, minor dealers, or persons only marginally involved in the drug trade. Major traffickers usually escape the sanctions of the laws. The problem is that the Rockefeller Drug Laws place the main criterion for culpability on the weight of the drugs sold or in a person's possession when he or she is apprehended, not on the actual role played in the narcotics transaction. Aware of the law's emphasis, drug kingpins are rarely foolish or reckless enough to carry narcotics; whereas teenagers, for example, employed as couriers by those same kingpins, are more likely to be picked up on the street and charged with a serious felony for having a relatively small amount of drugs in their possession.

Major dealers are also often able to take advantage of provisions permitting lifetime probation sentences in exchange for cooperation in turning other drug offenders over to authorities. Less centrally involved persons generally do not possess information that would be useful to prosecutors. They will sometimes decline to plea bargain and insist on a trial instead. If these persons are found guilty, they frequently are sentenced to a lengthy mandatory minimum prison term.

As a principal weapon of the so-called war against drugs, this statute results directly in the following misguided practice: law enforcement agencies focus their efforts on minor offenders who are the most easily arrested, prosecuted, and penalized, rather than on the drug trade's true masterminds and profiteers.

Racial Inequities

The drug laws have a harsh and disproportionate impact on communities of color. Studies have shown that the majority of people who use and sell drugs in New York State and the nation are white. Yet, about **91%** of the people doing time in New York State prisons for a drug offense are African-American or Latino. As of January 1, 2007, African-Americans comprised 57.7% of the drug offenders in state prison; Latinos, 33%; whites, 8%.

If larger numbers of whites participate in buying and dealing drugs, why are so many more blacks and Latinos in prison for these crimes? The problem – and it is a problem that is at least partially a function of having the drug laws in place – is that law enforcement efforts focus almost entirely on inner city communities of color. In New York City, for example, police squads carrying out recent anti-drug initiatives have been sent principally into such areas.

Much of the drug activity among white people takes place behind the closed doors of offices and living rooms. By contrast, most of the drug trade in low-income black and Latino neighborhoods is carried out on the streets where it is much easier to make arrests.

In addition, more violence is involved in the drug trade in low-income, inner city communities. The drug trade there is more visible and more disruptive, and the call for a police response is therefore greater. Moreover, because poor communities of color lack political clout, there are also few repercussions when police carry out drug raids and no-knock warrant busts.

Finally, white middle- and upper-class people involved in the drug trade often have the resources and political influence to resist law enforcement attempts to punish them. Well–paid, high–powered attorneys, for example, can successfully derail the effective prosecution of their clients' crimes.

In words that are unfortunately as true today as when he expressed them over 15 years ago, Commander Charles Ramsey, former head of the Chicago Police Department's Narcotics Division, summed up the war on drugs' inequity in this way:

> There is as much cocaine in the Stock Exchange as there is in the black community. But those guys are harder to catch. Those deals are done in office buildings, in somebody's home, and there is not the violence associated with it that there is in the black community. But the guy standing on the corner, he's almost got a sign on his back. These guys are just arrestable.[1]

The rationale for the policy that produces this outcome might make sense superficially, but the practices are ultimately discriminatory and have a devastating impact on communities of color by uprooting individuals and breaking up families.

[1] Harris, Ron, "Blacks Feel Brunt of Drug War," *Los Angeles Times*, April 22, 1990.

A System Imbalance

Mandatory sentences have a fundamentally negative effect on the administration of justice. These sentencing schemes do not abolish discretion; they remove it from the judge's hands and place it in the prosecutor's office. Whoever sets the charge (the district attorney) determines the outcome of the case. In our adversarial criminal justice system, these laws stack the deck in favor of one side.

As Justice James Yates of the New York County Supreme Court has stated:

> If some defendants are to receive lesser sentences than others for the same crime, the question becomes, how do you decide who will receive the benefits of a reduction? Under current law, that determination is made by an assistant district attorney who is not bound by written public guidelines or standards, is not compelled to hear arguments in favor of reduction, is not required to explain or justify the decision, is not held accountable by the public or through judicial processes and the decision is not reviewable by any court . . . .
>
> [In contrast], in a system where a judge has authority to set sentences, there are proceedings on a record in public, with advocacy on both sides and a decision by a neutral party who must explain his or her decision and can be held accountable.[2]

THE REMEDY

Many studies, including several sponsored by the National Institute on Drug Abuse and a 1997 report by RAND'S Drug Policy Research Center, have demonstrated that drug treatment programs are, on the whole, more successful than imprisonment in reducing drug abuse and crime rates and in increasing drug offenders' ability to find and hold jobs. The cost of keeping an inmate in a New York State prison for one year is **$36,835**. In comparison, the cost of most drug free outpatient care runs between **$2,700-$4,500** per person per year; and the cost of residential drug treatment is **$17,000-$21,000** per participant per year.

Although alternative programs are more effective and less expensive than imprisonment, the imposition of mandatory sentencing laws limits the court's ability to make appropriate use of them. In fact, it is fair to state that as long as the Rockefeller Drug Laws remain on the books, New York's governor and legislature of over three decades ago have more to say about the outcomes of today's narcotics cases than the judges who sit on the bench and hear all the evidence presented.

The Rockefeller Drug Laws are outdated, wasteful, ineffective, unjust, and marked by racial bias. They distort law enforcement practices and foster imbalance in the adjudication of drug cases. It is time to remove the stain of these statutes from New York's penal code. Commission members can achieve this long overdue objective by including in their report the recommendation to

[2] Interview, James A. Yates, New York Supreme Court Judge, New York City, November 21, 1996, "Cruel and Unusual: Disproportionate Sentences for New York Drug Offenders," Human Rights Watch, March 1997.

eliminate the mandatory minimum provisions of the Rockefeller Drug Laws and return sentencing discretion to judges in all drug cases.

If commission members are wary of the political liabilities that they would incur by adopting such a measure, they can seek insulation and take courage from the widespread support that the public has shown for reforming the Rockefeller Drug Laws. For example, according to an October 2002 *New York Times* poll, 79% of New Yorkers favor restoring sentencing discretion to judges in drug cases.

In addition, this past June the United States Conference of Mayors, a body representing the mayors of America's large cities, unanimously approved a resolution stating that the war on drugs has failed. The resolution also condemned mandatory minimum sentences and the incarceration of drug offenders, and called for more funding for treatment programs. Regarding this issue, Cory Booker, the Mayor of Newark, New Jersey, has said: "The drug war is causing crime. It's chewing up young black men. And it's killing Newark."[3]

The Commission can take an important step to reverse the destructive course of New York's current drug policy. By proposing Rockefeller repeal, they would join a growing chorus of voices being heard in the mainstream political arena. More significantly, they would, in effect, lend critical support to a constructive policy reform that would likely result in, among other benefits, the substantially expanded use of drug treatment alternatives, the reduction of drug trade-related crime, savings to relevant government agencies, and the restoration of fairness to the administration of justice.

[3] Curley, Bob, "U.S. Mayors Declare Drug War a Failure," *www.jointogether.org,*, July 18, 2007.

The Osborne Association

Testimony before the New York State Commission on Sentencing Reform

November 13, 2007

By Elizabeth Gaynes
on behalf of
The Osborne Association

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Good morning. My name is Elizabeth Gaynes and I am the executive director of the Osborne Association, the oldest organization in New York State continually providing services to men and women involved in the criminal justice system. We operate programs at our community sites in the Bronx, Brooklyn and Beacon, NY, as well as Rikers Island and 17 state prisons. Our services range from front-end alternatives to incarceration, including defender-based court advocacy and intensive outpatient substance abuse treatment, to health and family preservation services for incarcerated men and women and their children and families, to back-end reentry services, including discharge planning, employment, case management, and treatment and risk reduction services for individuals leaving prison and jail.

The Preliminary Report of the Commission clearly represents an extraordinary volume of work within a very short time, and I am delighted that, unlike so many important policy discussions that are held – and typically submerged – in the context of horrific and often sensational situations, the Commission is addressing areas of opportunity without a backdrop of crisis. Too many discussions about sentencing or parole occur only when an individual – and often exceptional – set of circumstances sets off an individual politician or editor and devolves into an opportunity to excoriate a judge or parole board and to "send a message." Unfortunately, our current sentencing scheme is largely a result of such grandstanding efforts leading to a new penalty, for example for "structure cases" (crimes which occur near a particular structure, such as a school or airport), or "naming opportunities" for crime victims. It rarely leads to a thoughtful discussion and to better policy.

I appreciate the Commission's desire to simplify the sentencing structure. My first job after law school was in Buffalo, NY, where I lived in the early 70's, working for a man I considered then (and consider now) the best defense lawyer in the world - even after he became a judge thirty years ago. According to the late Honorable Vincent E. Doyle, there really should only be two crimes in the penal code: Dumb in the First Degree, and Dumb in the Second. He thought getting caught was prima facie evidence of at least Dumb in the Second. I realize that your efforts at simplification are a great deal more nuanced, but I want to strenuously oppose the Commission's desire to sustain or move more toward determinate sentencing for any cases other than D and E felonies.

EXPAND THE USE OF INDETERMINATE SENTENCING FOR ALL CRIMES CURRENTLY CLASSIFIED AS A, B AND C FELONIES

I recognize that definite sentences are appealing for all the reasons stated in the report. They are also entirely at odds with the thrust of the well-crafted, and well-considered argument you made for Risk and Needs Assessments. In recommending the use of such assessment tools, the Commission recognized that there are DYNAMIC criminogenic risks and needs that change over time. The sentencing judge is basing a term largely on the risk as measured at the time of sentencing, along with punishment considered appropriate to the seriousness of the crime. That ought to be the minimum term, and if the person uses his time in prison to demonstrate that his new risks and needs assessment justifies his serving the remainder of his sentence under community supervision, he ought to serve the minimum. A determinate sentencing scheme ignores entirely the fact that people can – and do – transform their lives while incarcerated, and that multiple assessments might well demonstrate a very low risk to public safety and a set of needs better met in a less restrictive environment, e.g. work release or halfway house, or in the community. If the minimum term satisfies the need for punishment, and the person no longer poses a risk to public safety and has a discharge plan that makes sense, what is the purpose of holding him or her for the longer definite term? Whatever savings you might gain from the virtual elimination of the Parole Board would be lost in additional unnecessary time served.

Further, if the proposed sentencing guidelines were to be based on time NOW served for similar crimes, this would become bootstrapping of the worst order. The problem currently is that the board is holding people well beyond the minimum, often beyond what the judges had anticipated in the first place, and far beyond what justice requires. To use data derived from the low release rates manipulated by the last administration as a basis for future sentence lengths sort of defeats the purpose of this entire exercise. There is little evidence that sentences are shortened when parole is abolished; in states such as Virginia, sentences get longer not shorter, where those incarcerated prior to the abolition of parole remain technically eligible but are not being released consistent with the prevailing understanding at the time they were sentenced, but rather are being kept longer.

PAROLE: MEND IT, DON'T END IT

RECOMMENDATIONS FOR REFORM (SEE APPENDIX A)

Of course there are problems with New York's parole system, and the Commission's report correctly recognizes the need for guidelines that more directly reflect the full range of factors to be considered. Some of these ideas were among the recommendations of a committee of concerned citizens that included academics, community people and individuals on lifetime parole, judges, lawyers, corrections and parole professionals, and who signed the attached Recommendations for Parole Reform in New York. Over the last few years, the parole rate dropped precipitously, and technical parole violations rose unnecessarily. However, the attached recommendations suggest that it is more appropriate to start with the philosophy of Let's Mend It, Not End It. I believe the Permanent Commission ought to consider a separate task force on Parole. Such a task force might look at whether Parole ought to come under Corrections, include presumptive release at the minimum for all felonies based on pre-set criteria and assessments, develop guidelines along the lines suggested in the attached recommendations, and investigate and remedy the low utilization of medical parole as well as adding mechanisms for release based on age and health in appropriate cases. While I understand the need for certainty, I understand better the need for justice.

Several other concerns were raised in the report that I want to address, albeit briefly:

HOUSING: SUBSIDIZE FAMILIES PROVIDING SUPPORTIVE HOMES

The Report identifies housing as a barrier to reentry, and we certainly agree. We all know that there will never be enough affordable or supportive housing to solve this problem, and the recommendations regarding public housing are welcome. Over the years, we have found that the most potent solution to reentry housing is re-engaging families, many of whom are disengaged at least in part because of New York's far flung prison system that holds people hundreds of miles away, because visitation is not always friendly, and because of the high cost of supporting a loved one during and after incarceration. If we want people to leave prison and enter treatment and find a decent job, we have to recognize that they are not immediately self-supporting. Yet, if

one considers the relative cost of building and maintaining other housing options, it seems clear that helping families provide homes for people released from prison is far more cost-effective and practical. I request that the Commission consider recommending a subsidized reentry family support program that would provide cash assistance to families who provide a home to someone leaving prison. Not unlike "kinship foster care," which recognizes that it makes no sense to pay strangers to care for a child when a family member might be available, such a program could offset the considerable expense of providing housing to a person during the initial weeks or months as he or she becomes self-sufficient, and offer families additional financial incentives for helping to reduce recidivism. There is ample evidence that people with strong family ties do better than those who do not, and supporting families in this way is an evidence-based practice. Assistance could be made on a monthly basis, with a special incentive when the released family member remains at liberty successfully for 3 months, 6 months, 12 months and 24 months. This is far less costly and far more realistic than expecting families to shoulder this burden alone, or to expect to see thousands of new units of supportive or affordable housing geared to people leaving prison.

AVOID RELIANCE ON "BOUTIQUE" REENTRY UNITS

The report praises a variety of reentry initiatives, and the Osborne Association has been intimately involved in the delivery of services within a variety of DOCS reentry programs, including Orleans, TARP, Queensboro, and Chateaugay. We support the idea of beginning to plan for reentry at the beginning of the sentence, and bringing people closer to home prior to release to enable meaningful transitional planning and family reengagement, but we have found that the relatively short periods allocated for such interventions (30 days to 6 months) may be more disruptive than useful, and they have a long way to go before they should be recommended or expanded. Boutique programs, such as Reentry Courts, are expensive, unproven, and do little to change the basic approach to reentry that will be utilized for the other 20,000+ people leaving DOCS facilities each year. Attempting to "backload" intensive services at a time when people are so close to release is less likely to be effective than offering treatment and rehabilitation programs, including cognitive behavioral interventions, parenting programs, health literacy, and programs addressing substance abuse, domestic abuse, and sexual abuse. By offering programs

at the beginning of sentences, and then moving on to meaningful educational and vocational offerings, prisons as well as communities will benefit. Meaningful discharge planning should be provided as of right, as part of the sentence.

WORK RELEASE AND HALFWAY HOUSES SHOULD BE MADE AVAILABLE TO ALL APPROPRIATE CANDIDATES WHO WILL BE PAROLE ELIGIBLE WITHIN TWO YEARS, REGARDLESS OF CRIME

The single best approach to easing reentry is to vastly expand the work release system, so that virtually everyone who will be released has the opportunity to serve a period of time in work release, during which time he or she can earn and save money, adjust slowly to time in the community, and give his or her family an opportunity to re-engage. New York has no halfway houses but does have a number of facilities in the Metropolitan areas well suited to this purpose. There are a number of sentencing options that would and should permit people, regardless of offense or length of sentence, to spend time in work release facilities before or after parole grants.

One option to increase the value of reentry programming and the utility of work release would be for the Parole Board to consider release for people serving sentences with maximums in excess of 10 years at least one year prior to eligibility, and have the power to grant parole to an individual pending successful completion of one year of work release or other reentry programming. This would avoid the current problem of parole decisions being made shortly before release and rendering reentry programs too short to be of value.

RESTORATIVE AND REPARATIVE JUSTICE

The most disappointing part of the report, in my view, was the section addressing crime victims. At the Osborne Association we are currently undertaking a pilot program working with longtermers and lifers who are interested in exploring remorse and responsibility, including a growing understanding of the impact of their crimes. We have reached out to victims and victim surrogates, and have found that many people who have been harmed by crime are more interested in healing than in vengeance. The recommendations seem to assume the opposite, and as a society we do victims a disservice by encouraging the view that only long prison sentences

will give crime victims the peace they seek. Of course their views are important at the time of charge and sentencing, and they should receive both compensation and supportive services. But criminal cases are titled The People vs. the Defendant, and not the Victim vs. the Defendant for good reason. Crime affects the whole community, and a more restorative and reparative approach will benefit everyone involved, including the family of the victim and of the person who committed the offense.

CONSIDER THE IMPACT ON CHILDREN IN DEVELOPING POLICIES RELATED TO ARREST, SENTENCING, INCARCERATION AND PAROLE

We believe that public officials and policy makers know that public safety is best protected when the cycle of incarceration is broken, when people in prison stay connected to their families, and when children receive the most important thing they need to succeed: strong and loving parenting. We believe that our elected officials and our neighbors want to rethink and reform criminal justice policies – from arrest through sentencing and incarceration, to resettlement – by ensuring that they take into account their impact on children. These include family impact statements, community-based sentences where possible, and rational release policies.

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APPENDIX A

Statements of Individuals Released on Parole – November 2007

To: The Sentencing Commission,

My name is Maria Ramos. I was sentenced in 1981 for a murder in second degree, robbery in the first and robbery in the second. I was sentenced to 20 to life for all three. I went to the board in 2000, my first board, expecting to go home. I was denied parole for the seriousness of my crime. I went to five parole boards. During my parole denials, my institutional record or what I accomplished during my incarceration were not taken into account. . During my incarceration I lost my parents, my 14 year old daughter who was murdered, and my son was shot in the back, I hurt, but much more I hurt the person whose death I'm responsible for and their family. I was devastated that I hurt a family so much. Inside the remorse was there. I felt terrible about what I did. I felt hurt for the family. I wished I could have taken all this back. I couldn't. It will never go away that I am responsible for taking a life. I can't just ask for forgiveness. I pray for the person and the family but what I did will be with me for the rest of my life. It will never change and I am always going to feel bad for what I did.

While I was in prison I got my associates degree, the two years later I got my bachelor's degree in behavioral science. I had numerous achievement awards in college; I maintained a B average. I lived in the Honor Fiske Cottage for 17 years. I went from a maximum security prison to a minimum security prison, Beacon, where you go out to the community and work everyday with no fences, no barbed wire, no shackles, and I still 'got hit' by the board for the seriousness of the crime. No barbed wires, no fences- that should have been a redlight that I was going to go home after that. Yet still they hit me at the board twice when I was at Beacon- yet I was out in the community working with civilians 5 days a week yet they said I was a threat to society. That didn't make any sense.

I was giving up; if it wasn't for my friends I think I was giving up. I even won a de novo hearing yet even winning a de nova hearing didn't make any difference I still got hit at the board. I think the de nova hearing was just a formality. They were going to hit me anyway.

My expectation was that I was going to do 19 years and then one year work release. That's what I expected when I got sentenced.

I would hope that there would be less emphasis on the crime and look at the person's record and institutional adjustment. Who in the world is the same as to who you are 20 years later. You aren't the same person mentally and physically. You have made a dramatic change. You don't think the way you did 20 years earlier. All those years taught me so much, with the pain and the suffering, and then you come home to adjust to the new environment.

But I adjusted. Now I have a job at Fortune Society. I am a program manager, a counselor, an administrative assistant. I have an apartment, and I pay my bills. I have been on parole 14 months, I give no problems, I never violate curfew. I pay my supervision fee.

Why couldn't they have let me go 6 years earlier? Nothing changed in those six years. After 20 years, I was a new person; I expected to be home when I was 49. I didn't get home until I was 56.

Respectfully,

Maria Ramos

To the Sentencing Commission:

My name is Mark Graham, I served 22 years off of a 20 to life sentence. I was arrested, tried, and convicted of Felony Murder in 1979/80. I was 17 years old. While incarcerated I obtained my GED, AA, BA, and MPS from New York Theological Seminary. While in prison I was actively involved in programming, and created several programs.

When I went through orientation/reception at Elmira Correctional Facility, I was told by the Corrections Counselor that if I kept my "nose clean, and stay out of trouble, in 1997, I would receive work release". Needless to say, I played by the rules, kept my nose clean, stayed out of trouble, and programmed. In 1993, they changed the rules, and I was no longer eligible for work release which was inconsistent with what I was told thirteen (13) years previously. This definitely was devastating for me, I followed all the guidelines, and did what I was suppose to do seeking this reward for my behavior, and outlook, and here I am now four years from a goal, and reward that I had set for myself 13 years ago, being taken out of my grasp. Words cannot explain the devastation this had on me, I was unable to function for approximately one month. When I got a grip on myself, I began to re-adjust myself to the fact that I would have to wait for another six years before I was released. Explaining this to my mother and family was even more difficult because they thought and believed that I was doing something wrong in the prison system, which caused me to lose out on this opportunity.

In 1998, my mother passed away, and I was unable to attend her funeral because she was out of state.

In August of 1999, I appeared before my initial parole board and was denied release for two (2) years because of the nature of the crime. Throughout the state that news traveled, and the general sense of all the brothers who were sentenced to long term prison sentences were saying "there is no hope for us, if they denied Mark Graham release, then we don't have a chance to get out". I was considered by the prison administration and prisoners to be a model prisoner, serving 20 years, and only receiving two major infractions the entire 20 years was just unconceivable, and hope was lost for all. It took me six months to regain control of myself, and to get back to programming and doing the work that I was called to do. I then began to explain to my family who thought that something happened to me because I had no contact with them for six months. They were more devastated than I was. I only had my father left, and I began to worry about if I would ever see him alive again in society or would he wind up having the same fate as my mother, i.e., to die while their only son together is in prison.

I went to my second parole board in August of 2001, and was released. What a sigh of relief that was; however, I wasn't expecting to be released because of the "nature of the crime" which I knew would never change. When I was released I went to live with my father and started my first job in November working with Exodus Transitional Community as a Senior Case Manager. After working there for five years, I moved on and opened up a 17 bed Transitional Housing Facility for men and women being released from prison called The Redemption Center, located at 1186 Herkimer Street, Brooklyn, New York. I'm the Executive Director, and the doors of our facility opened July 5th 2007.

Respectfully,

Mark Graham

To: The Sentencing Commission From: Gloria Rubero

I was convicted of murder in the 2nd degree, and robbery in first, robbery in the second, and sentenced to 20 to life. I went to 5 parole boards, 4 regular and one de nova. By the time 20 years had passed I was a totally different person. I listened better. I learned a lot during all of the years I was in prison, a lot about my capabilities because I was now free from drugs, free from the environment in which I grew up; it just changed my perspective altogether. People come in at a younger age, they grow up, they might not have even had a family, they grow up and they look at things differently after 20 years. You don't have the same kind of environment, you get time to think, to see your future, to see the errors that you made, the whole emotional status you can see that, you learn how to separate out the good from the bad.

I had a stroke in the year 1999. I went to the first board with a stroke, and had a letter in my packet telling the board that I couldn't really remember well. When I went in I was stuttering, dragging my leg, I was asked a question and didn't remember even what she asked me. And the letter from the doctor told the board members if they had any questions, to call the doctor.

Now I am finally home after more than 26 years. I have a job in HIVAIDS and Testing, I work in an RV for an agency. I deal with many different cases with different kinds of people. I am a counselor for people who tell me their problems.

After I was sentenced, the first thing I thought about was 20, years, oh my god, it was like a stand still; life would be moving outside, and I thought that life would be at a standstill and I said "oh my god I'm never going to get out. But in less than month I was in a different environment and I just had to sit back and listen and see what I could do and can't do. I just set my goals: I'm going to finish school try to go to the honor floor and go to college. In less than a year and a half I got my GED, went to the honor floor, and then went to Fiske, the Honor cottage, and then finished college. I lost a lot in there, my grandmother, my grandfather, the daughter of my best friend who I saw like my daughter, too. I faced a lot of tragedy but I know that my actions caused a tragedy for others.

And then after I did 18 and half years in Bedford I decided it was time to leave. I went to Bayview and did five years there. I went to Beacon, worked outside, with really no supervision. I was seen as a model inmate, unescorted to a lot of places with tools. I walked all over the facility fixing all the things that were needed when they didn't want to call Rotor Rooters, fixed every kind of messes no matter what. I did the same at Bayview, Beacon and Bedford; I was on call in the middle of the night.

When I kept getting hit, I didn't know what they wanted more from me. I did the time that I got sentenced to and I didn't know what more I could do. It was a hurting feeling, an anger, a lot of mixed emotions and trying to figure out what to do. I have only regrets. I can't get back the life that was lost in my crime. I wish I could. I feel terrible about it. But denying me parole over and over also couldn't bring back the life.

To me, the parole board needs to have people who know us. It's like being judged by people who don't really know us. They go by the crime that happened 15, 20, 25 years ago, yet you're not the same person. You grow, you change, you develop- and that's what I think is important. I felt branded. And we are older, some of us came 30, some 25, some older, we aren't who we were, everything inside of us changes, as time moves on, our bones get frail, we calm down, we have more time and patience to listen.

Thank you for your consideration.
Gloria Rubero

APPENDIX B

Recommendations for Parole Reform in New York State

New York State has an opportunity to affect significant policy changes in the way the parole release and supervision system is administered in New York. Under the Pataki administration, persons who are serving sentences for violent crimes have been routinely denied parole release solely on the basis of the underlying crime, without regard to their institutional record of rehabilitation or their potential for successful reintegration into the community. For these individuals, as well as their families, the resulting uncertainty about when, and under what circumstances, release may be expected to occur has bred despair and cynicism. In addition, the policies are expensive. The per person cost of parole supervision is estimated to be one-tenth the cost of incarceration ($3,000 v. $30,000). The Pataki administration policies have resulted in a sharp decline in annual parole releases. Given that each person who is kept in prison, rather than being released on parole, costs the State $27,000, the annual cost to the State of these parole policies is substantial.

Below are some recommended areas of reform:

- **Restore predictability and rationality to parole release determinations.**

To restore hope and rationality to the system, we offer the following recommendations:

- Board of Parole release guidelines should be updated and modified to require the Board to give appropriate weight to the extent of an individual's rehabilitation and the lack of risk to public safety if the individual is released. In particular, the guidelines should reflect the research showing that persons who have served sentences for many categories of violent crimes – and particularly women – have low rates of recidivism. For example, according to available data, the average return rate for individuals released for murder (21.5 percent) was drastically lower than the overall average return rate (42.2 percent) between 1985 and 2000. Moreover among the 2000 releases with murder convictions, only 3.6 percent were returned for a new commitment. Most of the returns were for technical parole violations.

- Merit-based criteria for Board of Parole membership and a screening panel should be established. Such criteria should include a demonstrated background in criminal justice issues. In addition, Board members should be provided with access to professional development programs in which information current research, penological theory, and parole practices are presented and discussed.

- **Expand eligibility to programs that facilitate successful rehabilitation and release on parole.**

Persons convicted of violent felony offenses are barred from participating in programs that would facilitate their successful, timely reintegration into the community. To remedy this, we suggest the following:

- Persons convicted of violent felonies should be eligible to participate in work release programs. Work release can serve as an effective tool to demonstrate readiness to transition to the community. An individual who is successful on work release has established that he or she is able to be released into the community without being a threat to public safety.

- The eligibility criteria for the issuance of a certificate of earned eligibility should be expanded to include all persons, regardless of the length of their minimum sentence. The New York State Correction Law provides that individuals who are scheduled to appear for parole release consideration and who have satisfactorily completed their assigned rehabilitative programs may be granted a Certificate of Earned Eligibility (N.Y.S. CORRECT. LAW § 805). The issuance of the Certificate creates a presumption of parole release. However, eligibility for the Certificate is limited to individuals whose minimum sentence is eight years or less. This restriction excludes the majority of persons who are serving sentences for violent felonies. The law should be amended to allow all persons serving an indeterminate sentence of any length the opportunity to earn the Certificate.

• **Eliminate unnecessary parole supervision and revocation.**

Post-release resources are best used to protect the public from those individuals who pose an actual risk to the community. Under the Pataki administration, resources have instead been diverted to re-incarcerating individuals on technical violations and on precluding persons with a maximum sentence of life from ever obtaining discharge from post-release parole supervision. We recommend the following changes to address these problems:

- Guidelines for technical violations should be established. The increase in the number of individuals returning to prison over the past decade on technical parole violations, i.e. violations that do not involve any criminal conduct, has been staggering. The unchecked exercise of discretion by parole officers is a significant concern in cases where parole violations are alleged. More specific, concrete, uniform guidelines for parole revocation - particularly for technical violations - should be established to help reduce the number of people being sent back to prison for minor violations.

- The Division of Parole should have the discretion to grant any suitable person a merit termination of parole supervision. There should be no exception for persons who were sentenced to a maximum sentence of life.

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The Honorable William Erlbaum
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TESTIMONY OF

GLENN E. MARTIN
Associate Vice President of Policy and Advocacy
The Fortune Society, Inc.

Before

NYS Commission on Sentencing Reform

Association of the Bar of the City of New York
42 W. 44th Street
New York City, New York

November 13, 2007

My name is Glenn E. Martin and I am the Associate Vice President of Policy and Advocacy at the Fortune Society. Founded in 1967, The Fortune Society has been a staunch advocate for criminal justice policies which balance public safety with the creation of opportunities for people to regain their lives after being involved in the criminal justice system. The Fortune Society would like to thank Commissioner Denise O'Donnell and the Sentencing Commission members for the opportunity to testify at today's hearing.

Governor Spitzer exercised enormous courage and vision when he issued Executive Order #10, calling for the establishment of a Commission on Sentencing Reform. He gave the Commission a clear mandate to make recommendations on the future of sentencing in NYS in order to reform a system that is convoluted, complex and in disarray. Some of the thoughtful and forward-thinking recommendations supported by the Fortune Society include:

1. Improving the quality and accessibility of substance abuse treatment and other community based and institutional programming
2. Enhancing Certification and Clinical Training Requirements for Treatment Providers, including DOC Staff
3. Expanding Merit Time
4. Expansion of Work Release
5. Improving Release Procedures
6. Expanding Educational and Vocational Training in Prisons
7. Increasing Access to Higher Education in Prison
8. Procuring Identification, Medicaid and Other Benefits; and
9. Restoration of Voting Rights for People on Parole

However, while some of the recommendations in the Commission's Preliminary Report are insightful and respond to the Governor's call to create an "equitable system of criminal justice," the glaring omission of any mention of the racial disparity inherent in our sentencing laws, "real" Rockefeller Drug Law reform, the damage caused by mass incarceration on certain communities, or the need for an immediate and systemic expansion of Alternatives to Incarceration and other community based alternatives to imprisonment is a disappointment. Additionally, although NYS has been able to reduce crime and its prison population simultaneously over the past few years, the dollars saved have not been reinvested in the communities that continue to be ravaged by our inherently unjust criminal justice system or the upstate communities which rely on prisons as an "economic engine.' Parents who reside in New York's

low income communities of color have eagerly awaited the release of this report, hoping that the proverbial noose of the criminal justice system would soon loosen itself from the necks of their children. Without bold sweeping changes in our approach to criminal justice, the foot of the criminal justice system will continue to crush the necks of very specific communities in our state: whether it's the seven highly impacted NYC communities often discussed by policymakers and advocates or the upstate communities of Buffalo, Syracuse, Rochester and Albany, who are all beginning to experience a spike in violent crime.

While there is growing national concern about unequal treatment within the justice system, this Commission creates an opportunity for New York State to once again assume leadership on this key issue. Members of the Commission, you were appointed based on your immeasurable expertise, influence and experience. Your acknowledgment that the "work is far from complete" is a comfort to those of us who await additional recommendations which will make the rest of the country stand up and take notice. The Fortune Society wants to remind the Commission that during this historic moment, the citizens of New York State are banking on your wisdom and ability to create a final set of recommendations which balance public safety, reduce reliance on incarceration, enhance victims' rights, save public dollars, and create opportunities to rebuild the people and communities that are disproportionately impacted by the criminal justice system. Anything short of this amounts to an "indeterminate sentence" of punishment for affected communities. Thank you, once again, for this opportunity to testify, your willingness to open your efforts up to public scrutiny, and for your hard work on this Commission. The Fortune Society remains a resource to the Commission as you continue your difficult work.

Testimony of

Queens District Attorney
Richard A. Brown

New York State
Commission on Sentencing Reform

Association of the Bar
of the City of New York
New York, New York
November 13, 2007

Thank you for the opportunity to testify this morning.

* * * *

There is no question but that as you state in your preliminary report -- New York State's sentencing laws have over the years become overly complex.

As the District Attorney of Queens County -- a county of some 2.3 million residents -- I daily send my assistants into court with complicated sentencing charts that require magnifying glasses to read -- and which ofttimes are virtually impossible to understand. And, as you point out, numerous sentencing anomalies exist under our present structure that result in odd or inappropriate sentencing outcomes.

Most troubling of all is that at the time of the sentence - -as a result of both the complexity of the sentencing laws themselves and the many so-called "back-end" provisions in our correctional laws that can reduce the time that a defendant actually serves in prison --most judges, prosecutors, defense attorneys, defendants and victims cannot be certain how long the defendant will actually spend in prison. The result is that public confidence in the criminal justice system is undermined -- and at times public safety is put at risk. Our sentencing structure should enable everyone to know with certainty at the time of sentence how much time the defendant will actually serve.

In my view, moving to determinate sentences, as you suggest, will help to provide greater transparency in sentencing and clarity. However, in so doing it is essential that we make certain that all of the parties understand the many " back-end" options for potential early release. Placing all of the governing provisions in one section in the Penal Law would be helpful - - and streamlining the options would also be useful. Ideally, it would be preferable for the parties to have access to all of the sentencing information at the time that the

defendant is sentenced through a computer program which would lay out simply and clearly the shortest and longest potential prison term for any sentence imposed.

Beyond that, as you begin to consider the ranges for the new determinate sentences, I would caution you not to rely solely on what may have been the actual time served by defendants in the past, but rather on what the appropriate range should be given the seriousness of the crime. The fact that the highest range of an existing sentence has been infrequently imposed does not necessarily justify the conclusion that that sentence is too high and should be lowered. It may simply mean that judges and prosecutors have exercised their discretion appropriately and have reserved the most serious sentences for those who truly deserve them.

Also, I would favor establishing fairly broad ranges for the determinate sentences in order to give judges sufficient flexibility to distinguish, for example, between more culpable and less culpable defendants by picking from the higher or lower ends of the sentencing range. Two defendants convicted of the same offense may warrant very different sentences based on the nature and circumstances of their criminal conduct. The sentencing ranges should reflect that fact.

* * * *

Your preliminary report raises a number of other issues which should be discussed -- but there exists little time this morning to discuss them. I want you to know, however, that as you continue your important work during the coming months, I would be happy to make myself and my staff available to you and your staff to provide greater detail and more specific comments and recommendations.

* * * *

Before I conclude, however, I do want to touch briefly upon the issue of drug law reform. It is an issue about which I have spoken on many occasions in the past -- and to which I am no stranger.

In 1973 -- some 34 years ago -- as New York City's Legislative Representative in Albany, I vigorously opposed the enactment of the so-called Rockefeller Drug laws. I was joined by many others at that time -- not the least of whom were the District Attorneys of this State.

Six years later -- after serving as a New York City Criminal Court Judge and as a State Supreme Court Justice and observing first hand the injustices resulting from the enforcement of t hose laws -- I returned to Albany as Counsel to Governor Carey. And high on my personal agenda was reform of our then existing drug laws.

As a result, and with the support of the Governor and the legislative leaders, legislation was enacted which, in the words of Governor Carey, significantly revised our drug laws "to provide a more rational sentencing structure by giving to the judiciary greater flexibility to deal leniently with first offenders involved in small scale transactions. . .".

* * * *

The 1979 revisions -- together with the implementation of the re-sentencing provisions contained therein, grants of gubernatorial clemency and a host of sentencing reforms affecting drug offenders that have been implemented since that time -- have resulted in a dramatic reduction in the number of drug offenders in prison in New York today. Indeed, there are 41% fewer drug offenders in state prisons today than a decade ago.

I believe that it is fair to say that most drug offenders are in

prison today in New York State not because they possessed a small amount of drugs and have been swept up by the Rockefeller Drug Laws, but because they repeatedly sold drugs to make money or possessed large quantities of drugs intended for distribution to local communities -- or because they have also been convicted of violent crimes.

* * * *

Vigorous enforcement of our existing drug laws has been a major reason why we have been such a dramatic reduction in crime -- particularly violent crime -- in New York State over the past decade. Drug dealing is big business. Drug dealers use violence to protect their turf, intimidate witnesses, rob one another and punish those who threaten their livelihood.

Having come so far and having reduced violent crime in our communities so dramatically, it would be a serious mistake -- in my judgment -- to take away from law enforcement the tools that have enabled us to make our streets safer -- and which have given us the ability to provide treatment alternatives to those who need those alternatives and are prepared to avail themselves of them.

* * * *

1992 was my first full year as the District Attorney of Queens County. During that year I had 361 homicides in my county -- the majority of which were drug related. Last year we had 84 homicides in Queens -- an almost 80% reduction. And this year we are down another 10% compared to the same period last year.

Mine is the county in which a young police officer -- Police Officer Eddie Byrne -- was brazenly murdered not two miles from my office by

drug dealers while sitting in his patrol car protecting a witness in a drug case. The residents of my county -- indeed, the residents of localities all across this state -- will not forget what our streets were like only a few short years ago -- open air drug markets, drive by shootings, children caught in the crossfire of bullets in feuds between the drug dealers. These things haven't stopped by accident -- they've stopped because the members of these violent drug gangs have been arrested and put in prison under our existing drug laws.

* * * *

Consider also the devastating impact that drugs have on our communities. There were over 1,100 drug related deaths in New York State in the year 2000 - more than the number of homicides that year or the number of DWI related traffic fatalities. When the "cost" of drug crimes is being calculated, the number of lives lost to addiction must be factored in.

* * * *

While those who repeatedly deal drugs in our communities for profit should be sent to prison, those who are involved in drug crimes because they are addicted to drugs are more appropriately diverted to treatment. Over the last ten years, there has been a dramatic increase in the availability and utilization of alternatives to incarceration. As your report notes, there are currently 196 drug treatment courts in operation or in the planning stages in New York as well as a growing number of programs modeled on the Drug Treatment Alternative to Prison or "DTAP" Program.

Our Queens DTAP program, for example, targets non-violent second felony drug offenders who face mandatory prison sentences. They have their cases dismissed outright after completing up to 24

months of residential treatment. We have a 74% retention rate in that program and a 70% completion rate.

For first felony offenders we have a very active and involved felony Treatment Court. And for those charged with misdemeanors, we have a Misdemeanor Treatment Court. Close to 3,000 offenders have participated in these programs alone.

Central to the success of our DTAP and Treatment Court programs has been the effectiveness of having both a strong carrot and a strong stick to placing and keeping offenders in treatment. Breaking a drug habit is extremely difficult and requires a long and serious commitment. Residential treatment, for example, often takes 15 to 24 months. If a defendant knows that he or she faces only a very short prison term, the defendant may well opt for prison rather than treatment. If our goal is to address the substance abuse that leads to criminal conduct, we must not lower drug sentences to the point where we create a system that encourages defendants not to enter treatment. Similarly, lowering drug sentences may reduce the incentive for incarcerated drug offenders to participate in prison treatment programs.

* * * *

Instead of lowering sentences or eliminating mandatory minimums, there are other steps that we can take right now that will help more addicted offenders enter treatment programs in lieu of incarceration.

For example, there are instances when all of the parties agree that a particular offender should not serve an incarcerative sentence but plea restrictions hinder our ability to shape an appropriate disposition.

I would, as a result, support a proposal along the lines that your report recommends to create an exception to the plea restriction provisions of the Criminal Procedure Law in cases where the prosecutor puts on the record why, in the interest of justice, permitting a plea outside the restrictions is warranted and the court makes a finding on the record to that effect.

Similarly, you have suggested exploring certain modifications to the youthful offender statute including the possibility of expanding eligibility to 19 and 20 year olds. It is a proposal worth exploring and the related springback provision makes a great deal of sense. You might also consider allowing certain substance abusing offenders to receive youthful offender status upon successful completion of a rigorous residential treatment program using the DTAP model as a guide.

* * * *

A few other thoughts on facilitating increased accessibility to drug treatment programs. I would urge that funding be provided to drug courts for both independent screening of offenders by trained professionals and case management. Screening and case management are critical functions for a treatment court. Without them, we can fail to identify those in need of treatment or fail to provide crucial support or assistance that will enable an offender to succeed in rebuilding his or her life.

In smaller counties or rural counties where there are fewer than 10 assistant district attorneys in the prosecutor's office and a similar number in the defender's office, funding for drug court staffing and technical assistance could be very helpful. Some thought should also be given to insuring that treatment services are geographically accessible. In some upstate counties, for example, there are no treatment facilities

for female offenders within the county. This makes monitoring difficult and impairs the women's ability to build important family and community ties .

It is also vital that provision be made for offenders who cannot now be served because of language barriers. In a county as diverse as Queens -- where close to 130 languages are spoken -- it is, for example, often difficult to find a placement for an individual who speaks one of the 100 least common languages. A related barrier to treatment is immigration status. Non citizens may not eligible for certain programs and services.

Another essential element to improve accessibility of community based treatment is housing and/or residential treatment beds. Those in need of long term treatment must have a safe and secure place in which to live while they are undergoing treatment.

Community based mental health services are also urgently needed. We recently started a Mental Health Court in Queens but have not been able to place as many individuals as we would like because there simply are not enough services to which we can refer participants. Many defendants with substance abuse problems are also in need of mental health services.

By addressing these obstacles and investing in the types of services noted above, New York can make treatment more accessible to many who need it.

* * * *

The key to drug law reform is not to dismantle our drug and second felony offender laws that have been so successful in lowering the level of violence in our neighborhoods and providing the leverage

necessary to induce non-violent addicts into treatment. It is to expand available treatment opportunities and provide adequate funding for them.

* * * *

Thank you again for the opportunity to testify this morning. I look forward to working with you as you move forward in your deliberations.

Thank you.

NANCY GROSSELFINGER, Ph.D., M.P.A.

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Academic Preparation:

Ph.D., Florida State University, School of Criminology (1988). Dissertation: The Judiciary and Criminal Sentencing in the Dominican Republic.

M.P.A., Harvard University, John F. Kennedy School of Government (2000).

M.A., Rutgers University, School of Criminal Justice (1982). Masters Essay: The Transfer of Penal Sanction.

B.A., Connecticut College (1967), Sociology.

Employment History:

2005-2007, International League for Human Rights. Principal Investigator, U.S. Institute of Peace Grant (USIP-261-04F), "Pardoning For Peace and Reconciliation?: A Study of Early Release from Prison of War Criminals", empirically-based policy research regarding the management of the residue of war criminals of the International Criminal Tribunal for the Former Yugoslavia upon its completion in 2010, for use by policymakers of the ICTY, UN Security Council, and Member States currently hosting such prisoners.

2003, Judicial Expert, International Criminal Tribunal for the Former Yugoslavia, appointed to prepare the first pre-sentence social inquiry report in the case of Dragan Nikolic (IT-94-2-S): www.icty.org/trans2/031104IT.htm Nov 4 (p.337-353); Nov 6 (p.432-444).

2000-2005, Independent Researcher of various criminal justice issues.

1994-1999, Professor of Criminology, University of Malta, Faculty of Law, founding academic of the Centre for Criminology, Institute of Forensic Studies with specialized courses for criminal justice professionals in law enforcement, corrections, social work administration and law.

1998-1999, National Rapporteur (Malta), Council of Europe, Criminal Justice Sourcebook.

1996-1998, National Project Coordinator (Malta), United Nations Crime Victims Survey.

1994-1999, Criminal justice policy advisor to the Office of the Prime Minister and/or Ministry of Home Affairs, Republic of Malta.

1992-1993, Assistant Professor of Sociology, Gallaudet University.

1989-1992, Assistant Professor of Criminal Justice, Niagara University.

1972-1977, Youth Division Counselor, New York State Division for Youth, aftercare worker in Rockland, Westchester and South Bronx.

1967-1972, Probation Officer, Westchester County, N.Y.

Professional Experience:

2002-2005, Representative of the American Society of Criminology to the 11th U.N. Crime Congress (Bangkok, April 18-27, 2005).

1995-present, Representative of the International League for Human Right to the U.N. (Vienna) Crime Commission, 10th, 11th Crime Congresses, International Criminal Court Preparatory Commission (New York), International Criminal Court Assembly of State Parties (New York), and annual meetings of International Scientific and Professional Advisory Council (Milan).

1995-1998, Representative of the Government of Malta, Office of the Prime Minister to the 9th U.N. Crime Congress, Conference Permanente Europeanne de la Probation and 9th International Symposium on Victimology.

1993, Research concerned with foreign women inmates incarcerated in Costa Rica.

1986, 1991 Research concerned with foreign women inmates incarcerated in Italy.

1991, Participant in NATO Conference on the Violent Criminal Offender, Italy

1990, Representative of the International Penal Law Association, 8th U.N. Crime Congress, Havana, Cuba.

1986, Advanced student, Instituto Inter-Americano de Derechos Humanos, Costa Rica, inter-disciplinary Spanish language study course of human rights and means of redress of violations.

1985, Research concerning interest of Dominican inmates incarcerated in NY (state and federal prisons) for a bilateral treaty of prisoner transfer.

1985, Volunteer, Adirondack Correctional Facility, assigned to Hispanic inmate groups.

1984, Advanced student, Institut International des Droits de l'Homme, France, multi-lingual study of global and regional documents protecting human rights and mechanisms for redress of violations.

Honors and Awards:

2005, Elected to the Editorial Board of the International Journal of Comparative and Applied Criminal Justice, Division of International Criminology, American Society of Criminology.

2005, Invited to the Executive Board, Harvard-Radcliff Club of the Hudson Valley.

2003, Appointed Coordinator of American Society of Criminology participation in the 11th U.N. Crime Congress, Bangkok, April 18-27, 2005.

2003, Nominated for the Pioneer Award, British Home Office and National Probation Service, London, for work as judicial expert at the International Criminal Tribunal for the Former Yugoslavia.

2003, Appointed Referee of the European Journal on Criminal Policy and Research.

1998-2004, Elected for three successive terms as Executive Counselor, International Section, Academy of Criminal Justice Sciences.

2001-2003, Elected Secretary of the Division of International Criminology, American Society of Criminology.

2000, Nominated by peers at Harvard University, Kennedy School of Government, for the Robert F. Kennedy Award for Public Service.

1999, Elected to Individual Membership in the Conference Europeanne de la Probation.

1993-1994, Senior Fulbright Scholar Award, University of Malta, to create a culturally relevant design and teach a post-qualification Diploma in Probation Studies and B.A. in Criminology, in preparation of Malta's E.U. application.

1993, Gallaudet University, Faculty Development Award, Small Research Grant Award, Writing-to-Learn Faculty Development Workshop Award.

1992, Niagara University, Fund for the Improvement of Teaching Award to attend Harvard Medical School course on identifying abused persons.

1990-1992, U.S. Department of Education, Student Literacy Grant, to enable undergraduate students to receive a literacy training qualification and give literacy tutoring to maximum security prison inmates at Wende Correctional Facility.

1982-1984, Organization of American States, Regular Training Fellowship to support doctoral dissertation research in the Dominican Republic.

1983, El Fondo Para el Avance de Ciencias Sociales, Dominican Republic. Additional dissertation research support.

Publications and Presentations:

Expert Testimony, New York State Assembly, Standing Committee on Correction, "The Applicability and Utility of the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power," January 11, 2006.

"The U.N. Detention Unit" in The Hague: Legal Capital of the World, ed. P.J. van Krieken and David McKay, Asser Press/Cambridge University Press, 2005.

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Over fifty conference papers, guest lecturing and presentations in Austria, Bosnia, Canada, Costa Rica, Cuba, Dominican Republic, Egypt, Italy, The Netherlands, Nepal, Poland, Spain, Switzerland, Thailand and annually in the U.S. .

Memberships:
American Society of Criminology, 1978-2006
Academy of Criminal Justice Sciences, 1982-2004
European Society of Criminology, 2000-present
International League for Human Rights, 1993-present

Conference Europeanee de la Probation, 1999-2004
Harvard-Radcliff Club of the Hudson River Valley, 2002-present
International Penal Law Association, 1989-1999
Raquette Lake Owners Association, 1963-present

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**TESTIMONY OF DONNA LIEBERMAN,
ON BEHALF OF THE NEW YORK CIVIL LIBERTIES UNION,**

before

THE NEW YORK STATE COMMISSION ON SENTENCING REFORM

regarding

THE NEED FOR COMPREHENSIVE REFORM OF THE STATE'S DRUG SENTENCING LAWS

New York City
November 13, 2007

My name is Donna Lieberman. I am the Executive Director of the New York Civil Liberties Union (NYCLU). The NYCLU, the New York State affiliate of the American Civil Liberties Union, has approximately 50,000 members. The NYCLU is devoted to the protection and enhancement of those fundamental rights and constitutional principles embodied in the Bill of Rights of the United States Constitution and the Constitution of the State of New York. Central to this mission is our advocacy regarding fairness and equality in the state's criminal justice system.

The NYCLU commends Governor Spitzer for creating the Commission on Sentencing Reform, and we also commend the governor's charge to this new Commission: to "conduct a comprehensive review of New York's current sentencing structure . . . to ensure the imposition of appropriate and just criminal sanctions, and to make the most efficient use of the correctional system and community resources."

We are gravely disappointed, however, that the Commission has thus far failed to develop a proposal on the critical issue of drug sentencing reform.

There is, nevertheless, a broad and growing consensus among policy experts, criminal justice scholars, and law makers that the "war on drugs," with its singular emphasis on incarceration, has failed. It was in 1999 that federal drug czar General Barry F. McCaffrey stated, "We can't incarcerate our way out of [the drug] problem."[1]

Many prominent New Yorkers who were early supporters of the harsh penalties prescribed by the Rockefeller Drug Laws have renounced their support for those laws. John Dunne, the former Republican senator and original sponsor of the Rockefeller Drug Laws, has said, "The Rockefeller Drug Laws have failed to achieve their goals. Instead they have handcuffed our judges, filled our prisons to dangerously overcrowded conditions, and denied sufficient drug treatment alternatives to nonviolent addicted offenders who need help."[2] The late Thomas A. Coughlin, III, who for fifteen years served as the state's Corrections Commissioner, concluded that under the drug laws the state was "locking up the wrong people for the wrong reasons."[3]

Other critics have deplored the grave collateral consequences of the state's harsh mandatory sentencing scheme -- particularly for the low-income inner city communities of color that have been the primary focus of drug-law enforcement. In an article published recently in *The Boston Review*, the African American scholar Glenn C. Loury, a noted social conservative, called the war on drugs a "monstrous social machine that is grinding poor black communities to dust."[4]

We urge the Commission to consider the wisdom of maintaining a sentencing structure that ties the hands of judges, grants prosecutors enormous and essentially unreviewable powers, and results in the routine miscarriage of justice. I respectfully submit that in order to fulfill its mandate the Commission must address the following critical areas of inquiry: the stark racial and ethnic disparities in the population incarcerated for drug offenses; the impact of drug-sentencing laws on the integrity of the criminal justice system; the relationship between rates of incarceration and crime rates as regards drug offenses; and the social and economic consequences of the high incarceration rates for drug offenses.

- **Racial disparity**

It is well documented that there are gross racial and ethnic disparities in New York State's prison population, particularly among those incarcerated for drug offenses.[5] There is also voluminous evidence demonstrating the causes of these disparities, including selective arrest and prosecution, inadequate legal representation, and the

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[1] Timothy Egan, "The War on Crack Retreats," *The New York Times*, February 28, 1999.
[2] Press Release, Campaign for Effective Criminal Justice, May 6, 1998.
[3] Testimony of New York State Corrections Commissioner Thomas A. Coughlin, III: "Rockefeller Drug Laws—20 Years Later," Before a hearing convened by the Assembly Committee on Codes, June 8, 1993.
[4] Glenn C. Loury, "Why Are So Many Americans in Prison? Race and the transformation of criminal justice," *The Boston Review*, July-August 2007.
[5] New York State's population overall is 74% white, but its current prison population is 91% black and brown. Of every 100,000 whites in New York State, 174 are in prison or jail. The comparable figures for blacks and Hispanics, respectively, are 1,627 out of every 100,000, and 778 out of every 100,000.

absence of judicial discretion in the sentencing process. And yet the Commission's preliminary report is silent on the issue of race.

It is not possible to evaluate New York's sentencing laws without analyzing the ways in which race enters into law enforcement and judicial procedures. In undertaking such an inquiry, we urge the Commission to consider the following.

The racial disparity in New York's prison population has increased dramatically since the mid-1980s and the advent of the "war on drugs."

There were 886 persons incarcerated for drug offenses in 1980. Of these individuals, 32 percent were Caucasian; 38 percent were African American; and 29 percent were Latino. In 1992, the year in which the state reported the highest number of commitments for drug offenses, 5 percent of those incarcerated were Caucasian; 50 percent were African American; and 44 percent were Latino.

The demographics of the inmate population serving time for drug offenses in 2000 had changed little from the data reported in 1992. (See table below.) Of the 8, 227 new commitments for drug offenses in 2000, 6 percent were Caucasian; 53 percent were African American; and 40 percent were Latino.[6] The disparities persist. Today more than 90 percent of persons incarcerated for drug offenses are African American or Latino.

The racial and ethnic disparities among the population incarcerated for drug offenses in New York State do not reflect higher rates of offending among African Americans and Latinos.

In a relatively recent government study, a total of 1.8 million adults in New York (about 13 percent of the total adult population) reported using illegal drugs in the preceding year. Of those reported users of illicit drugs, 1.3 million – or 72 percent -- were white.[7]

Moreover, research indicates that whites are the principal purveyors of drugs in the state. When the National Institute of Justice surveyed a sample of more than 2,000 recently arrested drug users from several large cities, including Manhattan, the researchers learned that "respondents were most likely to report using a main source who was of their own racial or ethnic background regardless of the drug considered."[8] Upon closer analysis these findings reveal that there are, indeed, many more drug sales in white

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[6] New York State Department of Correctional Services data, as cited by The Correctional Association of New York; and by Rachel Porter in *Unjust and Counterproductive: New York's Rockefeller Drug Laws*, (Physicians for Human Rights and the Fortune Society), p. 23.

[7] Carol L. Council, Weihua Shi, Laurel L. Hourani, "Substance Abuse and Mental Health in New York, 2001," Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Office of Applied Studies, May 2005, at 5. "Illegal drugs" include, in order of popularity, marijuana, hashish, non-medical use of prescription drugs, cocaine, heroin, hallucinogens, and inhalants.

[8] K. Jack Riley, "Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities," National Institute of Justice and the Office of National Drug Control Policy, Dec. 1997.

communities than there are in communities of color, but they tend to escape detection because they take place behind closed doors in homes and offices.[9]

Criminologist Alfred Blumstein, the nation's leading expert on racial disparities in criminal sentencing practices, has concluded that with respect to drug offenses, the much higher arrest and conviction rates for blacks are not related to higher levels of criminal offending, but can only be explained by other factors, including racial bias.[10]

The over-representation of African Americans and Latinos in New York's prison population is the consequence of unequal treatment at each stage of the criminal justice process.

Arrest: It has been widely documented that the war on drugs has been waged largely in poor, inner-city communities. Noted sociologist Michael Tonry explains: "The institutional character of urban police departments led to a tactical focus on disadvantaged minority neighborhoods. For a variety of reasons it is easier to make arrests in socially disorganized neighborhoods, as contrasted with urban blue-collar and urban or suburban white-collar neighborhoods."[11]

New York City's policing practices demonstrate the routine and widespread practice of racial profiling. According to data recently released by the NYPD, police officers conducted 508,540 stop and frisks in 2006. Fifty-five percent of those stop encounters involved blacks, 30 percent involved Latinos, and only 11 percent involved whites.[12] Those percentages bear little relation to the demographic profile of the City's overall population. But the most salient fact is that 90 percent of the persons stopped were found to have engaged in no unlawful activity.

Racial bias is starkly evident in New York City's marijuana arrest statistics. Although whites use marijuana at least as often as blacks, the per capita arrest rate of blacks for marijuana offenses between 1976 and 2006 was nearly eight times that of whites. During this period there were 362,000 marijuana possession arrests in New York City. Fifty-four percent of those arrested were black and 30 percent were Latino; only 14 percent of the arrestees were white.

- **Prosecution:** The plea bargaining process is largely hidden from public scrutiny; but even assuming prosecutors in New York are making completely race-neutral charging and plea-bargaining decisions, there are other factors that place black

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[9] The Riley study found that powder cocaine users, who tend to be more affluent than heroin or crack users, "reported that they typically made indoor purchases in places of business more frequently than did other users."

[10] Alfred Blumstein, "Racial Disproportionality of U.S. Prison Populations Revisited," University of Colorado Law Review, Vol. 64, No. 3 (1993).

[11] Michael Tonry, *Malign Neglect: Race, Crime and Punishment in America*, Oxford Univ. Press, 1995, p. 105.

[12] Al Baker and Emily Vasquez, "Police Report Far More Stops and Searches," *The New York Times*, February 3, 2007, p. A1.

and Hispanic defendants in legal jeopardy. Chief among them is the fact of unequal access to legal resources. Most persons charged with drug crimes are poor and must rely upon the state's public defense system—which is in a state of crisis, according to a recent report by the Commission on the Future of Indigent Defense Services.

The Commission's report concludes that, "Whereas minorities comprise a disproportionate share of indigent defendants and inmates in parts of New York State, minorities disproportionately suffer the consequences of an indigent defense system in crisis, including inadequate resources, sub-standard client contact, unfair prosecutorial policies, and collateral consequences of convictions."[13]

- **Sentencing:** By the time a drug case reaches the sentencing stage the die has been cast. The racial inequities that operate in each phase of the criminal justice system produce a pool of defendants comprised almost exclusively of poor people of color. Ninety-eight percent of those defendants will enter a guilty plea for which the judge will be required to impose the mandatory minimum sentence.

  Over the years, many judges have expressed frustration and outrage at the mandatory minimum sentences prescribed by the Rockefeller Drug Laws:[14]

  "I sentence the defendant with a great deal of reluctance . . . and will state I think it's an inappropriate sentence and an outrageous one for what was done in this case." Judge Florence M. Kelly, Supreme Court, New York County

  "When I say the law is draconian, in your case it is. I am required by law to impose a sentence that in my view you don't deserve." Judge Martin E. Smith, Supreme Court, Broome County

  "But the bottom line is that I am handcuffed as a matter of law, so I have to do what the law says I have to do, because I cannot violate the law. But I am not going to give your client more than the minimum sentence." Judge Seymour Rotker, Supreme Court, Queens County

- **The integrity of our system of criminal justice**

We aspire to fairness in our system of criminal justice – due process of law, equal protection under law. We seek to enforce these principles not only through procedural checks and balances, but also by ensuring vigorous advocacy – on behalf of the people and of the defendant – subject to the authority of a neutral arbiter: the judge.

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[13] The Spangenberg Group, "Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services," June 16, 2006 at p. 158

[14] From *"Stupid and Irrational and Barbarous": New York Judges Speak Against the Rockefeller Drug Laws*, A Report of the Correctional Association of New York, December 2001.

With the enactment of the Rockefeller Drug Laws the state of New York elected to subvert judicial fairness – and to subvert the constitutional right to a fair trial; to a zealous defense; and, if found guilty, to a sentence that is commensurate to the wrong committed. This subversion of the judicial process is a consequence of the harsh mandatory sentencing scheme that relegates the judge to the role of bystander in the courtroom.

As one prominent legal scholar explains:

> Mandatory minimum sentences not only have stripped judges of sentencing power but also have driven defense attorneys to advise clients to accept plea bargains that they may previously have advised against. . . .
>
> In cases involving mandatory minimum offenses, the stakes are often too high for a defendant to exercise his constitutional right to trial, regardless of the weakness of the prosecutor's plea offer. Even if he believes he has a good chance of being acquitted because of the weakness of the government's case or the strength of his own defense, the defendant can never be sure of what the verdict of a judge or jury will be. If the judge is permitted to exercise discretion when imposing sentence, the defendant has at least a chance of convincing the judge to show some leniency. However, if the defendant is convicted of one or more offenses, each of which requires a mandatory minimum term of incarceration, he faces a definite, long prison term.[15]

The cases in which injustice has been worked by the state's drug-sentencing laws are legion. I offer just three recent examples that illustrate the perverse outcomes mandated by the harsh and irrational character of these laws.

> **The case of Rupert B.** Rupert B., twenty years old, lived with his mother, teenage sister, and girlfriend. He dropped out of school at seventeen to help support his family after his father left. However, without a high-school diploma or trade skills, he struggled to find work. His mother received public assistance, but had been falling behind on her rent. With his mother facing eviction, and his girl friend pregnant, Rupert accepted a job that he had attempted to avoid his entire life. He started selling drugs on the street corner, making enough in a few weeks to appease the landlord. But he was soon arrested, charged with selling a single vial of crack to an undercover officer. The judge gives him two choices: serve a one-year sentence (which meant leaving his family behind), followed by a year of post-release supervision, or participate in a twelve-to-eighteen-month drug program that he did not need – Rupert had never used drugs. Nevertheless, he accepted treatment. Not surprisingly, his progress reports were poor. He was accused of not participating fully in the program. Eventually, Rupert was offered a full-time job in New Jersey, which required him to spend the entire day out of the state. He accepted the job, even though it precluded him from finishing

[15] Angela J. Davis, *The Power of the American Prosecutor* (Oxford Univ. Press 2007), p. 5.

treatment. He was terminated from the program, returned to court on a warrant, and was sentenced to state prison.

The case of Hector V. Hector V., a Hispanic man of fifty-two, suffered from a physical disability. He had started using drugs when he was in his forties, after his wife left him. He had been using off and on since then. When he was forty-five, at the height of his addiction, Hector was so desperate for money to buy drugs that he broke into a neighbor's house and stole some jewelry. He was caught on the fire escape and received a sentence of two to six years. He was forty-nine when released. Hector managed to stay clean for a while, but within a couple of years, began using again. Broke and unable to support his habit, he made a deal with a seller in his building. If anyone asked, Hector would escort the person to the seller's apartment. In exchange, the seller would pay Hector in crack cocaine. When a haggard-looking man approached and asked Hector if he knew where to buy drugs, Hector escorted him to the seller's door and observed the drug sale. Minutes later a team of undercover narcotics officers raced in and arrested Hector. The charge: acting in concert to sell drugs to an undercover officer. If Hector had been a first-time offender, he would have been eligible for treatment. But because of the robbery conviction, he was classified a violent felony offender. The sentencing laws required that he serve at least six years in prison.

The case of Ashley O'Donoghue: In 2003 O'Donoghue, a twenty-year-old African American from Manhattan with no criminal record, was arrested in Oneida County for selling drugs in a state police buy-and-bust operation. Ashley was a high-school drop out with a history of learning disabilities. He was charged with an A-I felony and faced a sentence of fifteen-years-to-life. The defendant and his parents felt he had no choice but to accept the plea offered by the prosecutor. In February 2004, Ashley O'Donoghue pleaded guilty and was sentenced to seven to twenty-one years in prison for a first-time nonviolent offense. His parents have become outspoken advocates on behalf of their son – and others who have become victims of the state's irrational drug-sentencing laws.

- **Incarceration rates and crime rates**

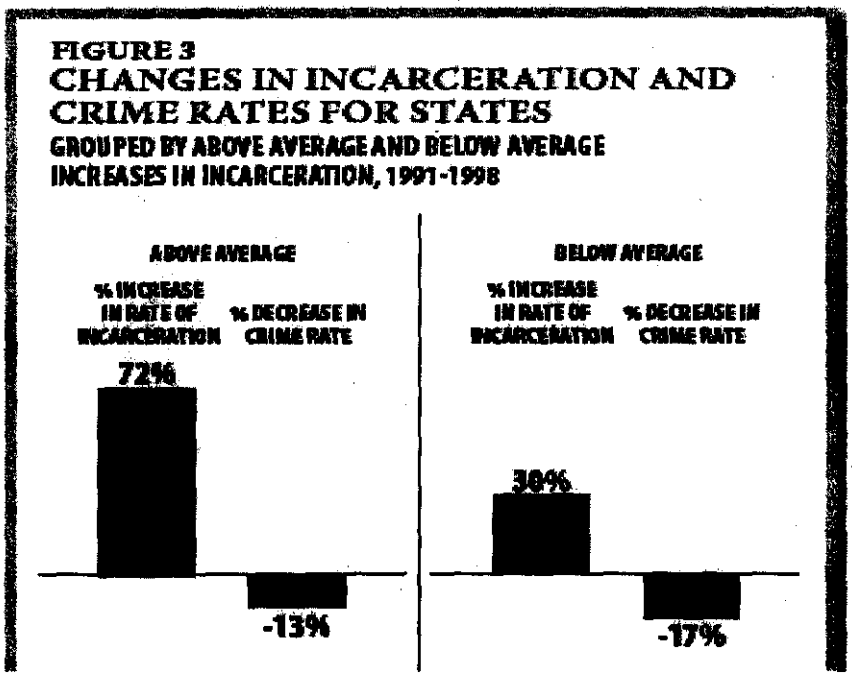
In its preliminary proposal for reform, the Commission writes:

The Commission heard many arguments on both sides of the debate as to whether to retain, eliminate or modify mandatory minimum sentences for certain first-time and repeat felony drug offenders. The Commission members heard forceful arguments from prosecutors that the mandatory minimum and second felony offender laws, including those for felony drug offenders, "played a vital role in providing us with the framework which has led to the tremendous and historic reduction in crime we have [seen] since about 1993."[16]

[16] P. 23.

The corollary to this argument, and one that is being made by some prosecutors, is that further reform of mandatory minimum sentences will cause the crime rate to rise again to the level of "the bad old days."[17] These arguments may be "forceful" – but they lack a sound empirical basis.

A recent study by the Sentencing Project examined prison and crime data and found that "there was no discernible pattern of states with higher rates of increase in incarceration experiencing more significant declines in crime."[18] Indeed, states that reported below-average increases in incarceration rates had *above-average declines* in crime rates.[19] (See table below.)



Nevertheless, there are those who persist in advancing the argument that massive incarceration is a rational response to an urgent public safety problem; and that imprisoning large numbers of drug offenders has led to a reduction in crime. Professor Glen C. Loury challenges this thesis.

> Increased incarceration does appear to have reduced crime somewhat. But by how much? Estimates of the 1990s reduction in violent crime that can be attributed to the prison boom range from 5 percent to 25 percent. Whatever the

[17] Transcript, New York State Commission on Sentencing Reform, Testimony of Michael Bongiorno, July 18, 2007 at p. 148.
[18] Marc Mauer, *Incarceration and Crime: A Complex Relationship*, (The Sentencing Project, 2005), p. 3.
[19] Ibid.

number, analysts of all political stripes now agree that we have long ago entered the zone of diminishing returns. The conservative scholar John DiIulio, who coined the term 'super predator' in the early 1990s, was by the end of that decade declaring in the *Wall Street Journal* that "Two Million Prisoners Are Enough." But there was no political movement for getting America out of the mass-incarceration business. The throttle was stuck.[20]

Indeed, there is research indicating that that the "concentration of incarceration" in particular communities "may actually elevate crime within neighborhoods."[21] Locking up people who break society's rules presumes that their neighborhoods will be safer once such people are removed. But, "[t]he constant rearrangement of social networks through removal and return of prisoners" creates instability that leads to more, not less, disorder.[22] This is because the role of formal social controls in maintaining law and order—the police, parole and probation officers, the courts, etc.—are only one piece, and probably the less critical piece, of the puzzle. More important are what social scientists call the "*informal* social controls" which regulate individual behavior in a community. "When places become unsafe, it is not primarily due to a breakdown in the formal social controls of the state, but because of the limitations of the informal social controls operating in those places. This is a routine sociological insight."[23]

The lesson from this research is clear: Intact families, churches, workplaces, social clubs, organized youth groups and civic associations have a greater positive impact on public safety than the police do. And all of those institutions are weakened when such large numbers of residents are either incarcerated or just returning from prison.

- **The harm caused by the state's drug laws**

Over the past twenty-five years, hundreds of thousands of poor, minority New Yorkers have been cycled in and out of the prison system. Drug offenders make up one-quarter of New York State's prison population today. Most of them were identified, upon admission to prison, as drug abusers by the Department of Correctional Services. Most are repeat offenders.[24]

A recent study of fifty typical ex-offenders, whose average age was forty-one, found they had spent, on average, of one-third of their lives in prison for non-violent,

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[20] Glenn C. Loury, "Why Are So Many Americans in Prison? Race and the transformation of criminal justice," *The Boston Review,* July-August 2007.

[21] Jeffrey Fagan, Valerie West, Jan Holland, "Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods," 30 Fordham Urb. L.J. 1551 (July 2003) at 1553.

[22] Fagan, et al., p. 2.

[23] Todd Clear, "Backfire: When Incarceration Increases Crime," in *The Unintended Consequences of Incarceration,* (Vera Institute of Justice, January 1996), p. 185.

[24] HUB SYSTEM: Profile of Inmate Population Under Custody on January 1, 2006, State of New York Department of Correctional Services, Division of Program Planning, Research and Evaluation, June 2006, p. 27; Identified Substance Abusers, December 2005, State of New York Department of Correctional Services, Division of Program Planning, Research and Evaluation, March 2006, p.3.

small-scale drug offenses.[25] This speaks to a policy of failure – not one of success. What's more, the collateral damage of the state's drug laws is inestimable. New York's drug-sentencing scheme has so damaged the state's most vulnerable communities that policy-makers' asserted commitment to fairness, justice and equality cannot be taken seriously. This damage has deeply corroded the social and economic networks that are essential to sustain communities.

Diminished opportunity for economic and life success: Prisoners and formerly incarcerated persons suffer extremely high unemployment rates. In New York, up to sixty percent of ex-offenders are unemployed one year after release.[26] It is generally the case that for an incarcerated black man, wages earned after release from prison are 10 percent less than wages earned before incarceration.[27]

According to Professor Loury, the ramifications of a black man's serving time for a drug offense are even more dire than these statistics suggest. "While locked up, these felons are stigmatized – they are regarded as fit subjects for shaming. Their links to family are disrupted; their opportunities for work are diminished .... They suffer civic ex-communication. Our zeal for social discipline consigns these men to a permanent nether caste. And yet, since these men – whatever their shortcomings – have emotional and sexual and family needs, including the need to be fathers and husbands, we are creating a situation where the children of this nether caste are likely to join a new generation of untouchables. This cycle will continue so long as incarceration is viewed as the primary path to social hygiene."[28]

Family disintegration: An estimated 11,000 incarcerated drug offenders, including 1,000 women, are parents of young children. Close to 25,000 children in New York State have parents in prison convicted of non-violent drug charges.[29] As a consequence of losing a parent to prison, these children and their extended families experience psychological trauma, financial deprivation and physical dislocation.

Destabilized communities: The vast majority of incarcerated drug offenders come from poor, inner-city neighborhoods. Paradoxically, the constant removal and return of prisoners (the "churning effect") make neighborhoods less safe. Recent research shows that the "concentration of incarceration" leads to the further destabilization of our most vulnerable neighborhoods. Columbia University sociologist Jeffrey Fagan and his colleagues have studied the "spatial effects"of high incarceration rates and found that "[i]ncarceration begets more

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[25] Rachel Porter, *Unjust and Counterproductive: New York's Rockefeller Drug Laws*, Physicians for Human Rights and The Fortune Society, 2004, p. 3.
[26] Bruce Western, et al, "Black Economic Progress in the Era of Mass Imprisonment," in *Invisible Punishment* (Eds. Mauer and Chesney-Lind, 2002), p. 177.
[27] Loury, p. 5.
[28] Loury, pp. 5-6.
[29] Human Rights Watch, *Collateral Casualties: Children of Incarcerated Drug Offenders in New York*, June 2002, p. 2.

incarceration, and incarceration also begets more crime, which in turn invites more aggressive enforcement, which then re-supplies incarceration . . . [T]hree mechanisms . . . contribute to and reinforce incarceration in neighborhoods: the declining economic fortunes of former inmates and the effects on neighborhoods where they tend to reside, resource and relationship strains on families of prisoners that weaken the family's ability to supervise children, and voter disfranchisement that weakens the political economy of neighborhoods."[30]

Loss of political representation: Most incarcerated drug offenders come from inner-city communities of color, but for purposes of the census they are counted as residents of the upstate, overwhelmingly white counties where they are serving time. In the last legislative redistricting, these inner-city communities lost 45,000 residents to upstate, mostly white districts. And because of the state's felon disfranchisement laws, tens of thousands of black and Latino prisoners and parolees cannot vote.

We have truly come upon a crossroads in our approach to the adjudication and sentencing of drug offenses. We can persist in the "locking up the wrong people for the wrong reasons" (in the words of Thomas A. Coughlin, the former New York State Corrections Commissioner), or we can muster the courage to create a sentencing structure that restores judicial discretion, expands eligibility for alternatives to incarceration (ATI), establishes a comprehensive ATI rehabilitation model – and that reinvests in our most vulnerable neighborhoods the enormous savings that will be realized from cutting the costs of incarceration.

I deeply hope that this Commission will have the courage to endorse the option of meaningful reform.

[30] Jeffrey Fagan, Valerie West, Jan Holland, Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods," 30 Fordham Urb. L.J. 1551, July 2003 at p. 1554.

November 13,2007

To: New York State Commission on Sentencing Reform
From: Robert Dennison (Retired Chairman of NYS Parole)
Subject: Outline of Testimony

- Constructive Proposal for amending section 259J of the Executive law which currently prohibits the Parole Board from exercising discretion in terminating the supervision portion of the sentences for those on parole serving life sentences for convictions other than drug sales or drug possession. The current law basically states that no matter how young a person was when their crime was committed, what their specific involvement was, how many years they spent in prison, what they achieved educationally, how long they have been under parole supervision or how well they are doing in the community, they have to stay on parole for the rest of their natural lives.
- History of granting discretion to the Parole Board in making decisions on these cases.
- How New York State's current policy differs from other states and the Federal Government and how counter productive it is to a good re-entry policy.
- Benefits of enacting this change for society, the individuals on parole, the Division of Parole, and the Sentencing Commission in bringing fairness to the manner in which people are sentenced and supervised in New York State.

Public Hearing Before New York State Commission on Sentencing Reform
New York City, November 13, 2007
Testimony of Professor Philip M. Genty, Columbia Law School

I want, first of all, to thank the Commission for conducting these hearings and for giving me the opportunity to appear today and speak. The Commission's Report – "The Future of Sentencing in N.Y.S.: A Preliminary Proposal for Reform" – is an impressive document which has created a framework for analyzing the critical issues of sentencing, imprisonment and re-entry in New York.

For the past 25 + years I have been involved in work with the New York State prison system and the individuals incarcerated within that system. For much of that time the primary focus of my research and my work with students in Columbia's clinical law program has been on preserving the ties between incarcerated persons and their families, and on successful family reunification.

Many of the Commission's observations and recommendations implicate these issues of family preservation and re-unification, as well as larger issues of rehabilitation and re-entry. In the Report the Commission notes that New York currently has a "labyrinthine sentencing structure," which is a "veritable object lesson in disorder and confusion." The Commission observes that current sentencing policy is the product of "ad hoc and piecemeal amendments." The Commission recommends moving to more rational "evidence-based" practices, which would include, in part, the use of a risk and needs assessment instrument at all stages of criminal proceedings, from sentencing and initial incarceration to release. A central goal would be to facilitate better-informed release decisions and successful re-entry.

These conclusions – that the current sentencing laws are often irrational and incoherent, and that we should be moving to an evidence-based system of assessing risks and needs – come together and are vividly illustrated in our current system of Parole Board practices.

The Parole Board guidelines currently in use date back to the late 1970's and have been essentially obsolete for more than 20 years. These guidelines were created for a purpose that no longer exists – guiding the Parole Board in the *setting of sentences*, specifically the minimum terms of indeterminate sentences. The guidelines measure two factors only – seriousness of the crime and prior criminal history. These are factors that *should* be used at the time of sentencing. The problem is that the responsibility for setting sentences was removed from the Parole Board and restored to the courts in 1980. This was done to eliminate unnecessary duplication of function between the Parole Board and the sentencing courts. Since 1980, the Parole Board's main responsibility has been to evaluate individuals for parole release after they have served their minimum sentences. *However, the Parole Board guidelines were never changed to reflect this shift in mission.* To this day, the guidelines continue to measure only two factors – seriousness of the crime and criminal history – rather than the array of factors that would be relevant to a meaningful assessment of who the individual is *today,* and whether that individual has been rehabilitated and can be safely released from prison.

This, then, is an important example of what the Commission has described as "disorder and confusion" caused by an "ad hoc and piecemeal approach to sentencing." Our current Parole Board guidelines were designed for a purpose that ceased to exist 27 years ago, and they are ill-suited to the purpose for which they are now being used. A consequence of this is that the Parole Board often acts as if it were still responsible for sentencing decisions – it simply re-examines

the underlying crime and criminal history. In doing so it fails to consider any changes that have occurred in the individual in the many years that have passed since the crime was committed. The Commission has commented on this on pages 16 and 17 of the report. This is especially true for individuals convicted of felonies classified as violent. The consequence is a growing sense of cynicism and despair among these incarcerated individuals and their families.

The promulgation of new Parole Board guidelines is therefore long overdue. Guidelines for parole release decisions for persons serving indeterminate sentences should give less weight to the underlying offense and more weight to the individual's accomplishments while in prison. This change is suggested by the Commission in footnote 105 of the Report. Specifically, the guidelines should utilize the evidence-based risk and needs assessment recommended by the Commission. As the Commission notes on page 37 of the report, such an approach is already used in parole release decisions in Pennsylvania.

To restore hope and rationality to the system, the Parole Board guidelines should therefore be modified and updated to require the Board to give appropriate weight to the extent of an individual's rehabilitation and the lack of risk to public safety if the individual is released. The guidelines should incorporate and reflect the most up-to-date research available. This includes research showing that persons who have served sentences for many categories of violent crimes have low rates of recidivism. One example is that preliminary research has shown an especially low recidivism rate among women who were convicted of these crimes. In short, the guidelines should be dynamic and should acknowledge people's capacity for significant change during their time of incarceration.

But in order to effect such changes, adequate rehabilitative programming must be available in prisons. Thus, a further, essential component of an evidence-based approach to parole release decisions is an increase in the resources for programs that have been shown to succeed. These include programs in higher education, vocational training and therapeutic counseling. In addition, work release eligibility should be expanded to persons convicted of all categories of crimes, because these programs play an important part in helping individuals to make a successful transition back into the community. On pages 48 and 49 of the Report, the Commission describes these types of rehabilitative programs and notes that these programs have been shown to reduce recidivism. And although the Commission does not discuss them specifically, programs aimed at strengthening family ties through facilitation of visitation and phone calls, and other assistance to children and families, also have a proven impact on successful re-entry.

In short, updating and rationalizing Parole Board guidelines and practices and increasing resources available for educational, vocational, family preservation and work release programs, will further the goals articulated by the Commission: to use evidence-based practices to reduce risk, increase public safety and ensure successful re-entry.

I look forward to seeing how these recommendations develop, and I hope that you will continue to involve the public in your deliberations. Thank you again for this opportunity to appear before you.

[Please see the attached memorandum summarizing recommendations.]

Recommendations for Parole Reform in New York State

New York State has an opportunity to affect significant policy changes in the way the parole release and supervision system is administered in New York. Under the Pataki administration, persons who are serving sentences for violent crimes have been routinely denied parole release solely on the basis of the underlying crime, without regard to their institutional record of rehabilitation or their potential for successful reintegration into the community. For these individuals, as well as their families, the resulting uncertainty about when, and under what circumstances, release may be expected to occur has bred despair and cynicism. In addition, the policies are expensive. The per person cost of parole supervision is estimated to be one-tenth the cost of incarceration ($3,000 v. $30,000). The Pataki administration policies have resulted in a sharp decline in annual parole releases. Given that each person who is kept in prison, rather than being released on parole, costs the State $27,000, the annual cost to the State of these parole policies is substantial.

Below are some recommended areas of reform:

- **Restore predictability and rationality to parole release determinations.**

To restore hope and rationality to the system, we offer the following recommendations:

- Board of Parole release guidelines should be updated and modified to require the Board to give appropriate weight to the extent of an individual's rehabilitation and the lack of risk to public safety if the individual is released. In particular, the guidelines should reflect the research showing that persons who have served sentences for many categories of violent crimes – and particularly women – have low rates of recidivism. For example, according to available data, the average return rate for individuals released for murder (21.5 percent) was drastically lower than the overall average return rate (42.2 percent) between 1985 and 2000. Moreover among the 2000 releases with murder convictions, only 3.6 percent were returned for a new commitment. Most of the returns were for technical parole violations.

- Merit-based criteria for Board of Parole membership and a screening panel should be established. Such criteria should include a demonstrated background in criminal justice issues. In addition, Board members should be provided with access to professional development programs in which information current research, penological theory, and parole practices are presented and discussed.

- **Expand eligibility to programs that facilitate successful rehabilitation and release on parole.**

Persons convicted of violent felony offenses are barred from participating in programs that would facilitate their successful, timely reintegration into the community. To remedy this, we suggest the following:

- Persons convicted of violent felonies should be eligible to participate in work release programs. Work release can serve as an effective tool to demonstrate readiness to transition to the community. An individual who is successful on work release has established that he or she is able to be released into the community without being a threat to public safety.

- The eligibility criteria for the issuance of a certificate of earned eligibility should be expanded to include all persons, regardless of the length of their minimum sentence. The New York State Correction Law provides that individuals who are scheduled to appear for parole release consideration and who have satisfactorily completed their assigned rehabilitative programs may be granted a Certificate of Earned Eligibility (N.Y.S. CORRECT. LAW § 805). The issuance of the Certificate creates a presumption of parole release. However, eligibility for the Certificate is limited to individuals whose minimum sentence is eight years or less. This restriction excludes the majority of persons who are serving sentences for violent felonies. The law should be amended to allow all persons serving an indeterminate sentence of any length the opportunity to earn the Certificate.

• **Eliminate unnecessary parole supervision and revocation.**

Post-release resources are best used to protect the public from those individuals who pose an actual risk to the community. Under the Pataki administration, resources have instead been diverted to re-incarcerating individuals on technical violations and on precluding persons with a maximum sentence of life from ever obtaining discharge from post-release parole supervision. We recommend the following changes to address these problems:

- Guidelines for technical violations should be established. The increase in the number of individuals returning to prison over the past decade on technical parole violations, i.e. violations that do not involve any criminal conduct, has been staggering. The unchecked exercise of discretion by parole officers is a significant concern in cases where parole violations are alleged. More specific, concrete, uniform guidelines for parole revocation - particularly for technical violations - should be established to help reduce the number of people being sent back to prison for minor violations.

- The Division of Parole should have the discretion to grant any suitable person a merit termination of parole supervision. There should be no exception for persons who were sentenced to a maximum sentence of life.

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Commission on Reentry at the Mosque of Islamic Brotherhood, Inc.

The Honorable William Erlbaum
(in a personal and unofficial capacity)

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TESTIMONY BEFORE THE NEW YORK STATE COMMISSION

ON SENTENCING REFORM

November 13, 2007

Good afternoon. My name is Alfred Siegel. I am the Deputy Director of the Center for Court Innovation, a not-for-profit organization that works with courts and related agencies - prosecutors, the defense bar, probation and parole officers and others - to reduce crime, aid victims, strengthen neighborhoods, and promote confidence in justice. The Center serves as the independent research and development arm of the State Court System. I want to thank the Commission for extending an invitation to the Center to speak today on the very important issues raised in your recently published preliminary report. We commend the Commission for the thoughtful and progressive ideas presented in that comprehensive document. I am joined by Michael Rempel, the Director of Research at the Center. Each of us has some brief remarks after which we would welcome your questions.

I will confine my remarks to responding to some of the specific questions contained in the hearing notice. As an organization that has been at the forefront locally, nationally and internationally in the establishment of a range of "problem-solving" courts, the Center for Court Innovation strongly believes that equipping the justice system with responsible alternative sentencing options can simultaneously promote public safety, reshape offender behavior and inspire greater confidence in the system's ability to reduce crime. Problem-solving courts seek to address social problems such as substance abuse, mental illness, homelessness and domestic

violence, issues that contribute mightily to criminal behavior, fuel high caseloads in our courts and profoundly affect the quality-of-life in our communities. As you are well aware, addressing these problems has historically proven to be quite vexing to the justice system.

We are all familiar with the term "revolving door", a euphemism for a justice system devoted to rapidly processing criminal cases but one that has little or no impact in reducing crime or altering offender behavior. Before the advent of problem-solving courts, judges often were confronted with too few meaningful community-based alternatives to address offender behavior. The result was a system that did a wonderful job of protecting litigants' legal rights and moving the docket, but did little to address the problems that brought people into court in the first place. Incarceration was the safest option, even though it offered little realistic prospect of rehabilitation and left offenders woefully unprepared for life back in the community upon their release. And, probation and parole officers, burdened by overwhelming caseloads, have scant resources through which to link those assigned to their charge to vitally needed assistance.

Conversely, problem-solving courts, including the drug courts that my colleague Mr. Rempel will be discussing shortly, are making a difference. These courts provide ready access to services, matching offenders to programming through comprehensive assessments. Compliance with service mandates is rigorously monitored by program staff and judges, and infractions are aggressively dealt with through responsive interventions and graduated, intermediate sanctions. New York State now has 229 drug courts, 39 integrated domestic violence courts, 35 domestic violence courts, 15 mental health courts, 7 sex offender management courts and 9 community courts. Together, these problem-solving courts are driving down recidivism among participants,

and helping to reclaim neighborhoods while aiding victims and achieving more effective, enduring case outcomes. Problem-solving courts rely on collaborative, multi-disciplinary partnerships among justice system players, law enforcement and community-based providers to improve the quality of justice. These courts are information-driven. Judges and other key decision makers are armed with more information so that they can make better determinations. Evidence-based assessments help identify offender deficits and facilitate the crafting of individualized, responsive sanctions. Offenders, as noted, are held accountable through vigorous monitoring of compliance. And, each of the programs utilize research and data analysis to tell us whether the courts are achieving the results they were designed to accomplish. Are they, in fact, working?

Indeed there is a wealth of evidence now that supports the notion that these reforms have promoted fairness and improved the effectiveness of the justice system. Researchers have documented reductions in street crime, substance abuse and recidivism, as well as enhanced compliance with court directives and increasing public trust in justice. Upon seeing these kinds of results, problem-solving justice has been hailed by all 50 state court chief justices.

In recent years, we have applied the problem-solving approach to the challenges posed by offender reentry. In one of our community courts - the Harlem Community Justice Center - we have been testing the impact of problem-solving justice in helping parolees adjust to life back in the community upon their release from confinement. In Harlem, the formerly incarcerated return to a community that provides few genuine opportunities to earn a living wage legitimately, secure decent and affordable housing, or receive the education, training and assistance they need to have

a fighting chance at becoming productive, law abiding members of society. At the Justice Center, we are tackling these problems head on, working with our partners, the Division of Parole and an array of local providers. At the program, reentry begins when a prospective parolee receives a scheduled release date. At that point, a comprehensive pre-discharge plan is prepared that focuses on risk, treatment needs and other critical services like housing, workforce training, employment, education and family engagement - issues that if left unaddressed could affect a parolee's compliance and continuing ability to remain arrest free. The plans are informed by comprehensive psycho-social assessments and home visits conducted prior to the offenders' release.

Once released, participants report directly to the community court where they appear before a legal authority who lays down the law - an Administrative Law Judge. At the initial hearing, parolees sign a contract agreeing to comply with the conditions of release and the individualized service plans. A team of on-site parole officers, social workers and locally-base providers then work with the parolees to implement the plans and to begin the process of moving offenders down the road to reintegration and productive lives. Compliance is rigorously monitored and parolees must report regularly to the courthouse to meet with the Administrative Law Judge and their parole officers. Non-compliance meets with an immediate response and incentives - like public congratulatory ceremonies - are used to encourage adherence to release conditions. All of this takes place in the community where participants live, a model of service delivery that greatly improves the chances of successful reintegration.

The work going on in Harlem is important and holds great promise for the future. The

Commission has asked for ideas on how to improve the current system for preparing offenders for reentry. The Reentry Court includes the ingredients of a comprehensive reentry strategy: extensive pre-discharge planning, locally-based supervision, linkages to readily accessible and necessary services, collaborative case management, sanctions and incentives, and on-going judicial monitoring, all in a community setting - components that, in combination, are most likely to achieve reentry success. In several instances, the Court has been expanded to serve as a sanction for non-compliant parolees, offering more intensive monitoring with heightened surveillance while providing critically-needed services. Utilizing the Reentry Court in this manner is a safe, responsible alternative to revocation and incarceration, particularly for those parolees charged with technical infractions. Such programs are not only cost-effective when compared to the significant expense of re-incarceration, but, most importantly, represent sound public safety policy.

Now I will turn the microphone over to Mike who will speak about the current state of drug court research.

TESTIMONY BEFORE THE NEW YORK STATE COMMISSION

ON SENTENCING REFORM

November 13, 2007

Good afternoon. My name is Mike Rempel. I am the Research Director of the Center for Court Innovation. My comments will focus specifically on the use of court-mandated treatment as a sentencing option in criminal cases.

Since the 1990s, state court systems and local jurisdictions across the country have been experimenting with treatment as an alternative to incarceration. The principal rationale has been to short circuit the "revolving door" by addressing the underlying addiction to drugs that motivates much of the criminal behavior we see today. Time does not permit reviewing the literature on every approach to court-mandated treatment, so my testimony will focus on drug courts, the most popular and proven model on a national scale. The original Miami Drug Court opened in 1989. By April of 2007, there were 1,767 drug courts open nationwide, including 1,038 programs serving adult criminal defendants.[1]

How do drug courts work? Specific practices vary from jurisdiction to jurisdiction, but the model's essential outline is as follows: The court mandates addicted defendants to substance abuse treatment as an alternative to incarceration or an alternative to probation. In most drug courts, defendants formally enroll upon pleading guilty to some offense, but in some places,

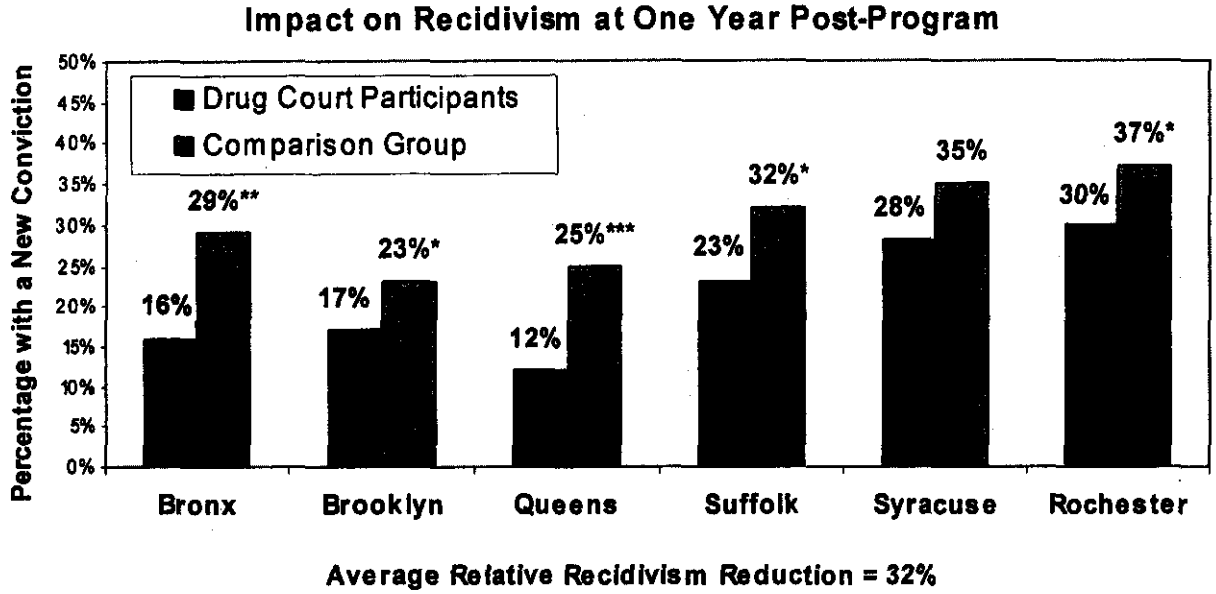
[1] Bureau of Justice Assistance (BJA) Drug Court Clearinghouse. Drug Court Activity Update, April 12, 2007, Washington, D.C.: American University.

defendants may enroll before a plea is taken. In either scenario, the defendants receive tangible legal incentives to do well – successful participants have the charges against them dismissed or reduced, while those who fail are sentenced to jail or prison. During the treatment process, the court closely monitors the defendant's performance through regular drug testing, meetings with court-affiliated case managers, and ongoing court appearances before a dedicated drug court judge. At each such appearance, the judge converses directly with the defendants, motivating them to comply and reminding them of the consequences of noncompliance. Also, the judge responds to progress and setbacks by administering interim rewards and sanctions. Since the treatment literature tells us that relapse is typical even among those actively seeking help, the drug court model advocates the use of "multiple chances" in response to positive drug tests, missed court dates, or other noncompliance. That is why the model promotes the heavy use of interim sanctions, such as essays, jury box attendance, or short jail stays, over final sentences of incarceration, until such time that a participant is repeatedly or severely noncompliant.

The drug court research literature is voluminous and generally positive. Whereas only 10 to 30 percent of persons enrolling in treatment voluntarily graduate or are still active in treatment one year later, the equivalent one-year "retention rate" for drug court participants averages about 60 percent nationwide[2] and 66 percent in New York State.[3] Furthermore, a series of literature reviews and commentaries published in the early 2000s, including one by the U.S. Government Accountability Office, all conclude that drug courts generally produce significant reductions in

[2] S. Belenko, *Research on Drug Courts: A Critical Review,* 1 National Drug Court Institute Review 1 (1998).
[3] M. Rempel, D. Fox-Kralstein, A. Cissner, R. Cohen, M. Labriola, D. Farole, A. Bader, and M. Magnani. *The New York State Adult Drug Court Evaluation: Policies, Participants, and Impacts* Report submitted to the New York State Unified Court System and the U.S. Bureau of Justice Assistance, New York: Center for Court Innovation (2003).

FIGURE 1



recidivism.[4] One particularly influential study was a randomized trial of the Baltimore drug court, which demonstrated significant recidivism reductions over both two-year and three-year tracking periods after the initial arrest.[5] Locally, a statewide evaluation of New York's drug courts, completed by the Center for Court Innovation in 2003, demonstrated a 32% average recidivism reduction across six different sites over a one-year "post-program" period beginning after program exit or final disposition. Those results are in Figure 1.[6]

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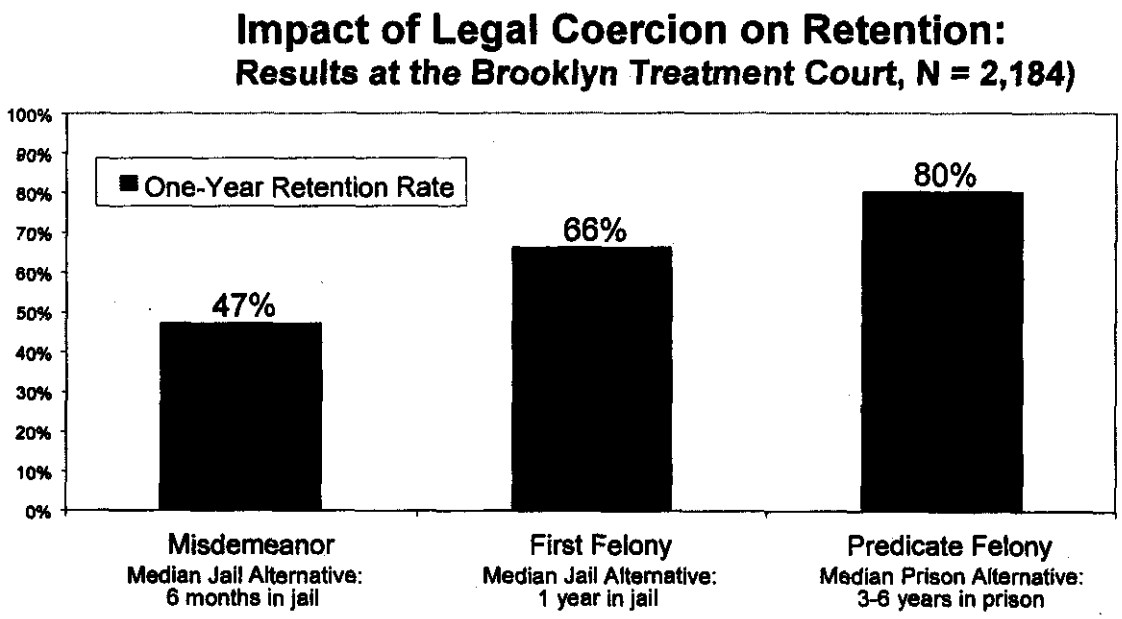
[4] See Government Accountability Office, *Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes*, United States Government Accountability Office, Report to Congressional Committees (February 2005). See also S. Aos, P. Phipps, R. Barnoski, and R. Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime Version 4.0*. Olympia, WA: Washington State Institute for Public Policy (2001); J. Goldkamp, "The Impact of Drug Courts," *Criminology and Public Policy* 2: 2: 197-206 (2003); A. Harrell, "Judging Drug Courts: Balancing the Evidence," *Criminology and Public Policy* 2: 2: 207-212 (2003). M. Rempel and A. Cissner, *The State of Drug Court Research: Moving Beyond "Do They Work,"* New York: Center for Court Innovation (2005); J. Roman and C. DeStefano, "Drug Court Effects and the Quality of Existing Evidence," In, *Juvenile Drug Courts and Teen Substance Abuse*, eds. J. Butts and J. Roman. Washington, DC: Urban Institute Press (2004).

[5] See D. Gottfredson, B. Kearley, and S. S. Najaka, "Effectiveness of Drug Treatment Courts: Evidence from a Randomized Trial," 2 *Criminology and Public Policy* 171, 196 (2003); and D. C. Gottfredson, B. Kearley, S. S. Najaka, and C. Rocha, "Baltimore City Drug Treatment Court: Evaluation of Client Self-Reports at Three-Year Follow-up," College Park, MD: University of Maryland (January 2003).

[6] M. Rempel et al., *supra* note 3.

FIGURE 2



To help inform evidence-based policymaking, as important as whether drug courts work is to understand why they work. In this regard, among other factors, the evidence strongly points to the critical role of: (1) clear legal incentives and (2) intensive judicial supervision.

Concerning legal incentives, the tangible threat of imprisonment in response to failure is widely believed to explain why drug court retention rates are so much higher than retention rates for persons enrolling in treatment voluntarily. Even within drug courts, the evidence indicates that where the legal incentives are relatively greater, the outcomes are relatively better. As shown in Figure 2, one-year retention rates at the Brooklyn Treatment Court are lowest for participants pleading guilty to a misdemeanor, who face an average of six months in jail in the event of failure, and, on the other end of the spectrum, are highest for predicates (participants pleading guilty to a felony with a prior felony conviction on their record), who face an average of three to

six years in state prison.[7] Such findings suggest that drug courts are particularly effective with more serious categories of defendants.

Concerning judicial supervision, a series of randomized trials conducted in several Northeastern sites indicate that drug court outcomes are consistently better when participants are required to appear biweekly before the drug court judge than when they are only required to appear "as needed." The impact of appearing regularly before the judge was especially pronounced for "high risk" defendants, defined in this research as having previously failed treatment or having anti-social personality disorder.[8] Additionally, based on preliminary findings presented publicly last June, a multi-site drug court evaluation including 23 drug court and six comparison sites across the country will show that drug court participants have better outcomes specifically as a result of: (1) more positive defendant perceptions of the fairness of the judge, (2) more frequent court appearances before the judge, and (3) more frequent meetings with court-affiliated case managers or probation officers.[9] All three of these factors point to the effectiveness of treatment-based sentences that include ongoing, intensive court involvement. Of note, there are some other initiatives, such as Brooklyn's Drug Treatment Alternative-to-Prison (DTAP) program, that have demonstrated positive results with less intensive judicial oversight.[10] In the case of DTAP, its success likely has to do with its intensive case management model coupled with the program's

[7] M. Rempel et al. *supra* note 3. Figure 2 of this testimony is not specifically presented in the report cited (M. Rempel et al.) but is constructed on primary data and findings contained in Chapter Nine of the report.
[8] D. B. Marlowe, D. S. Festinger, P. A. Lee, M. M. Schepise, J. E. R. Hazzard, J. C. Merrill, F. D. Mulvaney, and A. T. McLellan, A. T. (2003). Are Judicial Status Hearings a Key Component of Drug Court? During-Treatment Data from a Randomized Trial." 30 *Criminal Justice and Behavior* 141, 162 (2003).
[9] J. Roman, C. Lindquist, and M. Rempel, "Preliminary Results from the Multi-Site Adult Drug Court Evaluation," presented at the National Association of Drug Court Professionals 13th Annual Training Conference, Washington, D.C., June 14, 2007.
[10] National Center on Addiction and Substance Abuse, *Crossing the Bridge: An Evaluation of the Drug Treatment Alternative-to-Prison (DTAP) Program*, A CASA White Paper, New York: Columbia University (2003).

tailored focus on predicates, who face multi-year prison sentences and who may therefore have all the legal incentive they need to do well, even without returning for regular court appearances.

To summarize, the major conclusions to be drawn from this testimony are that: drug courts are an effective model for reducing imprisonment, drug use, and recidivism; and, to the extent that strong legal incentives are applied, relatively more serious defendants are targeted, and the court plays an ongoing, proactive role in supervising the treatment process, the benefits of drug courts will generally be maximized.

Thank you.

LEGAL ACTION CENTER

TESTIMONY OF THE LEGAL ACTION CENTER

Before

THE NEW YORK STATE COMMISSION

ON

SENTENCING REFORM

PUBLIC HEARING

ON

THE FUTURE OF SENTENCING IN NEW YORK STATE

Tuesday, November 13, 2007

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My name is Anita Marton. I am Vice President of the Legal Action Center, a not-for-profit law and policy center specializing in issues involving the criminal justice system, alcohol and drug addiction, and HIV/AIDS. For over three decades, the Legal Action Center has advocated for a fairer and more effective criminal justice system, and has worked to lower the barriers faced by people with criminal records as they strive to become law-abiding, tax-paying citizens. I would like to thank the Commissioner O'Donnell and the Sentencing Commission for the opportunity to testify here today. I would also like to thank the Commission and Director Robert Maccarone for giving the Legal Action Center the opportunity to serve on the Subcommittee on Supervision in the Community. We appreciate that the Commission had a huge mandate and an enormous amount of material and information to gather and synthesize, and are very pleased that many of the recommendations contained in the Blueprint for Criminal Justice Reform, which we drafted for the Coalition for Criminal Justice Reform, have been included in the Sentencing Commission's Preliminary Proposal for Reform.

I am going to begin by highlighting the many recommendations contained in the report that we support. I will then address our recommendations for sentencing reform.

ALTERNATIVES TO INCARCERATION AND DRUG TREATMENT

Community-based programming

New York has reduced the number of people behind bars, yet it still incarcerates many thousands of people who could safely receive intermediate community-based sanctions, which, when targeted to appropriate individuals, have proven to be both more effective and less costly in reducing recidivism than prison. Community corrections, when properly utilized, not only better protect public safety and save money, but also avoid the disruption that incarceration causes families and communities.

Thus, we are pleased that the report recommends improving the quality and accessibility of drug and alcohol treatment and other community-based programming, and recognizes the importance of community-based programs providing a range of services that address identified criminogenic needs, including drug and alcohol, mental health, and sex offender programs, as well as education and employment, anger management, family

functioning, and other programs. The report correctly points out that there are substantial geographic gaps in the availability of these services statewide, and thus we support the Commission's recommendation that a comprehensive plan be developed to provide statewide access to treatment programs and eliminate identified gaps in treatment services. It is critical that Governor Spitzer, in his budget, propose increasing funding for Alternatives to Incarceration (ATI) and treatment in New York State, so that the Sentencing Commission's important recommendation can be implemented.

We also support the Commission's recommendation to expand the use of pre-trial services and the use of a validated risk and needs assessment instrument, and we strongly agree that the use of such an instrument should be dynamic, as risk factors routinely change. We also agree that ATI programs should be evaluated. While we are not experts in assessment instruments and thus cannot endorse one instrument over another, we can state that ATI programs have consistently said that they want to be evaluated, because they are certain that their programs both produce positive change in participant behavior and target and divert appropriate candidates who are headed for prison.

Prison-Based Treatment

We also appreciate that the Commission recognizes that treatment provided in prison is not OASAS certified and we support the Commission's recommendations that all clinical staff in DOCS should be licensed, that there should be close coordination between DOCS and OASAS, and that there be unified implementation of validated drug abuse screening and assessment instruments and joint review and refinement of DOCS treatment models to ensure that they comport with best practices.

MERIT TIME AND YOUTH

We support expanding merit time to allow certain individuals serving determinate sentences for a violent felony offense to earn merit time. We also support extending youthful offender eligibility to at least some non-violent felony offenses committed by 19 and 20 year olds. We agree with the Commission's comment that there is "nothing magical about the age of 18, which separates eligible from ineligible youth." So too, we would add, there is nothing

magical about the age 16 when youth are required under New York law to be treated as adults in the criminal justice system. New York is 1 of only 2 states that still require 16 year olds to be treated as adults. At 16, a youth in New York cannot drink, vote, or serve in the military, but at 16, a youth must be treated as adults in the criminal justice system. Thus, we recommend extending Family Court jurisdiction to youth up to 18 years of age.

REDUCING RECIDIVISM THROUGH EFFECTIVE RE-ENTRY

We agree with the Commission's recommendations for reducing recidivism, including:

- **Expanding work release and improving release procedures** - We support expanding work release and furloughs, to ease the transition back into the community. This should include expanding the number of work release beds, the list of people who are eligible, and the activities that are legitimate work release activities, including drug/alcohol and mental health treatment, education and care of relatives. We also recommend that discharge planning begin when an individual first enters prison. Each individual's educational, vocational, health, and treatment needs should be evaluated using validated assessment tools upon entry to prison, and a *comprehensive* reentry plan designed. This plan should be periodically updated as the individual's needs change. The TPCI model is illustrative.
- **Expanding educational and vocational training in prisons, including providing eligible individuals with assistance in obtaining a post-secondary education** - Eligibility for the New York State Tuition Assistance Program and other public resources should be restored to people in prison. Research has demonstrated that doing so will reduce dramatically return to criminal activity. Vocational programs known to be relevant to the current labor market should be immediately available in DOCS.
- ***Enhancing employment and housing opportunities*** - We support the creation of incentives to hire individuals with criminal histories (not just those who are formerly incarcerated) and the creation of a statutory solution to negligent hiring claims. We also support increased use of Certificates of Relief from Disabilities and Certificates of Good Conduct. Finally, we support eliminating existing barriers to housing in a way

that does not jeopardize public safety and creating a funding stream that provides for an array of housing options for individuals being released into the community. These facilities could accommodate the large number of returning individuals who are unable to find permanent housing or are not able to get access to the services they need to successfully reenter. This can include converting under-utilized work-release or urban facilities into community reentry centers or transitional or supportive housing, building new facilities, or utilizing scatter site options.

- **Procuring identification, Medicaid and other benefits** - We agree that Medicaid paperwork should be completed prior to release so that individuals can get immediate access to health care services. In addition, each person leaving prison and jail should be provided with state-issued identification cards. People coming out of prison or jail are released without any official state identification other than a prison discharge slip or with a DOCS inmate identification card, neither of which are sufficient to obtain a job, a place to live, public benefits, or necessities in the community. DOCS has the proofs of identity needed to get a Motor Vehicles photo ID and thus is in the ideal position to issue state-identification cards.
- **Restoring the right to vote for persons on parole** - Increasing voter participation by people coming out of the criminal justice system gives them a voice and a stake in the community. A recent study found that formerly incarcerated people who vote were half as likely as those who do not vote to end up back in prison. The right to vote - to be empowered and to have a voice in the democratic process - is not only a fundamental civil and human right, it is also critical to an individual's successful reintegration into the community.

We are also very pleased that the report highlights the huge number of individuals who are returned to prison for technical violations. We agree that a significant number of these violations could be addressed using alternative sanctions and community-based treatment options and agree with many of the recommendations suggested for the number of technical violations, including implementing a comprehensive system of graduated sanctions, reducing

the number of conditions of parole for parolees found to be at a low risk of recidivating and re-examining the rule violation criteria. We also agree that parole and probation supervision should be aligned with level of risk and that parole resources should be concentrated during the first year of parole supervision.

VICTIMS' RIGHTS

We strongly support expanding the rights of, and services to, victims, and recommend that a broader view of victims' services be adopted, one that incorporates principles of restorative justice. Restorative justice emphasizes repairing harm caused or revealed by criminal behavior and includes not just restitution, but also other programs such as mediation, victim assistance, assistance for the criminal justice-involved individual, and community service. We support victim notification of the right to participate in restorative justice programs including mediation and defendant-offender reconciliation. We also support the expansion of related services to implement restorative justice programs so that victims can benefit from the criminal justice process in many ways other than retribution.

SENTENCING REFORM

Determinate Sentences

We agree with the members of the Commission who withheld support for the Commission's recommendation for adopting a determinate sentencing scheme in New York because no specific determinate sentencing ranges have been discussed or agreed to and because the determinate sentencing proposal warrants further study. We do not know if the Commission looked at changes in sentencing patterns by jurisdiction, since sentences for certain categories of convictions were changed to a determinate sentencing scheme. Conceivably, lengths of sentences could have been reduced in the New York City, but increased in some upstate counties. Since more people are prosecuted in the City than in other jurisdictions, under such a scenario, it would appear, incorrectly, that sentences have not been affected, or have even gone down. Until we see what sentencing ranges are proposed and until we are confident that a determinate sentencing scheme will not result in harsher penalties, we must withhold our support for this recommendation.

Drug Sentencing Reform and Mandatory Minimum Sentences for Certain Drug and Other Non-Violent Felony Offenses

We appreciate that, because of short time frame, the Commission was unable to complete its review of drug sentencing issues and fully debate the merits of the various arguments for and against additional drug law reform. However, given Governor Spitzer's support for drug law reform, and given the overwhelming evidence that treatment is effective at reducing alcohol and drug use and crime and is less expensive than prison, we urge the Commission to support additional drug law reform. Thousands of non-violent individuals who have no substantial role in the drug trade but who use or sell small quantities of drugs to support their own habits are locked up every year. Our drug laws have deprived children of their parents, wasted enormous human and financial resources, and failed to effectively address the addiction that underlies most drug offenses. These laws have had a particularly onerous impact on communities of color. Although their rates of drug use are similar to those of whites, African Americans and Latinos comprise over 90% of the drug offenders in New York State prisons.

The preliminary report lists the many arguments put forth by prosecutors against further reform of our mandatory minimum and second felony offender laws. I would like to address these arguments and other arguments made by prosecutors one by one:

1. **Drop in Crime** - The prosecutors claim that the mandatory minimum and second felony offender laws, including those for felony drug offenders, "played a vital role in providing us with the framework which has led to the tremendous and historic reduction in crime we have [seen] since about 1993. The reality is that these laws were on the books since the mid-seventies, during which time the crime rates surged. The drop in crime has resulted from a variety of other factors, including reduced crack use, changes in policing, increased use of ATI and drug treatment programs, lower unemployment, and an aging population. The one constant during the rise and fall in crime has been our drug laws, and thus they are not the explanation for the drop in crime.

2. **Risk to Public Safety** - The prosecutors say that DAs should have the role of determining which offenders should be eligible for treatment because they are accountable to their communities for reducing drug dealing and violence. They state that the voices of the people who complain about drugs in the community are not being heard. We have a two responses to this argument:
    - First, under drug law reform, prosecutors will still have an opportunity to voice their concerns about whether a particular individual should be eligible for community-based treatment. They just will not be the only voice heard or have the final say.
    - Second, effectively addressing the addiction that underlies most drug offenses and indeed much criminality can only enhance public safety. We understand that people do not want drugs in their community, and sentencing reform will not affect policing policies. But while people want drug dealers off their streets, they want an effective solution to the problem. They do not want people arrested, imprisoned, coming home, and returning to their old patterns. Instead, they want real answers. Polls have shown time and time again that most people support sending addicted individuals to treatment instead of prison, and most feel that judges, not prosecutors, should make that decision. In fact a poll commission by the Legal Action Center in 2002 found that an overwhelming majority of New Yorkers in all parts of the state believe that New York's drug laws should be changed to allow non-violent, addicted offenders to be sent to treatment instead of prison and that judges and not prosecutors should have the discretion in making those sentencing decisions.
3. **Cooperation with Prosecutors** - The prosecutors state that our drug laws encourage cooperation in the prosecution of those higher up in drug organizations. If our drug laws are reformed, there may be some affect on the ability of prosecutors to get individuals to cooperate. However, it should be noted that most individuals affected by, and incarcerated under our drug laws are low-level, non-violent, individuals who

use or sell small quantities of drugs to support their addiction, and thus are not in the position to have valuable information to give to DAs.

4. **The Role of Coercion and Incentives to Participate in Treatment** - The prosecutors state that the threat of mandatory prison time provides a powerful motivation for drug-addicted individuals to participate in community-based treatment in lieu of prison. If the threat of mandatory prison time is useful in referring and keeping individuals in treatment, judges can exert that authority successfully and indeed are in the best position to exercise a credible threat of coercion.
5. **The Reform Already Enacted Increased Judicial Discretion** - Prosecutors often claim that the 2004 sentencing reforms increased judicial discretion. The laws did increase judges' ability to send people to prison-based treatment. However, despite the fact that an astonishing 70-80% of individuals involved in the criminal justice system have a drug or alcohol problem, these reforms did not enable judges to send even one additional addicted individual to community-based treatment instead of prison.

Studies Show Treatment is Cost Effective, Reduces Recidivism and Enhances Public Safety

Numerous studies have proven that mandatory drug and alcohol treatment is cost effective, reduces recidivism and enhances public safety:

- The Brooklyn District Attorney's office estimates its DTAP program has saved $36.6 million in correction, health care, public assistance and recidivism costs, combined with tax revenues generated by DTAP graduates. A report from the National Center on Addiction and Substance Abuse at Columbia University, found that, compared to a matched group, DTAP participants are 67% less likely to return to prison two years after leaving the program, and graduates had re-arrest rates that were 33% lower; had re-conviction rates that were 45% lower; and were 87% less likely to return to prison and three and one-half times likelier to be employed.
- According to a recent study of the impact of California's Proposition 36 conducted by the Justice Policy Institute, California reduced its drug-possession prison population by

over 34%, while at the same time experiencing a dramatic drop in violent crime. This study follows one by UCLA that showed that Proposition 36 saves California $2.50 for every dollar invested in the program. Over a 30-month follow-up period, this represented a savings to state and local government of $173.3 million.

- A cost benefit analysis conducted by the Legal Action Center found that for every individual diverted from prison to community-based treatment, New York could save approximately $60,000.
- According to a meta-analysis conducted on 78 studies of drug treatment conducted between 1965 and 1996, "drug abuse treatment has both a statistically significant and a clinically meaningful effect in reducing drug use and crime...."

We support the Commission's recommendation that the law should create an express statutory exception to the mandatory sentencing statutes when all parties agree that an individual facing mandatory prison upon conviction should receive drug, alcohol, mental health or other community-base treatment - as long as the statutory exception does not result in longer records for individuals diverted, since currently cases are dismissed or reduced to a misdemeanor, when a second felony offender is diverted.

We also urge the Commission to make the following recommendations:

1. **Reform our sentencing laws so that judges and prosecutors have expanded opportunities to send appropriate individuals to community-based programs instead of prison.**
   - Probation should be an option for individuals convicted of first time Class B felony drug offenses. When such a person is given a sentence of probation and assessed (by an addiction specialist licensed or certified by OASAS) as having a drug or alcohol dependency problem for which treatment would be beneficial, participation in treatment should be a mandatory condition of sentence.
   - Probation with a mandatory treatment requirement should also be an option for individuals convicted of a first time Class B or predicate Class B, C, D, or E drug offenses involving sale of or possession with intent to sell one eighth of an ounce or less of a narcotic drug or other controlled substance, who are assessed (by an

addiction specialist licensed or certified by OASAS) as having a chemical dependency problem for which treatment would be beneficial. Since possession of less than an eighth of an ounce of a narcotic drug is currently only a misdemeanor offense, a sentence of probation for sale of or possession with intent to sell that amount is more proportionate, especially when the individual is addicted and in need of treatment.

- There should also be an opportunity for court supervised drug treatment for other individuals charged with first time Class B and predicate Class B, C, D and E drug felonies. If individuals successfully complete treatment, their cases should either be dismissed or reduced to a misdemeanor, depending on the conditions specified by the court.

2. **Make a wider range of defendants eligible for diversion from prison to community-based programs, including addicted individuals charged not just with drug crimes but other offenses as well, and non-addicted individuals charged with non-violent offenses - and expand the category of individuals eligible for retroactive relief.**

   - Community-based treatment opportunities should also be provided to addicted individuals who have a history of minor violence, provided they meet other qualifications for community custody. Individuals incarcerated on Class B drug offenses should have an opportunity to go before a judge and have their sentences reduced, in accordance with the revised sentencing guidelines recently passed by the Legislature.

Good Afternoon. My name is Amy James-Oliveras. I am appearing before you today as the co-director of CURE-NY, an organization committed to reducing recidivism by reforming the criminal justice system as well as the individual. I thank Gov. Spitzer for creating this commission and applaud each of you individually for involving yourselves so actively.

CURE-NY is just one of over thirty organizations belonging to the Coalition for Rehabilitation and Re-entry. My recommendations for parole and the eventual discharge from supervision are representing, in part, the correlating platform issue of this coalition.

I am here to talk about parole supervision, primarily the ability to be discharged from it. In addition to my own personal belief, there is an enormous amount of current, evidence based data to justify returning to the pre 1998 version of executive law 259j and allowing the parole commissioners the discretion to grant merit discharge from parole to all but a small percentage of the people on parole.

A great majority of the statements I will be making are from research results published just a few months ago. I am including the supporting articles and sources. The research and science behind parole reforms supports the following:

- Recidivism is one of the major contributors to current prison admissions
- Recidivism is most common among those recently released
- Successful parole policies must be based on incentives rather than disincentives
- Successful parole policies should build in motivational incentives
- Incentives can effect lasting behavioral change
- The prospect of getting off parole can motivate lasting, positive change.
- Negative interventions, inconsistently applied, can encourage recidivism.
- Work, school and treatment are keys to reducing recidivism.

Recidivism studies have consistently shown that those who will return to crime will do so quickly. It is important that parole supervision is focused on those at high risk to re-offend, thus ensuring public safety. Resources should not be wasted on those that have demonstrated that they don't need supervision and are least likely to re-offend. Instead, services should be front end loaded to address the needs of those most likely to violate the conditions of their parole or commit new crimes.

I am including an Earned Discharge Assessment Tool that will be used in the state of California. The risk factors considered and the positive or negative points assigned to each one show that many of those currently on lifetime parole in New York State possess the non-static, related risk factors that show no need of supervision. I am speaking of residential factors, employment history, abiding by conditions of parole and restitution compliance. The other factors considered will never change...conviction, criminal history, age at time of conviction etc.

When New York eliminated discharge from parole for those with life sentences, other than those with drug convictions, they became one of two states to have lifetime parole for violent felony offenses. We, as a state, have decided to punish, forever, men and women who our appointed parole commissioners have deemed as worthy and safe for return to society. My understanding from several conversations with and presentations by Parole Chairman George Alexander, Executive Director of Parole Felix Rosa and several other directors of their agency, is that the role of parole is becoming one with more emphasis on assisting those under supervision and less about policing. At no time have I ever heard anyone in this administration describe the function of parole to be one of punishment. Yet being on parole long after necessary for public safety reasons or rehabilitative reasons is a continuation of the punishment phase of ones sentence.

Being denied the right to vote is certainly punishment. What message is being sent to people, especially our youth, when we show them that we will never see these men and women as whole people; that no matter what the track record is, a person will never be trusted again or allowed the freedom to choose their place of employment, where they reside, where they can travel, and a whole variety of other things.

Men and women with violent felony convictions that have been out of prison for three, five, ten years and more without a single violation of their conditions of parole are continuing to abide by the conditions outlined on their green sheet, without ever being able to earn a termination to these sanctions. This is punishment.

I have spoken with dozens of people serving lifetime parole. Each one has said "it beats being in prison, but it isn't really being free".

This is not about trying to garner sympathy for people on lifetime parole; it is about the lack of an evidence based reason for ever imposing lifetime parole in the first place. The evidence weighs in on the side of terminating parole as soon as safely possible. Many field officers, as recently as this past week, are still offering to put their lifers in for discharge. The people on parole are the ones informing them of the change, and the PO's are the ones not understanding the rationale for it. They understand that if a person has not committed a new offense within in the first three years of release, it is likely, within all reasonable probability that they never will.

In addition to familiarizing myself with the extensive research done by professionals in the field, I have spoken with many parole officers and parole commissioners, both former and current, about this dilemma. Without exception they have shared the opinion that this newly eliminated class of people on parole, those with life sentences, are the easiest to supervise and a preferred caseload, being that they are unlikely to commit a new offense violation.

I recommend restoring the discretion to the Board of Parole the discretion afforded them for sixty years prior to 1998, to discharge any person from parole that serves three consecutive years of unrevoked parole and whose discharge would not conflict with the best interests of society and who has demonstrated a good faith effort to comply with any order of restitution.

Thank you for your time. I hope that my recommendation will be take into consideration.

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The Science Behind Parole Reform and Earned Discharge

Compiled By Dr. Joan Petersilia

Parolee recidivism is one of the major reasons the U.S. prison population is growing. Blumstein & Beck (1999) estimated that 42 percent of the total growth in state prison admissions during 1980 through 1999 resulted from parole violators.

Recidivism is very common among recently-released offenders. A Bureau of Justice Statistics (BJS) study found that just over one-half (52%) of all released prisoners in a national sample were returned to prison within three years.

26 percent were returned to prison solely for a technical violation (Langan & Levin 2002).

Recidivism studies consistently show that inmates who are going to return to crime do so quickly (Langan et al. 2002, National Research Council 2007). If prisoners can remain completely arrest free for the first year after release, they have low probabilities of recidivism thereafter.

Successful parole policies must balance the carrot and stick. One of the core missions of parole is behavioral change. In recent years parole supervision has shifted from a casework/rehabilitation model to a surveillance/deterrence model (Petersilia 2003, Travis 2005). Today's parole contract clearly spells out the negative consequences that will be applied if a parolee fails to comply with specified conditions. This model is based almost entirely on disincentives rather than incentives, and as such, fails to reflect scientific principles of how 'contracts' can be best structured to foster long-term behavioral change. A balance of rewards and sanctions is necessary to foster prosocial behavior and treatment participation (*Andrews & Bonta 2006, Bandura 1977*).

Successful parole policies should build in motivational incentives. Current parole contracts fail to build in sufficient motivational incentives and positive rewards to encourage parolees to stay involved in treatment programs. Research shows that offenders should be involved in programs for a minimum of 3 to 6 months to achieve measurable positive outcomes (Aos et al. 2006, Hser et al. 2004, National Institute on Drug Abuse 2006, National Research Council 2007). For most parolees, getting discharged from parole is a major motivation. Combining both of these elements – behavioral contracting and accelerated parole discharge – produces tangible benefits for public safety, recidivism reduction, and resource allocation.

Incentives can effect lasting behavioral change. The parole system today is focused almost entirely on *disincentives* and negative sanctions, whereas *incentives* and positive reinforcements are required for lasting change. Research shows that punishment-only systems tend to cause people to change their behavior briefly or only long enough to avoid further punishment, but seldom do such changes continue once the threat of sanction is lifted (Bandura 1977).

Negative interventions, inconsistently applied, can encourage recidivism. Inconsistent application of negative interventions may actually *increase* the risk of offending. On the other hand, the procedural justice literature suggests that if the offender believes that he or she is being treated fairly, they are more likely to comply with the law or program requirements (Tyler 2003).

The prospect of getting off parole can motivate lasting, positive change. Parolees have consistently said that one of the strongest motivators to enroll in rehabilitation programs and keep attending would be the prospect of getting *off* parole supervision. Today, parolees are successfully discharged from parole if they adhere to their parole conditions (mostly, remain crime-free) for the length of that pre-assigned time period. They have little opportunity to reduce the length of their imposed parole term once it has been imposed. In California, where nearly 120,000 prisoners are released each year, virtually all of them are assigned to three years parole supervision, regardless of risk or need classifications (Petersilia 2006).

Work, school and treatment are keys to reducing recidivism. Recidivism rates are even further reduced if a parolee participates in work, education and substance abuse programs (Lipsey & Cullen 2007, National Research Council 2007).

Summary of Joan Petersilia's article, "Employ Behavioral Contracting for "Earned Discharge" Parole, *Criminology & Public Policy*, Vol. 6, No. 4, 2007. Click here to view entire article and sources.

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September 17, 2007

Parole Reform Increases Supervision of Serious Offenders; Adds Evidence-Based Screening to Reduce Recidivism

Earned Discharge Provides Incentives for Parolees to Rehabilitate

SACRAMENTO-Today the California Department of Corrections and Rehabilitation (CDCR) announced changes to parole regulations that will enable parole agents to focus more resources on high-risk parolees that are most likely to commit new crimes. Low-level, non-violent parolees that are least likely to commit new crimes will be eligible to earn discharge from parole after six months if they meet strict guidelines. These new regulations were developed in consultation with national experts, and are modeled after evidence-based practices proven successful in reducing recidivism in 33 other states.

The regulations give parole agents a new, powerful and science-based tool to evaluate parolees and focus on those most likely to recidivate. Sex offenders, gang members and other serious, violent or high-risk offenders are ineligible for discharge under these reforms. Additionally, allowing low-risk offenders to earn discharge from parole by completing rehabilitation, education and job training programs creates an incentive for inmates to participate in rehabilitation programs, which in turn reduces recidivism.

Upon approval by the Board of Parole Hearings, the regulations will be put into effect as soon as November. A parole district in south Orange County is the first district equipped to start implementing these regulations. The remaining 23 districts will be brought online within 90 days following analysis of the Orange County program. CDCR will work with Orange County, and local law enforcement to evaluate the effectiveness of this program.

In California, approximately 120,000 inmates are released each year from state prisons. Every offender, regardless of commitment offense or posed risk, is required to report to CDCR's Division of Adult Parole Operations (DAPO) for a statutorily required period of parole, a practice unique to California and Illinois. Estimates suggest that within the first three years after release, 65-70 percent of offenders violate the terms of their parole or commit a new crime. In 2006, 68,000 parolees were returned to prison for violations of their imposed conditions of parole serving an average four month period of revocation.

"Studies and experts have repeatedly shown that ineffective parole policies in California contribute to our state having some of the highest recidivism rates in the country, which significantly contributes to the crisis-level overcrowding in our prisons," said CDCR Secretary James Tilton. "By using evidence-based screening strategies we will increase supervision of serious offenders on parole, and not waste resources on those least likely to re-offend."

"Removing low risk parolees demonstrating good behavior from the overburdened caseloads of parole agents will free them to keep a closer eye on the more serious threats to commit new crimes in our communities," said Tom Hoffman, Director of the Division of Adult Parole Operations. "With our agents actively enforcing Jessica's Law and monitoring serious and violent parolees, it is imperative that we maximize our resources in the interest of public safety."

The earned discharge strategy is an evidence-based practice that has been shown in numerous studies to reduce recidivism and the commission of new crimes by parolees. This policy was one of the recommendations submitted to the Governor by the Expert Panel Report [Page 13] in July 2007. It was also included in the report submitted to the state by the California Independent Review Committee of 2004, chaired by Governor Deukmejian [recommendation #30 in the Inmate and Parolee Population Management Section of the Independent Review Panel], which recommended: "Discharge parolees who are determined to be very low risk from parole three months after they are released from prison." Other reports by the Little Hoover Commission (1994 and 2006), and on numerous occasions by Dr. Joan Petersilia, have also recommended earned discharge.

"Recidivism studies have consistently shown that inmates who are going to return to crime do so quickly. By reallocating scarce parole resources away from those who have demonstrated they don't need the services and the surveillance, it will allow agents to focus on those who pose a higher risk," said Dr. Joan Petersilia, co-chair of the 2007 Expert Panel and Director of Parole Reform for Governor Schwarzenegger's Strike Team. "By rewarding participation in work, education, and substance abuse programs we will motivate parolees to complete rehabilitation programs as an incentive to earn their way off of parole. Research tells us that by implementing earned discharge in California we can replicate many of the positive results experienced by other states."

Research suggests that during the first 180 days of release parolees have the highest recidivism and technical violation rates. By focusing parole services and supervision on these initial days of release, recidivism and return-to-custody rates are expected to significantly decline. The earned discharge regulations will also allow parole agent resources to be more effectively reallocated to concentrate supervision on more serious violators for longer periods.

Earned Discharge Parole Policy Process: The new regulations will be initially implemented in one south Orange County parole district. This will allow CDCR and the Governor's rehabilitation strike team to closely evaluate its impact prior to a statewide rollout.

Under these regulatory changes, select parolees who are violation-free and have been reviewed for risks and needs assessments may be recommended for earned discharge after six months of good behavior, based on a number of criteria. Those inmates considered for earned discharge will be reviewed in a four step process.

Step 1: The two lowest-risk levels of active parolees, those classified as minimum supervision and controlled service, will be reviewed for referral to Step 2. As of Sept. 4, 2007, there were **27,851** cases classified as minimum supervision, and **58,694** cases classified as requiring controlled service. Offenders who are excluded from consideration for earned discharge include:

- *Registered sex offenders;*
- Parolees whose current commitment offense is either serious or violent;
- Parolees who have been on active parole for a period of six months or longer who committed violations based on CalParole and/or the Revocation Scheduling Tracking System (RSTS), or broke the terms of their parole; and,
- Parolees currently assigned to the United States Immigration and Customs Enforcement (ICE), *state mental hospitals, and few* select others.

Step 2: All eligible Step 1 cases will undergo an additional risk assessment to identify further exclusionary criteria which may prohibit them from being referred to Step 3. These criteria include:

- Parole violations not captured in CalParole/RSTS;
- Prior convictions for serious and violent crimes;
- Active cases in local custody and not in revocation status;
- Gang affiliations;
- Any other identified exclusionary factors as determined by CDCR.

Step 3: All remaining cases will be referred to the respective parole unit for final review. During this review the agent of record, unit *supervisor and district administrator will review the parolees'* documents. In addition to the findings of the assessment tools, parole officers will also consider such factors as whether the parolee:

- Has a stable residence;
- Has employment or a dependable means of ongoing financial support;
- *Has a history of successful completion of an educational, vocational or community service programs; and,*
- Has demonstrated compliance with victim restitution orders. These and other factors may be considered as supportive evidence of *appropriateness* for consideration for earned discharge.

Step 4: Those control service cases and minimum supervision cases that have been violation free for six months, and are not removed based on exclusionary criteria in the above steps, will be recommended for earned discharge – unless parole officers at the unit, supervisor, and district administrator levels concur that the parolee represents a continued threat to public safety that warrants continued supervision. All recommendations for earned discharge prior to the completion of 12 months of continuous parole will then also be submitted to the Board of Parole Hearings for consideration and final approval.

Broader Parole Reforms: Earned discharge is one component of a package of parole reforms that CDCR is in the process of *undertaking as part of a broader overall strategy to realign resources with risk.* In addition to earned discharge, this strategy also includes:

- Providing better inmate transitions from prison to parole through secure community reentry facilities;
- Ensuring better coordination with crime victims before the release of their offenders;
- *Restructuring parole supervision using risk assessments to better identify high and low-risk parolees for caseload placements; and,*
- Developing a decision making matrix to be used in assessing when to revoke parolees, as well as alternative sanctions to prison, such as drug treatment beds, and others.

Additional Resources:

- Research Document: The Science Behind Parole Reform and Earned Discharge – by Dr. Joan Petersilia
- Fact Sheet on Parole Basics.
- Proposed Earned Discharge Regulations.

EMPLOY BEHAVIORAL CONTRACTING FOR "EARNED DISCHARGE" PAROLE

JOAN PETERSILIA
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Roughly 600,000 people are released each year from state and federal prisons in the United States, about 1,600 a day. About 80% of all releases will be required to report to local parole authorities and to begin the process of supervised parole, which lasts an average of just over 2 years (Hughes et al., 2001; Petersilia, 2003).[1]

During parole supervision, the parolee must comply with a standard set of release conditions, such as living at an approved address, meeting with a parole officer, staying drug-free, not committing new crimes, and not leaving the jurisdiction. Some parolees have additional conditions, such as random drug testing or participation in a treatment program. No prisoner has a legal right to obtaining parole. Rather, it is a privilege provided by state grants, through a contractual arrangement with a prisoner, who signs a parole release contract in exchange for the promise to abide by these specified conditions. Parole officers—sometimes called parole agents—are responsible to ensure that parolees fulfill the terms of their contracts. If the parole officer discovers that these conditions have not been met, then the parole officer typically has the discretion to consider the parole "violated," and can change the conditions of release or can recommend that the parolee be returned to prison after a parole revocation hearing.

The failure rate is very high among released prisoners. A Bureau of Justice Statistics study found that just over one half (52%) of all released prisoners in a national sample were returned to prison within 3 years, and 26% were returned to prison solely for a technical violation (Langan and Levin, 2002). These high parole revocation rates are one major factor linked to the growing U.S. population. Blümstein and Beck (1999) estimated that 42% of the total growth in state prison admissions during 1980 through 1999 resulted from parolees violating parole conditions.

Ex-prisoners contribute to more than just prison crowding; they also commit crimes disproportionately. Rosenfeld et al. (2005) estimated that between 1994 and 1997, ex-prisoners accounted for 10% to 15% of all arrests, and arrest frequencies for returning prisoners were 30 to 45 times higher than for the general population. Most released prisoners who are

1. Parole supervision can last much longer in some states. For example, Texas parole supervision is often for 10 to 20 years, and several recently enacted laws require lifetime supervision and registration of sex offenders. The 2-year time period reflects the average time served on parole prior to discharge or return to custody. No national data are available on the length of parole term imposed.

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arrested for new crimes will be returned to prison—and most of them will be released again (Blumstein and Beck, 2005).

How can we alter this release-and-return-to-prison scenario? The answer is right in front of us if only we look. We must revise the current "contract" between the parole officer and the offender so that it reflects research evidence on how to increase motivation and promote behavioral change in resistant clients. At the center of the revised contract must be a system of "earned discharge" or accelerated release, whereby parolees have the ability to reduce the total length of their parole term by demonstrating arrest-free behavior and self-sufficiency.

SCIENTIFIC PRINCIPLES TO INITIATE AND SUSTAIN BEHAVIORAL CHANGE IN HARD-TO-TREAT CLIENTS

One core mission of parole is behavioral change. But over time, with the demise of the medical model and the increasing "get tough on criminals" public attitude, parole supervision changed from a casework/rehabilitation model to a surveillance/deterrence model (Petersilia, 2003; Travis, 2005). Today's parole contract spells out clearly the negative consequences that will be applied if a parolee fails to comply with specified conditions. It is a model almost entirely based on disincentives rather than on incentives, and as such, it fails to reflect scientific principles of how "contracts" can be structured to foster long-term behavioral change. A balance of rewards and sanctions is necessary to foster prosocial behavior and treatment participation (Andrews and Bonta, 2006; Bandura, 1977).

Current parole contracts also fail to include sufficient motivational incentives and positive rewards to encourage parolees to stay involved in treatment programs. Research has shown that offenders should be involved in programs for a minimum of 3 to 6 months to achieve measurable positive outcomes (Aos et al., 2006; Hser et al., 2004; National Institute on Drug Abuse, 2006; National Research Council, 2007). For most parolees, to be discharged from parole is a major motivation. To combine both of these elements—behavioral contracting and accelerated parole discharge—produces tangible benefits for public safety, recidivism reduction, and resource allocation.

Behavioral contracting has been shown to be a core component to achieve change in a variety of challenging behaviors, including the modification of eating behaviors, the prevention of repeat attempts in suicidal patients, the treatment of personality disorders, the increase of the attention span of students with attention deficit and self-control issues, and the decrease of alcohol-dependency and illicit drug use and other criminal and

HIV risk behavior (for a review, see Clark et al., 1999). Moreover, contracting has been used successfully in a variety of criminal justice settings, including drug courts, mental health courts, juvenile justice programs, and probation and parole (Bralley and Prevost, 2001; Clark et al., 1999; Gottfredson et al., 2003; Peters and Murrin, 2000; Prendergast et al., 2006; Wilson et al., 2007; Wolff and Pogorzelski, 2005). Criminologists have endorsed its applicability to parole (Petersilia, 2003; Taxman et al., 2004), and several state agencies are now using it with success (Burke, 1997; McGarrell et al., 2004; Meredith, 2001; Taxman et al., 2004).

A behavioral contract for parolees would be simply a written contract that specifies the parolees' behavioral obligations in meeting the terms of the contract and the parole agents' obligations once the parolee has met these obligations. Although it sounds straightforward, it is very different from the parole contract used in most agencies today. Currently, parole contracts impose a unilateral application of conditions on parolees by the State, are enforced with a high degree of officer discretion, and focus almost exclusively on the sanction and the punishment of offenders who fail to comply with legal conditions (Feeley and Simon, 1992; Lynch, 2000; McCleary, 1992; Petersilia, 1999). It is a system focused almost entirely on *disincentives* and negative sanctions, whereas *incentives* and positive reinforcements are required for lasting change. Research shows that punishment-only systems tend to cause people to change their behavior briefly or only long enough to avoid additional punishment, but such changes seldom continue once the threat of sanction is lifted (Bandura, 1977).

To increase parole and treatment effectiveness, the target of the intervention should have significant input into the conditions that are established (assuring that the person understands what they are being asked to do), positive reinforcements should outweigh negative sanctions by at least four to one, and both positive and negative sanctions must be delivered frequently and consistently (Andrews and Bonta, 2006; Gendreau et al., 1996; Hanlon et al., 1999). Inconsistent application of negative interventions may actually *increase* the risk of offending. On the other hand, the procedural justice literature suggests that if the offender believes that he or she is being treated fairly, they are more likely to comply with the law or program requirements (Tyler, 2003). Sherman (1993) suggests that punishment perceived as unjust or excessive will lead to defiant pride that increases future crime. Behavioral contracting can instill a sense of procedural justice because both the necessary steps toward progress and the sanctions for violating the contract are specified and understood in advance.

But what is sufficiently motivating to get parolees engaged in the process of their own supervision? The author has conducted dozens of interviews with parolees over the last several years and has asked them what

might motivate them to enroll in rehabilitation programs and continue to attend. They have told her consistently that one of the strongest motivators would be the prospect of being *released* from parole supervision. Today, parolees are discharged successfully from parole if they adhere to their parole conditions (mostly, remain crime-free) for the length of that preassigned time period. They have little opportunity to reduce the length of their imposed parole term once it has been imposed. In California, where nearly 120,000 prisoners are released each year, virtually all of them are assigned to 3 years of parole supervision, regardless of risk or need classifications (Petersilia, 2006).

FROM SCIENCE TO PRACTICE: IMPLEMENTING EARNED DISCHARGE PAROLE TERMS

First, we should begin by reducing the total length of time required on parole if the offender represents little risk of returning to crime. For example, parole supervision could last 6 months for low-risk inmates incarcerated for 1 to 2.5 years; 6 to 12 months for moderate-risk inmates serving 2.5 to 5 years; and 12 to 36 months for high-risk inmates who serve more than 5 years. Research suggests the impact of parole supervision diminishes after 15 months (Bhati, 2004). Such a proposal would take into account the seriousness of the original crime and the offender's risk, shorten parole terms overall, and front-load scarce parole resources on those parolees who need more services and supervision.

Second, parole terms should not depend on solely "sustaining no new arrests" but also on completing prescribed prosocial activities. Offenders who complete activities (e.g., drug treatment or education) should be rewarded with a reduction in the length of the total time they are required to be on parole. Here is how Earned Discharge might work. Let's assume that the parole supervision term (imposed at release) is a maximum of 3 years. At release, the parolee is told:

- Remain arrest-free for the first year, and we will subtract 1 month off your total parole supervision period for each arrest-free month you have in the second year. So, if you remain arrest-free for 2 years, we reduce your entire parole supervision period by 1 year. You have 2 years to be under supervision instead of 3.
- You can reduce your supervision from 2 years to 1 1/2 years if you engage in community service and complete all payments of victim restitution.
- You can reduce your supervision from 2 years to 1 year if you participate in prosocial or self-improvement programs (drug, education) or remain fully employed.

- You can reduce that 3-year parole term to 6 months if you can show us that at the end of 6 months, you have achieved stability in housing, employment, and substance abuse/mental health for a period of 6 months.

The public has little to lose in this arrangement. Every parolee must be on parole for at least 6 months. Recidivism studies consistently show that inmates who will return to crime will do so quickly (Langan et al., 2002; National Research Council, 2007). So, parolees who wish to remain criminally active are under parole supervision when they need to be. If prisoners can remain completely arrest-free for the first year after release, they have low probabilities of recidivism thereafter. Recidivism rates are even reduced more if a parolee participates in work, education, and substance abuse programs (Lipsey and Cullen, 2007; National Research Council, 2007). Parolees are self-selecting into low risk-of-recidivism groups so the public safety risks of an "earned discharge" parole system are minimal, and the cost efficiencies are increased because parolees who do not need supervision are removed from crowded caseloads.

We have much to gain from restructuring parole supervision in this manner. A greater number of parolees might participate usefully in rehabilitation programs if they were convinced that the duration of their parole might be reduced appreciably. Program participation not only addresses the individual's personal circumstances, but also it helps the convict to establish connections with law-abiding citizens, which, in turn, increase their social networks and legitimate opportunities. Over time, many will develop "stakes in conformity" and gradually will reorient their assessment of the costs and benefits of crime.

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Joan Petersilia is a Professor of Criminology, Law, and Society in the School of Social Ecology, University of California, Irvine (UCI). Prior to joining UCI, she was the director of the Criminal Justice Program at RAND. She has directed major studies in policing, sentencing, career criminals, juvenile justice, corrections, and racial discrimination. Her expertise includes policy analysis, program evaluation, cost/benefit analysis, and statistical analyses. Dr. Petersilia's current work focuses on parole and prisoner reintegration. She is the director of the newly established UCI Center for Evidence-Based Corrections and has served as president of both the American Society of Criminology and the Association of Criminal Justice Research in California. She is an elected fellow of both the American Society of Criminology and the National Academy of Public Administration. She is the former vice-chair of the National Research Council's Committee on Law and Justice. Her most recent book *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003) received the *Choice* award for outstanding academic book. Her other books include *Reforming Probation and Parole in the 21st Century* (2002); *Crime: Public Policies for Crime Control*, edited with James Q. Wilson (2002); *Prisons*, edited with Michael Tonry (1999); *Criminal Justice Policy* (1998); and *Community Corrections* (1998). Dr. Petersilia has a B.A. degree (1972) in sociology from Loyola University, an M.A. degree (1974) in sociology from Ohio State University, and a Ph.D. degree (1990) in criminology from the University of California, Irvine.

State of California
EARNED DISCHARGE ASSESSMENT
CDCR 2162 (09/07)

Department of Corrections and Rehabilitation
Division of Adult Operations

PAROLEE'S NAME (LAST, FIRST, MI)	CDC NUMBER

ADULT OFFENDER RISK FACTORS

I. Demographics					
1. *Age at time of current sentence.*	○ *60 or older* ○ 50 to 59 ○ 40 to 49 ○ 30 to 39	**(0)** **(1)** **(2)** **(3)**	○ 20 to 29 ○ 18 to 19 ○ 13 to 17	**(4)** **(5)** **(6)**	**Risk Score**
2. Gender.	○ Female	**(0)**	○ Male	**(1)**	
II. Juvenile Record (All prior and current times the offender was sentenced. Each sentence is defined by a unique or different date of sentence.)					
3. Prior juvenile felony adjudications.	○ None ○ One ○ Two	**(0)** **(1)** **(2)**	○ Three ○ Four ○ Five or more	**(3)** **(4)** **(5)**	
4. Prior juvenile non-sex violent felony adjudications for: Homicide, robbery, kidnapping, assault, extortion, unlawful imprisonment, custodial interference, domestic violence, or weapon.	○ None ○ One	**(0)** **(1)**	○ Two or more	**(2)**	
5. Prior juvenile sex adjudications.	○ None	**(0)**	○ One or more	**(1)**	
6. Prior commitments to a juvenile institution.	○ None ○ One	**(0)** **(1)**	○ Two or more	**(2)**	
III. Commitment to the California Department of Corrections and Rehabilitation					
7. Current commitment to the California Department of Corrections and Rehabilitation.	○ First ○ Second ○ Third	**(1)** **(2)** **(3)**	○ Fourth ○ Five or more	**(4)** **(5)**	
IV. Total Adult Felony Record (All prior and current times the offender was sentenced. Each sentence is defined by a unique or different date of sentence.)					
8. Felony homicide offense: e.g., murder, manslaughter.	○ None	**(0)**	○ One or more	**(1)**	
9. Felony sex offense.	○ None ○ One	**(0)** **(1)**	○ Two or more	**(2)**	

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State of California
EARNED DISCHARGE ASSESSMENT
CDCR 2162 (09/07)

Department of Corrections and Rehabilitation
Division of Adult Operations

PAROLEE'S NAME (LAST, FIRST, MI)	CDC NUMBER

IV. Total Adult Felony Record (Continued)					
10. Felony violent property conviction for a felony robbery, kidnapping, extortion, unlawful imprisonment, custodial interference offense, harassment, burglary 1st, arson.	O None O One	(0) (1)	O Two or more	(2)	Risk Score ☐
11. Felony assault offense – not domestic violence related.	O None O One	(0) (1)	O Two O Three or more	(2) (3)	☐
12. Felony domestic violence or *violation of a domestic violence* related protection order, restraining order, or no-contact order, harassment, malicious mischief.	O None O One	(0) (1)	O Two or more	(2)	☐
13. Felony weapon offense.	O None O One	(0) (1)	O Two or more	(2)	☐
14. Felony property offense.	O None O One O Two	(0) (1) (2)	O Three O Four O Five or more	(3) (4) (5)	☐
15. Felony drug offense.	O None O One	(0) (1)	O Two O Three or more	(2) (3)	☐
16. Felony escape.	O None	(0)	O One or more	(1)	☐
V. Total Adult Misdemeanor Record (Total number of sentences, past and current, involving a misdemeanor conviction for)					
17. Misdemeanor assault offense – not domestic violence related.	O None O One O Two	(0) (1) (2)	O Three O Four O Five or more	(3) (4) (5)	☐
18. Misdemeanor domestic violence assault or violation of a domestic violence related protection order, restraining order, or no-contact order.	O None O One	(0) (1)	O Two or more	(2)	☐
19. Misdemeanor sex offense.	O None O One	(0) (1)	O Two or more	(2)	☐

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State of California
EARNED DISCHARGE ASSESSMENT
CDCR 2162 (09/07)

Department of Corrections and Rehabilitation
Division of Adult Operations

PAROLEE'S NAME (LAST, FIRST, MI)	CDC NUMBER

V. Total Adult Misdemeanor Record (Continued)

					Risk Score
20. Misdemeanor or other domestic violence; any non-violent misdemeanor convictions such as trespass, property destruction, malicious mischief, theft, etc., that are connected to domestic violence.	O None	(0)	O One or more	(1)	☐
21. Misdemeanor weapon offense.	O None	(0)	O One or more	(2)	☐
22. Misdemeanor property offense.	O None O One	(0) (1)	O Two O Three or more	(2) (3)	☐
23. Misdemeanor drug offense.	O None O One	(0) (1)	O Two or more	(2)	☐
24. Misdemeanor escapes.	O None	(0)	O One or more	(1)	☐
25. Misdemeanor alcohol offenses.	O None	(0)	O One or more	(1)	☐

VI. Total Sentences/Supervision Violations

26. Total sentence/supervision violations.	O None O One O Two	(0) (1) (2)	O Three O Four O Five or more	(3) (4) (5)	☐

Total Combined Static Risk Score _____

Parole Agent's Name (Last, First, MI)	Badge #	Date Signed	Parole Agent's Signature

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State of California
DYNAMIC RELATED RISK FACTORS
CDCR 2162-A (09/07)

Department of Corrections and Rehabilitation
Division of Adult Parole Operations

PAROLEE'S NAME (LAST, FIRST, MI)	CDC NUMBER

Parole Related Risk Factors

					Risk Score
1. Residential Factors	O Self/family O Friends O Transitional housing	(-2) (+1) (+2)	O One or More Address Change. O Transient or Homeless.	(+2) (+3)	☐
2. Employment History	O Fulltime O Self-supporting	(-2) (-1)	O Part time O None	(-1) (+3)	☐
3. Abiding by Conditions of Parole	O No Positive Drug Test. O Reporting. O Following Instructions. O Positive attitude. O Participating in recommended programs.	(-2) (-2) (-2) (-1) (-1)	O Negative attitude. O Hard to Contact. O One Positive Drug Test. O Two or More Positive Drug Tests. O Failure to Follow Instructions O Nonparticpant	(+1) (+1) (+1) (+2) (+2) (+2)	☐
4. Victim Information	O Restitution Paid O Attempting to Pay Restitution. O Complying With No Contact Instructions.	(-2) (-1) (-1)	O Restitution Not Paid O Non-Compliance With No Contact Instructions	(+2) (+2)	☐

Total Combined Dynamic Risk Score _____

3 Points or Less: Eligible.
4 Points or More: Not eligible.

Parole Agent's Name (Last, First, MI)	Badge #	Date Signed	Parole Agent's Signature

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State of California
STATIC RISK FACTOR WEIGHTING
CDCR 2162-B (09/07)

Department of Corrections and Rehabilitation
Division of Adult Parole Operations

PAROLEE'S NAME (LAST, FIRST, MI)	CDC NUMBER

Felony Score	Property & Violent Score	Violent Score	Static Risk Factor
STATIC RISK FACTOR WEIGHTING			
Part I - Demographics			
+ 5	+ 4	+2	Age at Time of Sentence for Current Offense.
+ 5	+ 4	+4	*Gender.*
Part II – Juvenile Record			
+ 4	+ 4	+ 2	Prior Juvenile Felony Adjudications.
+ 2	+ 2	+ 5	Prior Juvenile Non-Sex Violent Felony Adjudications.
- 3	- 2	- 1	Prior Juvenile Felony Sex Adjudications.
+ 4	+ 3	+ 2	Prior Commitments to a Juvenile Institution.
Part III – Commitment to Department of Corrections and Rehabilitation			
+2	+1	+1	Current Commitment to the Department of Corrections
Part IV – Total Adult Felony Record			
- 5	- 3	+ 1	Felony Homicide Offense.
- 4	- 2	+ 2	Felony Sex Offense.
+ 6	+ 5	+ 5	Felony Violent Property Conviction for a Felony Robbery, Kidnapping, Extortion, Unlawful Imprisonment, Custodial Interference Offense.
+ 1	+ 2	+4	Felony Assault Offense – Not Domestic Violence Related.
+ 3	+ 6	+ 10	Felony Domestic Violence Assault or Violation of a Domestic Violence Related Protection Order, Restraining Order, or No-Contact Order.
+ 3	+ 2	+ 5	Felony Weapon Offense.
+ 4	+ 5	0	Felony Property Offense.
+ 6	- 2	0	Felony Drug Offense.
+ 5	+ 3	+ 1	Felony Escape.
Part V – Total Adult Misdemeanor Record			
+ 2	+ 2	+ 3	Misdemeanor Assault Offense – Not Domestic Violence Related.
+ 2	+ 3	+ 3	Misdemeanor Domestic Violence Assault or Violation of a Domestic Violence Related Protection Order, Restraining order, or No-Contact Order.
+ 3	- 1	0	Misdemeanor Sex Offense.
- 3	- 1	+ 1	Misdemeanor Other Domestic Violence.
+ 6	+ 4	+ 4	Misdemeanor Weapon Offense.
+ 4	+ 4	+ 1	Misdemeanor Property Offense.
+ 3	+ 1	0	Misdemeanor Drug Offense.
+ 4	+ 3	+ 2	Misdemeanor Escapes.
- 1	- 1	+ 1	Misdemeanor Alcohol Offense
Part VI – Total Sentence/Supervision Violations			
+ 5	+ 3	+ 1 *	Total Sentence/Supervision Violations (* Three or more scored as 3 for violent score).

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FAMILY JUSTICE

The Future of Sentencing in New York State:
Public Hearings before the
New York State Commission on Sentencing Reform

Testimony of Family Justice
Submitted on November 13, 2007

I want to thank the Commission for the opportunity to deliver testimony on this topic of concern for tens of thousands of underserved families in New York State.

Family Justice's testimony will not reiterate what people from many other organizations have eloquently said here and elsewhere about the need to address indeterminate sentences and change drug laws, although we favor these and other similar reforms. Along with the other members of New York State's Alternative to Incarceration Coalition, or ATI Coalition, Family Justice supports expanding ATI programs, restoring Tuition Assistance Programs (TAP) and increasing educational programming in prisons, restoring the right to vote to individuals on parole, relaxing the criteria for technical parole violations, and other related measures.

Yet too often, we focus only on the impact that sentencing practices have on the person before the court and disregard the devastating effects on families, social networks, and the neighborhoods to which they are connected. Family Justice's unique organizational focus, therefore, is not limited to the consequences for individuals convicted of a crime, but on entire families that have a loved one involved in the criminal justice system. By and large, criminal justice issues are public health issues, and by definition, serious multigenerational health concerns take a dramatic toll on families, especially those living in poverty.

We must recognize and address the collateral consequences for families. Numbers alone cannot capture the full impact on families and neighborhoods when a loved one and community member cycles in and out of the criminal justice system. More than 2.4 million American children have at least one incarcerated parent—and more than 5 million children have a parent on probation or parole.[1] Many children deprived of a parent suffer from trauma, anxiety, guilt, shame, and fear. They frequently manifest sadness, withdrawal, low self-esteem, aggressive behavior, truancy, a decline in school performance, and use of alcohol or other drugs. When people are incarcerated, they may be unable to fulfill their roles as parents, caregivers, providers, and companions.

Incarceration strains families and social networks in myriad ways: Men, women, and young people sentenced to a state facility are often hundreds of

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FAMILIES ARE PART OF THE SOLUTION

miles away from family, making visitation prohibitively expensive and logistically difficult—and at times creating estrangement. Those burdens punish entire families, particularly families that live in poverty. Not only do they often lose a source of income, but incarceration also forces a family to spend additional funds to visit or even maintain telephone contact with a loved one. The family left behind must make many sacrifices to try to compensate for the forced separation.

We need to train judges and prosecutors. Family involvement is an indicator of parole and probation success and should inform sentencing decisions. New York's district attorneys and judges sitting in criminal courts, drug courts, mental health courts, and other specialized judicial settings will be better equipped to consider and draw on a defendant's social network if they receive training on how to tap the family as a resource. By engaging members of the family, broadly defined, from the moment an individual enters the criminal judicial system, he or she can receive support and a positive form of coercion from loved ones. This can inspire motivation and underscore a judge or counsel's recommendations, leading to improved post-sentencing outcomes.

Short-term improved outcomes will translate into long-term preventive impacts on successive generations—whose family members, no longer separated by incarceration, will have a real chance of overcoming the potentially debilitating effects of involvement in the criminal justice system. Ideally, district attorneys and judges will stop seeing so many members of subsequent generations cycling in and out of the criminal justice system. Imagine if our judges and other legal professionals had time to pursue more innovative interventions, allowing them to do even more to help people change their lives.

New York State should expand and rely on Alternative to Incarceration (ATI) programs. Drug treatment and other ATI programs have far-reaching benefits for individuals and families. These programs provide treatment for conditions such as addiction and mental illness, which often result in criminal justice involvement. Fortunately, the programs are often located closer to home than correctional institutions are, thus eliminating the prolonged, burdensome separation a prison sentence entails. Many ATI substance abuse programs that engage the family are more effective and result in measurably better outcomes than those that do not recognize family members as a resource and therefore do not involve them.

The State should encourage and facilitate family contact during incarceration. Longer sentences mean more time is spent away from the beneficial influence of loved ones. Research on the relationships of incarcerated men reveals that those who maintain "strong family ties" while in jail or prison demonstrate higher levels of post-release success than those who do not maintain family ties.[2] In another study, researchers found that family relationships had a significant influence in preventing relapse among

parolees who have a history of harmful involvement with alcohol or other drugs.[3]

New York State should increase its use of programs within facilities to foster literacy, parenting, and job-training skills, and to treat addiction. Such programs can serve a dual purpose. For instance, reading and writing exercises can become opportunities for reaching out to friends and family and for analyzing and exploring relationships. Making literacy programs practical and personal has obvious benefits and comes at relatively little cost where such programs already exist. Other ways to support connections include offering phone cards and improving visitation conditions. Though these strategies may require additional expenditures, the amount of money saved through more effective prevention and intervention is unquestionably worth the cost.

Here's an example of a state that is putting these ideas into practice: In Washington, the Department of Corrections coordinates parent-teacher conferences for prisoners and their parenting partners. Care is taken to protect the incarcerated parent's status when concerns exist about teachers stigmatizing the child.

We must think beyond risk and need. Increasingly, states are examining their corrections risk-assessment tools and case-management systems and considering how families can be a resource for their loved ones while they are incarcerated and as they prepare for reentry from prison or jail. A few states are demonstrating bold leadership and gaining national attention by adopting a strength-based, family-focused approach. Traditionally, assessment tools have rarely asked about the strengths of the individuals themselves, the social supports they will rely on during incarceration, or the positive attributes and abilities of people in their support networks. Once these resources are identified and discussed, staff can draw on them in case management and reentry planning.

Let me describe a tool our organization has developed for that purpose: To complement existing risk and needs instruments, Family Justice—in partnership with the National Institute of Corrections, corrections departments in Massachusetts, Michigan, Ohio, and Oklahoma, as well as Chicago's Safer Foundation—has developed and piloted an instrument called the Relational Inquiry Tool. The tool, created and tested with corrections counselors and case managers, consists of carefully crafted questions designed to gather information and build rapport between staff and individuals involved in the criminal justice system. The tool helps identify the strengths in people's social networks and family relationships, particularly as they prepare to return home from prison or jail. More than 80% of incarcerated and formerly incarcerated people who participated in testing this tool stated that it would be useful in planning for reentry from prison. Nearly 80% of case managers also said that the tool would help in reentry planning. And more than 75% of staff reported that the tool increased their

understanding of the incarcerated men and women.

We must create opportunities for family members to support one another *before* release. Families play a vital role in the reentry process. Research shows that parole outcomes improve when individuals have strong family support.[4] In an Urban Institute study in Chicago, people interviewed four to eight months after their release cited families as "the most important factor" in helping them stay out of prison.[5] A study by the New York–based Vera Institute of Justice found that for individuals recently released from prison or jail, "supportive families were an indicator of success across the board, correlating with lower drug use, greater likelihood of finding jobs, and less criminal activity."[6]

Programs that keep families connected during incarceration provide a head start in the reentry process and help ensure successful outcomes. We urge New York to look to examples of creative initiatives undertaken in other states. In Michigan, the Department of Corrections runs family reunification sessions before men and women leave prison. Because a staff person is designated to collaborate with community-based organizations, incarcerated individuals can participate in a facilitated family prerelease visit to talk about the entire family's transition upon a loved one's reentry. If the family is interested, these conversations can continue in the community with a partnering organization's staff.

In Ohio, the Department of Rehabilitation and Corrections instituted a program that reunites incarcerated fathers and children at three prisons. Inmates, parenting partners, and children are offered programming including educational and experiential activities that allow loved ones to spend time together. Transportation to the institution is provided at least twice a month. Partner organizations in the community assist families in identifying and accessing resources. After release, family-focused programming continues at the partner organization.

Conclusion

To summarize: As New York State reforms its sentencing laws, we must ensure greater opportunities for family involvement. It is crucial that we tap the strengths of social networks during incarceration and through alternatives to incarceration, so that people will stop cycling in and out of the criminal justice system. This will improve the health and well-being of families and the safety of our neighborhoods. Bold leadership will help New York's families now and for generations to come—but only if we act now.

November 13, 2007

[1] Mumola, C.J. (2004). Presentation on Incarcerated Parents and Their Children (U.S. Department of Justice, Bureau of Justice Statistics): *2004 Administration for Children and Families/Office of Planning, Research & Evaluation Annual Welfare Research and Evaluation Conference,* May 28, 2004. Washington, DC: U.S. Department of Health & Human Services.

[2] Hairston, C. F. (2002, January). *Prisoners and Families: Parenting Issues During Incarceration.* Paper prepared for the From Prison to Home conference at the National Institutes of Health, Bethesda, MD. *http://aspe.dhhs.gov/hsp/prison2home02/Hairston.htm.*

[3] Slaght, E. (1999). Focusing on the Family in the Treatment of Substance Abusing Criminal Offenders. *Journal of Drug Education* 19 (1), 53-62.

[4] Sullivan, E., et al. (2002). *Families as a Resource in Recovery from Drug Abuse: An Evaluation of La Bodega de la Familia.* New York: Vera Institute of Justice.

[5] LaVigne, N. G., Visher, C., & Castro, J. (2004). *Chicago Prisoners' Experiences Returning Home.* Washington, DC: Urban Institute.

[6] Nelson, M., Dees, P., & Allen, C. (1999). *The First Month Out: Post-Incarceration Experiences in New York City.* New York, NY: Vera Institute of Justice.

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Testimony of

ERIKA L. WOOD

Deputy Director, Democracy Program
Brennan Center for Justice at NYU School of Law

Before the

New York State Commission on Sentencing Reform

November 13, 2007

Good afternoon. My name is Erika Wood and I am the Deputy Director of the Democracy Program at the Brennan Center for Justice at NYU School of Law. I would like to thank the New York State Commission on Sentencing Reform and the New York State Division of Criminal Justice Services for holding this hearing and giving me the opportunity to testify. I commend the Commission for its important policy recommendations. They are important steps towards rectifying the injustices that continue to permeate our criminal justice system.

The Brennan Center for Justice is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. As part of our mission to advance voting rights for all Americans, we lead a national campaign to restore the vote to people with criminal convictions. Today my testimony will focus on the Commission's recommendation to restore voting rights to people on parole.

The National Landscape

The right to vote forms the core of American democracy. Our history is marked by successful struggles to expand the franchise, to include those previously barred from the electorate because of race, class, or gender. As a result our democracy is richer, more diverse, and more representative of the people than ever before. There remains, however, one significant blanket barrier to the franchise. 5.3 million American citizens are not allowed to vote across the country because of a

felony conviction.[1] As many as 4 million of these people live, work and raise families in our communities, but because of a conviction in their past they are still denied the right to vote.[2] In New York, over 122,000 people are barred from voting, nearly 56,000 of whom are people on parole living in the community.[3]

Felony disenfranchisement laws vary by state, ranging from Virginia and Kentucky where all felonies result in permanent disenfranchisement, to Vermont and Maine where voting rights are never suspended. The rest of the country falls somewhere in between, forming a patchwork of different laws across the country. The current law in New York disenfranchises people in prison and on parole, while people on probation are allowed to vote.[4] Thirteen states and the District of Columbia already allow people on parole to vote.[5]

History of Felony Disenfranchisement Laws

Felony disenfranchisement laws in the United States are deeply rooted in the troubled history of American race relations. In the late 1800s these laws spread as part of a larger backlash against the adoption of the Reconstruction Amendments – the Thirteenth, Fourteenth, and Fifteenth Amendments of the U.S. Constitution – which ended slavery, granted equal citizenship to freed slaves, and prohibited racial discrimination in voting.[6] Felony disenfranchisement laws were part of an organized effort to maintain white control over access to the polls. At the same time that states were enacting felony disenfranchisement laws, they expanded their criminal codes to punish offenses that they believed freedmen were most likely to commit.[7] Targeted criminalization and felony disenfranchisement combined to produce the legal loss of voting rights, usually for life, which effectively suppressed the political power of African Americans for decades.[8]

The history of New York's felony disenfranchisement law is consistent with the national narrative. The current law is a relic of a shameful and racist past. In New York, felony disenfranchisement provisions were created in tandem with other

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[1] Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* 76 (2006).
[2] *Id.* at 77.
[3] *Id.* at 249, tbl. A3.3.
[4] N.Y. ELEC. L. § 5-106.
[5] Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah all restore voting rights upon release from prison. *See* Brennan Center for Justice, *Criminal Disenfranchisement Laws Across the United States* (2007), http://www.brennancenter.org/dynamic/subpages/download_file_48642.pdf.
[6] Manza & Uggen, *supra* note 1, at 56-57; Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 560-61 (2003); Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1087-88.
[7] Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* 593 (1988); Ewald, *supra* note 6, at 1088-89.
[8] *See Hunter v. Underwood*, 471 U.S. 222 (1985).

provisions such as literacy tests and property requirements that sought to exclude African Americans from participating in the political process. At the second Constitutional Convention in 1821, delegates met specifically to address Black suffrage. Based on their belief in Blacks' unfitness for democratic participation, the delegates designed new voting requirements aimed at stripping African-American citizens of their right to vote.[9] The result was Article II of the New York State Constitution which contained new discriminatory suffrage restrictions, including unusually high property requirements for African Americans, as well as the felony disenfranchisement provision. The felony disenfranchisement provision of Article II remains in tact today.

Disproportionate Impact on Minority Communities

The disproportionate racial impact of disenfranchising laws also continues to this day. Nationwide, 13% of African-American men have lost the right to vote, a rate that is seven times the national average.[10] Given current rates of incarceration, three in ten of the next generation of African-American men across the country can expect to lose the right to vote at some point in their lifetime.[11] Restoring voting rights to people who are living and working in the community is one important step in the battle to correct centuries of organized efforts to disenfranchise African-American voters.

The disproportionate rates of incarceration have caused New York's disenfranchised population to be overwhelmingly composed of people of color. Nearly 87% of those disenfranchised under New York's law are African-American or Latino.[12] In contrast, probationers in New York, who never lose their right to vote, are 51% white.[13]

Moreover, because 80% of New York's prison population hails from a handful of communities in New York City,[14] the voting strength of certain minority communities is decimated by current disenfranchising policies. Not only do these communities lose voting strength when residents are incarcerated upstate, but the political strength of the entire community continues to be crippled even after people return from prison because community members who are on parole are not eligible to vote. It is a simple equation – communities with high rates of people with felony convictions have fewer votes to cast. Consequently, all residents of these communities, not just those with convictions, become less influential than residents of more affluent communities from which fewer people are sent to prison.

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[9] First Amended Complaint, *Hayden v. Pataki*, No. 00 Civ. 8586, 2004 U.S. Dist. LEXIS 10863 (S.D.N.Y. June 14, 2004), ¶¶ 46-47 [hereinafter *Hayden* Complaint] *available at* http://brennancenter.org/dynamic/subpages/download_file_8936.pdf

[10] The Sentencing Project, *Felony Disenfranchisement Laws in the United States* 1 (April 2007), http://sentencingproject.org/pdfs/1046.pdf.

[11] *Id.*

[12] *Hayden* Complaint, *supra* note 9, at ¶ 64.

[13] *Id.* at ¶ 65.

[14] *Id.* at ¶ 70.

Voting Rights and Re-Entry

The Commission's report recognizes that effective re-entry practices reduce recidivism and thus protect public safety. The Commission concludes that fostering civic participation is one way to facilitate the re-entry process, and that restoring the right to vote to people on parole is fundamental to that participation.[15] The Commission's recommendation is consistent with a growing belief among law enforcement leaders nationally.

Officials with deep experience in law enforcement have begun speaking out against disenfranchisement, not only because they believe in democracy but also because they are committed to protecting public safety. They recognize that bringing people into the political process makes them stakeholders, which helps steer former offenders away from future crimes. While it is difficult to prove that restoration of the franchise directly reduces crime rates, allowing voting after release from incarceration affirms the returning community member's value to the polity, encourages participation in civic life, and thus helps to rebuild the ties to fellow citizens that motivate law-abiding behavior.[16]

Moreover, there is absolutely no credible evidence showing that continuing to disenfranchise people after release from prison serves any legitimate law enforcement purpose. This is not surprising. Criminal justice experts typically point to four accepted purposes of criminal penalties: incapacitation from committing new crimes, deterrence, retribution, and rehabilitation.[17] Post-incarceration disenfranchisement does not further any of these goals.

❖ Incapacitation, Deterrence, Retribution

Under the incapacitation theory, the right to vote would be denied as a means of preventing crime related to voting. But states are hard pressed to identify evidence that people with felony convictions are prone to commit offenses affecting the integrity of elections, and there is no evidence that people on parole have a greater propensity for voter fraud in the states where they are entitled to vote.

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[15] New York State Commission on Sentencing Reform, *The Future of Sentencing in New York State: A Preliminary Proposal for Reform* 52 (2007).

[16] Measuring the causal relationship between voting rights and criminal behavior is difficult. But the one published study tracking the relationship between voting and recidivism did find "consistent differences between voters and non-voters in rates of subsequent arrest, incarceration, and self-reported criminal behavior." Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 213 (2004). In fact, the study found that the former offenders who voted were half as likely to be re-arrested as those who did not. *Id.* at 205.

[17] Brief for The National Black Police Association et al. as Amici Curiae Supporting Appellants, *Farrakhan v. Gregoire*, No. CV-96-076 (filed Dec. 11, 2006), *available at* http://brennancenter.org/dynamic/subpages/download_file_47026.pdf

Similarly, there is no basis for concluding that continuing to disenfranchise people after release from prison serves to deter them from committing new crimes. Deterrence flows from the other penal consequences of a felony conviction, namely a term of incarceration and significant fines. It is unlikely that a person who is not dissuaded by the prospect of a prison sentence will be deterred by the threat of losing his right to vote.

The law enforcement community and society at large now recognize that a punishment can be morally justified as retribution only if it is proportionate in severity and duration to the crime in question. Continuing to disenfranchise people who have been released from prison is unjustifiably severe. To deny the vote to individuals who are out of prison is to disregard the assessment of the sentencing judge or jury and the corrections officials who, after careful review of each individual's circumstances, deemed them fit to reenter society.

❖ **Rehabilitation**

Law enforcement officials recognize that voting rights and rehabilitation are closely connected. The American Probation and Parole Association recently passed a resolution calling for restoration of voting rights upon completion of prison, finding that "disenfranchisement laws work against the successful reentry of offenders."[18] A copy of this resolution is attached to my testimony and is available on the APPA website.[19]

Many local law enforcement officials agree. Writing in support of Rhode Island's recent successful referendum establishing automatic post-incarceration voting rights restoration, Providence Police Chief Dean Esserman explained: "Denying the vote to people who have completed their prison sentence disrupts the reentry process and weakens the long-term prospects for sustainable rehabilitation."[20] Similarly, a Kentucky prosecutor seeking to change his state's archaic disenfranchisement laws wrote: "Voting shows a commitment to the future of the community."[21] In testimony before the Maryland Legislature, a member of the National Black Police Association testified that rights-restoration "promotes the successful reintegration of formerly incarcerated people, preventing further crime and making our neighborhoods safer."[22]

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[18] American Probation and Parole Ass'n, *Resolution Supporting Restoration of Voting Rights* (Oct. 17, 2007), *available at* http://www.appa-net.org/newsreleases/2007/APPA_Voting_Rights_Release.pdf

[19] *See* http://www.appa-net.org/newsreleases/2007/APPA_Voting_Rights_Release.pdf

[20] Dean Esserman & H. Philip West, *Yes on Question 2 – Freed Felons Should Have a Voice*, PROVIDENCE JOURNAL, Sept. 25, 2006, at C4.

[21] R. David Stengel, *Let's Simplify the Process for Disenfranchised Voters*, CENTRAL KENTUCKY NEWS-JOURNAL, Jan. 28, 2007, *available at* http://www.cknj.com/articles/2007/01/28/opinion/02editorial.txt

[22] *Voter Registration Protection Act: Hearing on S.B. 488 Before the S. Comm. on Education, Health & Environmental Affairs*, 2007 Leg., 423rd Sess. (Md. 2007) (written testimony of Ron Stalling, National Black Police Assoc.), http://www.brennancenter.org/dynamic/subpages/download_file_48135.pdf

Administrative Confusion

Laws that continue to disenfranchise people after release from prison often lead to widespread confusion among both elections officials and the public. This is certainly the case in New York. Thousands of *eligible* New Yorkers with felony convictions have been illegally denied the right to register and vote because of confusion and noncompliance on the part of elections officials. Studies in 2003 and 2005 showed that county election officials are unclear about the law, leading to the potential disenfranchisement of eligible voters.[23] A 2006 Brennan Center report revealed that one-third of all counties refused to register people on probation, even though they never lose the right to vote, and another third illegally required individuals to show documentation or proof of their eligibility status.[24]

Because of this persistent misinformation, many New Yorkers with felony convictions do not know whether they are eligible to vote. In 2005, researchers found that about half of New Yorkers surveyed incorrectly thought they were ineligible to vote while on probation and about 30% believed they lost their right to vote if they had only been arrested, but not convicted, for a crime.[25] Nearly 30% of people with felony convictions in New York thought they would never be eligible to vote again.[26] The widespread confusion among impacted individuals and state officials suggests there is a need for a simplified voting system with easier eligibility rules and proper notification procedures.

National Momentum

Nationwide, governors, legislators, and voters have taken bold steps towards restoring the right to vote to people with felony convictions. Some recent, important reforms include:

- **Iowa** – On Independence Day, July 4, 2005, Governor Tom Vilsack signed an executive order restoring voting rights to 80,000 Iowa citizens who had completed their sentence.

- **Rhode Island** – On Election Day 2006, Rhode Island voters were the first in the country to approve a state constitutional amendment authorizing automatic restoration of voting rights to people as soon as they are released from prison.

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[23] Brennan Center for Justice at NYU School of Law & Demos: A Network for Ideas and Action, *Board of Elections Continues Illegally to Disenfranchise Voters with Felony Convictions* (Mar. 2006), http://www.brennancenter.org/dynamic/subpages/download_file_34665.pdf

[24] *Id.*

[25] Ernest Drucker and Ricardo Barreras, The Sentencing Project, *Studies of Voting Behavior and Felony Disenfranchisement Among Individuals in the Criminal Justice System in New York, Connecticut, and Ohio* 8 (2005), *available at* http://www.sentencingproject.org/Admin/Documents/publications/fd_studiesvotingbehavior.pdf.

[26] *Id.* at 9.

- **Florida** – In April 2007, Governor Charlie Crist issued new clemency rules ending that state's policy of permanent disenfranchisement for all felony offenders.

- **Maryland** – Also in April 2007, Maryland Governor Martin O'Malley signed a law streamlining the state's complicated restoration system by automatically restoring voting rights upon completion of sentence.

The public also supports restoring voting rights. A 2002 telephone survey of 1,000 Americans found that substantial majorities (64 percent and 62 percent, respectively) supported allowing people on probation and parole to vote.[27] A 2006 survey found that 60 percent of Americans think the right to vote is an important factor in a person's successful reintegration into society after incarceration.[28] And the Election Day victory in Rhode Island demonstrates that the voting public supports voting by all people who are living and working in the community.

Several national organizations representing law enforcement officials and legal professionals recognize the fundamental unfairness of continuing to exclude people from the franchise when they reenter the community. Organizations that support automatic post-incarceration restoration of voting rights include:

- American Bar Association,
- American Law Institute,
- American Probation and Parole Association,
- National Black Police Association,
- National Conference of Commissioners on Unified State Laws, and
- National Organization of Black Law Enforcement Executives.

The mainstream media also understands the importance of restoring voting rights. Dozens of papers and magazines across the country have run editorials urging restoration of voting rights including *Newsweek*, *Forbes*, and the *New York Times*.[29] In the last two years alone the *New York Times* has published fifteen editorials calling for an end to felony disenfranchisement laws.[30]

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[27] Jeff Manza, Clem Brooks & Christopher Uggen, *Public Attitudes Towards Felon Disenfranchisement in the United States,* 68 PUB. OP. Q. 275, 280-82 (2004).

[28] *Attitudes of US Voters toward Prisoner Rehabilitation and Reentry Policies* National Council on Crime & Delinquency (April 2006), based on results of Zogby International Poll *Available at:* http://www.facesandvoicesofrecovery.org/pdf/Zogby_poll.pdf

[29] Editorial, *Enfranchising Ex-Felons Ignites Debate*, FORBES, May 10, 2007, *available at http://www.forbes.com/business/2007/05/09/felons-voting-rights-biz-cx_0510oxford.html;*

[30] Editorial, *Extending Democracy to Ex-Offenders*, N.Y. TIMES, June 22, 2005; Editorial, *Playing Games with Voting Rights*, N.Y. TIMES, Sept. 14, 2005; Editorial, *Voting Rights, Human Rights*, N.Y. TIMES, Oct. 14, 2005; Editorial, *Restoring the Right to Vote*, N.Y. TIMES, Jan. 10. 2006; Editorial, *Voting Rights Under Siege*, N.Y. TIMES, Feb. 10. 2006; Editorial, *Dickensian Democracy*, N.Y. TIMES, Feb. 27, 2006; Editorial, *Go Away: You Can't Vote*, N.Y. TIMES, March 25, 2006; Editorial, *Prisoners and Human Rights*, N.Y. TIMES, July 31, 2006; Editorial, *Denying the Vote*, N.Y. TIMES, Sept. 11, 2006; Adam Cohen, Editorial Observer, *American Elections and the Grand Old Tradition of*

The Governor's Authority

Our research indicates that Governor Spitzer has the authority to restore voting rights to people on parole through his clemency powers under Article 4, Section 4 of the New York Constitution. A brief memo outlining our analysis is attached to my testimony and is available on our website.[31]

Conclusion

Restoring voting rights to people on parole will enhance New York's democratic system, advance civil rights, promote broad public safety and future crime prevention, ease administrative burden, and establish a fair voting process that includes all citizens who have served their prison time. We encourage the Governor to use his broad clemency powers to take this important step for democracy.

Thank you and I welcome your questions.

Disenfranchisement, N.Y. TIMES, Oct. 8, 2006; Editorial, *Building Better Citizens*, N.Y. TIMES, Oct. 28, 2006; Editorial, *Ending the Prison Windfall*, N.Y. TIMES, Jan. 17, 2007; Editorial, *Free to Vote in Florida*, N.Y. TIMES, March 6, 2007; Editorial, *A Step for Voting Rights,* N.Y. TIMES, March 30, 2007; Editorial, *Still Waiting in Florida*, N.Y. TIMES, Oct. 12, 2007.

[31] *See* http://brennancenter.org/dynamic/subpages/download_file_48255.pdf

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ATTACHMENT 1

American Probation & Parole Association
Resolution Supporting Restoration of Voting Rights

American Probation and Parole Association

c/o The Council of State Governments
P.O. Box 11910
Lexington, KY 40578-1910

Association contact: Diane Kincaid, Public Relations Coordinator
dkincaid@csg.org or (859) 244-8196
FOR IMMEDIATE RELEASE – October 17, 2007

Resolution Supporting Restoration of Voting Rights Released

The American Probation and Parole Association (APPA) has released a new resolution calling for the restoration of voting rights upon completion of an offender's prison sentence and advocates no loss of voting rights while on community supervision. The resolution was passed by APPA's Board of Directors in September 2007.

Voting is an integral part of community participation in democratic societies and is one of vital importance in building truly representative governments. When large sectors of the population are prevented from voting, a democracy *cannot function as it should.*

These facts are cited by The Sentencing Project[1] and underline some of the reasoning behind APPA's current stance on the issue:

- 48 states and the District of Columbia prohibit inmates from voting while incarcerated for a felony offense.
- Only two states - Maine and Vermont - permit inmates to vote.
- 35 states prohibit felons from voting while they are on parole and 30 of these states exclude felony probationers as well.
- Two states deny the right to vote to all ex-offenders who have completed their sentences. Nine others disenfranchise certain categories of ex-offenders and/or permit application for restoration of rights for specified offenses after a waiting period (e.g., five years in Delaware and Wyoming, and two years in Nebraska).
- Each state has developed its own process of restoring voting rights to ex-offenders but most of these restoration processes are so cumbersome that few ex-offenders are able to take advantage of them.

As a result:

- An estimated 5.3 million Americans, or one in forty-one adults, have currently or permanently lost their voting rights as a result of a felony conviction.

APPA's resolution is as follows:

WHEREAS, many citizens who have been convicted of felonies and have completed their sentences, including community supervision, do not have the right to vote; and

WHEREAS, many states have some restrictions on voting privileges for felons; and

WHEREAS, the loss of the right to vote is not based on a need to protect the integrity of the electoral process and the justice system; and

WHEREAS, disenfranchisement of felons is disproportionately affecting an increasingly large segment of the population and their families; and

WHEREAS, disenfranchisement laws work against the successful reentry of offenders;

THEREFORE, BE IT RESOLVED that the American Probation and Parole Association advocates the restoration of voting rights upon completion of an offender's prison sentence and advocates no loss of voting rights while on *community supervision.*

For questions regarding APPA's resolution, please contact Diane Kincaid at (859) 244-8196 or dkincaid@csg.org.

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[1] http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cfd_bs_fdlawsinus.pdf

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ATTACHMENT 2

Brennan Center Analysis
The Power of the Executive Order

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The Power of the Executive Order:
Restoring Voting Rights to People with Felony Convictions in New York

Background

Under current law, New Yorkers convicted of a felony and sentenced to prison lose the right to vote. Voting rights are automatically restored to individuals upon their release from prison or discharge from parole. People on probation and those convicted of misdemeanors *never* lose the right to vote.

As a result of the state's felony disenfranchisement law, over 122,000 New Yorkers are barred from voting. Nearly 56,000 of those individuals are on parole and living in the community, working, paying taxes, and raising families alongside the rest of us. Additionally, New York's law disproportionately impacts the Black community: about 65% of those disenfranchised because of a felony conviction are Black.

Moreover, thousands of *eligible* New Yorkers with felony convictions are illegally denied the right to register and vote because of confusion and noncompliance on the part of election officials. Studies in 2003 and 2005 showed that county election officials are unclear about the law, leading to the potential disenfranchisement of eligible voters. A 2006 Brennan Center report revealed that one-third of all counties refused to register people on probation, even though they never lose the right to vote, and another third illegally required individuals to show documentation or proof of their eligibility status.

Because of this persistent misinformation, many New Yorkers with felony convictions do not know whether they are eligible to vote. In 2005, researchers found that about half of New Yorkers surveyed incorrectly thought they were ineligible to vote while on probation and about 30 percent believed they lost their right to vote if they had only been arrested, but not convicted, for a crime. The widespread confusion among impacted individuals and state officials suggests there is a need for a simplified voting system with easier eligibility rules and proper notification procedures.

The Solution

To ease the administrative burden of determining the eligibility of people with felony convictions, New York should restore the vote to individuals upon their release from prison. Currently, 12 states restore voting rights upon release from prison.[1] In states with post-incarceration restoration, the very fact that an individual is back in the community signals that he is eligible to vote. Election officials can delete from the rolls the names of people who have been convicted of a felony and sentenced to prison, and once those individuals are released and present themselves to register, they can without a doubt be presumed eligible.

Restoring the vote post-incarceration also makes sense as a way to prevent further crime and improve the safety of New York neighborhoods. Voting is an important part of making people feel connected to their communities, which in turn helps them avoid falling back into crime. In fact, studies show that, among those who have been arrested, voters are less than half as likely to be re-arrested as non-voters. Reforming New York's law to re-enfranchise people coming out of prison would promote their successful reintegration back into the community.

New York should also enact other measures to ensure proper compliance with the law. However, the State Senate has failed to act on a bill that would help guarantee that eligible New Yorkers with convictions are able to participate in the electoral process. Drafted in part by the Brennan Center, the New York Voting Rights Notification and Registration Act (AB 11652) would have provided clear and systematic notice to

[1] Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and South Dakota. In Vermont and Maine, people with felony convictions never lose the right to vote.

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individuals of their voting rights as they complete their maximum prison sentences or are discharged from parole, required criminal justice agencies to provide assistance with voter registration and voting by absentee ballot, and assured that corrections and elections agencies share the data necessary to verify voter eligibility.

Because legislative attempts at reform have been unsuccessful, we encourage the Executive to restore voting rights to all people on parole. In July 2005, Governor Thomas Vilsack issued an Executive Order restoring the vote to approximately 80,000 Iowans with felony convictions. Similarly, we urge the incoming Governor of New York to use his executive authority to act where the Legislature has failed to do so. By automatically restoring voting rights to people who have been released from prison and are living in the community, the Governor can help enhance New York's democratic system, ease the administrative burden that currently leads to confusion and misinformation, promote broad public safety and future crime prevention, and establish a fair voting process that includes all citizens who have served their prison time.

The Authority

Article 4, Section 4 of New York's Constitution provides, "The governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment . . . as he or she may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons." This provision has been interpreted by New York courts to give unreviewable discretion to the Governor to grant clemency. "The governor's power in the matter of granting pardons, reprieves and the like is unlimited. It stems from the Constitution and cannot be curtailed by the Legislature." *Vanilla v. Moran*, 67 N.Y.S.2d 833, 841 (N.Y. Sup. Ct .1947), aff'd 83 N.E.2d 696 (N.Y. 1949); *see also Sturnialo v. Carey*, 394 N.Y.S.2d 137 (N.Y. Sup. Ct. 1977) (denying judicial review to clemency decisions).

This broad executive power to grant clemency includes the power to grant a partial pardon restoring voting rights to all New Yorkers currently on parole. As described by the *Guidelines for Review of Executive Clemency Applications*, a pardon can "relieve a disability imposed upon a judgment of conviction for an offense." Department of Corrections, *Guidelines for Review of Executive Clemency Applications* 2. Currently, individuals on parole can seek to have their rights restored by applying to the Board of Parole, or in certain circumstances to their sentencing court, for a Certificate of Relief from Disabilities or a Certificate of Good Conduct. As provided by statute, this process is a form of clemency that can be granted by the Board alone, without the Governor's approval. However, this process is lengthy and cumbersome, and requires each individual to apply separately. While the clemency guidelines currently suggest, "Absent exceptional and compelling circumstances, a pardon is not available if the applicant has an adequate administrative or other legal remedy," including through Certificates, these guidelines, created by an executive agency, cannot limit the Governor's power to grant clemency.

Finally, while the constitutional provision suggests that the Legislature may have the power to regulate the manner of application for pardons, the Legislature has not yet done so. The only limitation contained in Article 2-A of the Executive Law, governing Reprieves, Commutations and Pardons, requires the Governor to "annually communicate to the legislature, each case of reprieve, commutation or pardon; stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve." N.Y. Exec. Law § 17 (2006). While such a report would be lengthy with respect to an executive order restoring the right to vote to all parolees, presumably the generation of such a report would be feasible. *See also* N.Y. Corr. Law art. 11 (empowering Governor to appoint executive clemency hearing officers); *id.* art. 23 (empowering issuance of a Certificate of Relief from Disabilities or a Certificate of Good Conduct).

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Cheri O'Donoghue

November 13, 2007

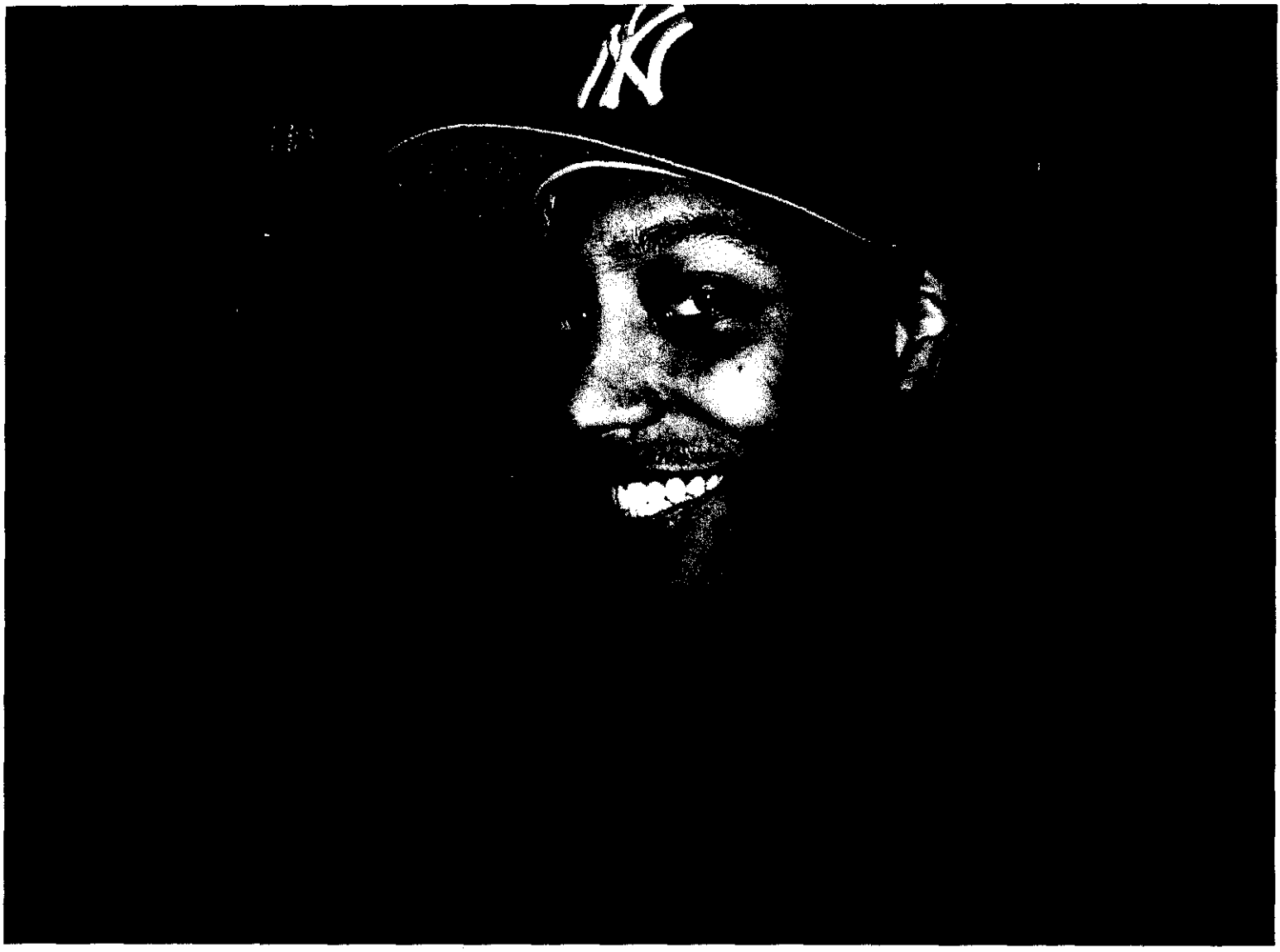
My name is Cheri O'Donoghue and I thank you for giving me the time to speak here today. I have a 24 year old son, Ashley, who is currently serving a 7 to 21 year "B" felony sentence, due to the Rockefeller Drug Laws, even though this was his first felony conviction ever and it was a non-violent felony at that. Ashley was arrested in a sting operation, orchestrated by the Oneida county police and two Hamilton college students: Peter McEnaney and Preston Kraus. Peter had purchased a small amount of cocaine from Ashley and he and Preston were selling it on their school campus. Eventually someone reported them to the school officials. The school officials called in the Oneida county police, who told them that if they cooperated and helped set up the person they bought it from, who was Ashley, they could help themselves out a lot. Since Peter and Preston didn't want to go to prison, they helped the police set up a buy and bust operation, and Ashley was arrested. The police instructed Peter to call Ashley and order as much as he could without being suspicious. In this case it was 2.6 ounces. They told them, "we're shooting for two ounces....just to make the cutoff for an A felony", which at the time carried a 15years to Life sentence. In return for their participation, Peter and Preston were let go, free of charge, no prison time, and even got their records sealed. How wonderful their families must have felt. To come so close to losing their children to prison and then all of a sudden, all the charges are dropped, they get to go on with their lives and put this episode behind them. But we weren't so lucky. For me and my family, this nightmare continues. Ashley's been in prison for four years now, and the pain I feel today, is as deep as it was when it first happened. I do feel that Ashley should have been punished for his actions, but the sentence he received was cruel, excessive and unjust, which is a perfect description of the Rockefeller Drug Laws. And as horrendous as this story may seem, it is not unusual. It is a common practice in the state of New York, but because it happens mostly to African Americans and Hispanics, it goes unnoticed by most white people. It does not affect their communities, so it is of little importance to them. I'm sorry to have to say this, but it's true. It is my feeling that only when we are honest with ourselves, will we be able to make the necessary changes to these laws.

Ashley was arrested in October of 2003, so unfortunately he was sentenced under the old laws, prior to the minor changes to the laws in 2004 and 2005, and since there was no retroactivity when the laws did change, it didn't help him out at all. Those in the "B" category, such as himself, were not allowed to apply for re-sentencing under the new law, which means that these 14 – 15,000 prisoners are still in prison and will be there until the Governor changes this. I'd like to suggest that if Governor Spitzer is honest about making the sentencing practices more just, that he start by allowing retroactivity for those in the B category. It makes no sense to change a law if you can't benefit from the change.

Ashley's story is a compelling one. It's a perfect illustration of everything that's wrong with the Rockefeller Drug Laws. I urge you to google his name: Ashley O'Donoghue,

and read the story written about him in the Village Voice newspaper: "Anatomy of a Drug Bust" by Jennifer Gonnerman. It is very interesting, especially when you see that our former Attorney General, Dennis Vacco, was the lawyer for one of the Hamilton college students and that Kevin McEnaney, a high level executive at Phoenix House (one of the nation's largest drug treatment centers), is the father of the other student. I found it shocking that people who could have helped, did more harm then good; at least where Ashley is concerned.

The Rockefeller Drug Laws must go! If in the end, this Sentencing Report that you are all spending so much time on, does not recommend repeal, or in the very least, drastic reform of these laws, then you will have done a great injustice to the citizens of New York. Everyone knows these laws are racist, inhumane and wasteful. To be honest, we shouldn't even be having these hearings. There is no further need for further research, it's already been done, over and over and over. It's time to take action and change these laws. It's time for my son and many like him, to come home to their families. Thank you.



THE COLLEGE INITIATIVE
...A Reentry Program

Elevation through higher education

NY Sentencing Committee (November 13, 2007)

Thank you for an opportunity to speak here today... my name is Kirk James and I am the associate director of the College Initiative Program

The College Initiative is a Prison reentry program affiliated with the City University of New York based at Lehman College in the Bronx with offices also at the Fortune Society on 23rd St. our mission is to assist formerly incarcerated men and women better their lives and their communities through higher education.

Today I am here to speak about the importance of higher education in regards to reentry, but we should not only be reactive to this social dilemma...We need to take a proactive stand to disrupt this pipeline to prison.

Unfortunately we all are too familiar with the astronomical number of men and women incarcerated in the United States today

(737 per 100.000 - 25% of the world's prisoners, but yet only 5% of the world's population)

The figures are staggering:

- **There are over 2.2 million people incarcerated.**
- **About. 1 in 20 Americans is expected to serve time in prison during their lifetime --- for African American men.... 1 in 4.**
- **There are over 2 million children whose parents are in prison.**
- **5,000,000 are on probation and parole (1 in 32 Americans)**

I am sure most people can recite these numbers in their sleep...but we need to look beyond these numbers for a minute....we need not forget that these

numbers represent men and women, fathers and mothers, daughters and sons....

I and many others now believe that Incarceration and reentry constitute and unprecedented crises and must be seen as one of top social, political and *economic issues of our time.*

- **This includes cost to our society in dollars,**
- **cost in lives locked up and locked out,**
- **cost in the collateral damage involved with incarceration (in particular the millions of children who grow up with out parents in their lives)**

The prison business has grown from a 9 billion dollar industry 20 years ago to a 60 Billion dollar industry today
In many states, including NY and California, more money is spent on incarceration than education.

Those affected are primarily people of color: in particular black males

As the Prison Policy Initiative puts it:
"Incarceration is not an equal opportunity punishment

- **Over 70 % of those incarcerated in the US are people of color**
- **Over 50% of those incarcerated in the US are black males (12% of the US population is black)**
- **There are more black men of college age in prison than in college**
- **70% of Black men born bet. 1965-69 had prison records in "99**

Most of those incarcerated fell through the cracks educationally while they were growing up:

- **In urban areas 52% of black males do not finish high school**
- **75% enter Prison without a diploma or GED**
- **40% in prison are functionally illiterate (cannot read a newspaper)**

As Angela Davis puts it, "Problems of education become problems of violence and public safety."

When incarcerated people are spoken of as offenders or ex cons or felons, these words carry an underlying message, that we are speaking about someone not like us: we are speaking about" OTHER" further desensitizing and alienating this population.

I urge everyone here to begin using words that support the healing of incarcerated people and those who are coming home.

There is no "us" and "them" – There is only us.

A bit of history:

On September 9, 1971 there was an unprecedented event in the history of prisons in this country: the Attica rebellion. This took place when some 1200 prisoners at Attica prison in rural upstate NY seized control of half the prison, took 38 prison guards hostage, and declared, "we are men. We are not beasts and we do not intend to be beaten and driven as such..... For months prior to the uprising, the Attica Brothers had tried to negotiate with prison officials over a long list of grievances and demands. Notorious for treating prisoners as less than human, Attica prison was built to hold 1,600 men but by 1971 the prison population was more that 2,200.... Confined to their cells from 14-16 hours each day, and paid between 20cennts and $1.00 a day for prison work, the men at Attica were allowed one shower a week, allotted 1 bar of soap and one roll of toilet paper each month. Their mail was heavily censored, access to literature was restricted and visitors were harassed.....Black and Latino prisoners were routinely subjected to racist slurs and beatings by prison guards. There were no real education programs and food and medical care was horrible." ..... Etc. 10 hostages and 29 incarcerated men died

A great sacrifice was made that day! Change occurred!

There was funding for libraries and educational programs.

A group of men incarcerated at Green Haven (Stormville, NY) formed a Thinktank --- and in collaboration with Reverend Muller, the prison Chaplin and Charles Berry, the Superintendent, invited Duchess Country Community

College to give college level classes. Soon afterwards, Marist came in and provided bachelor degree programs.

The idea of college in prison spread, and during the next few years, there was at least one college associated with each of the 70 prisons throughout NYS. Some prisons had two or three degree programs, including graduate degrees.

***For those who were fortunate enough to be incarcerated in a facility with a degree program, miracles occurred.**

Men and women might never have access to college, took advantage of the classes and relationships with instructors and volunteers who were able to come into prisons through these programs and grew.

Today, many of the leaders of agencies and non-profits serving people in reentry came up through the college programs in prisons

How were these college programs financed? These college programs were paid for using Pell and Tap grants, paid directly to the colleges.

Fast forward to the late eighties and early nineties – the pendulum, which after Attica had invigorated programs inside..... is now swinging in the direction of get tough on crime.

Mandatory sentencing laws (beginning with the Rockefeller Drug laws of 1973) put people behind bars for longer and longer sentences. This "get tough" approach spread and grew into a "get tough on crime attitude" which culminated in 1994-1995 with the elimination of Pell and Tap for prison college programs. Hundreds of prison college programs closed overnight.

This was a sad, sad day for the thousands behind bars who had access to new possibility.

If prison is the end of one road. College offered a different road.

Since then, there have been a handful of programs through private colleges and private money.

Statement from the Inmate community at Bedford Hills Correctional Facility (1996?)

"We understand the public's anger about crime and realize a prison is first and foremost a punishment for crime. But we believe that when we are able to work and earn a higher education while in prison, we are empowered to truly pay our debts to society by working towards repairing some of what has been broken.

It is for these reasons and in the name of hope and redemption, that we ask you to help us rebuild a college program here at BHCF."

Another sad piece of the story:
Recidivism and Re-Arrest Rate is enormous:

- **2 out of 3 people released from prison are rearrested within 3years**

Prison activist, Eddie Ellis speaks about how if a business had so many "returns" they would quickly go out of business, this has not happened—why?

Hopeful

-
- **Simply attending school behind bars there is a 29% reduction in *recidivism***
- **Higher education in prisons yield at least $2 in public savings for every $1 spent**
- **After employment, higher education is the single most effective way to prevent further crime and lower recidivism.**

- **At the College Initiative, our 5 years statistics showed that 1 out of 400 plus students who have completed a semester or more has returned to a NYS prison since 2002**

- **The majority of our students major in Human Services/Social Work further demonstrating their propensity for change and social justice**

Successful Reentry is a process...*it should not start when someone is* released...instead it should start at the beginning of incarceration.

What can you do?

We need to advocate for higher education within the Prison System.....bring back federal funding to allow men and women a opportunity to truly rehabilitate their lives and create opportunities for success once released

Educational release programs need to be reconsidered. If we can allow someone to participate in work release.... working some marginal job...we can surely allow someone the opportunity to work towards attaining sustained success that would come with a college degree.

The Department of Parole and the Department of Corrections need to realize that college is a viable alternative for men and women being released from prison and treat it as such.

Allocate funding for Reentry programs that can successful demonstrate that their program works!

Spread the word....The CUNY system is free for all men and women being released from prison....the doors are open...Lets move forward!

Testimony of Sarah B. From
Director of Public Policy & Communications, Women's Prison Association
Before the New York State Commission on Sentencing Reform
November 13, 2007
New York, NY

Thank you Chairperson O'Donnell and members of the Commission on Sentencing Reform for the opportunity to testify before you today. My name is Sarah B. From, and I am the Director of Public Policy & Communications at the Women's Prison Association. WPA is a direct service and advocacy organization that works to create opportunities for change in the lives of women at all stages of criminal justice involvement. Last year we helped over 3,500 New York women obtain housing, employment and healthcare; to reunify with their families, connect with their communities, and comply with their criminal justice mandates. We also work nationally to reform the public policies and systems that impact women's lives on an everyday basis. WPA has been doing this work for over 160 years.

While the word "prison" has always been a part of our name, much of WPA's work occurs in the communities in which women live, the environments in which they must succeed if they are to avoid criminal justice involvement. WPA was privileged to participate in the work of the Commission; our Executive Director, Ann Jacobs, served as a member of the Subcommittee on Supervision in the Community.

As many speakers throughout the course of this Commission have underscored, this is a unique and important opportunity for New York to remedy some of the most egregious inconsistencies and injustices in our criminal justice system. What is done in New York will be noticed and considered around the country. There is much to comment on in the preliminary report, and I trust my colleagues will address many of the major points. Today I would like to speak to you specifically about how the recommendations of the Sentencing Commission would impact women, their families and communities.

Gender Makes a Difference

The first point I would like to make is a simple one: gender makes a difference. The way women enter the criminal justice system is different, they way they experience criminal justice involvement is different, and what they need to lead law abiding, self-sufficient lives in the community is different. At this critical juncture when we are reforming our systems and practices, if we fail to acknowledge and plan for these gender differences, the outcome will be insufficient in dealing with the unique needs of women.

No doubt members of the Commission are well aware that women involved in the criminal justice system face particular challenges to succeeding in the community. Women in the system face higher rates of childhood and adult trauma, mental illness, and substance abuse than their male counterparts. In New York, women in prison are more than twice as likely to be HIV positive than men. Overwhelmingly mothers, criminal justice involved women are often the primary caretakers of children. Most have low levels of formal education, spotty or non-existent work histories, and housing situations that are tenuous at best. Women in the system tend to be

instead of incarceration as a response to those with low-level drug offenses. These interventions should be community-based and gender responsive.

New York has a vibrant community of alternatives to incarceration, and the research shows that they work. To truly bring treatment and alternatives to incarceration to scale will require a significant investment of resources on the part of the State. As Michael Jacobson pointed out when he testified before this Commission over the summer, public opinion has shifted such that there is the political will to make this investment. The Commission can play an important role in recommending that now is the time for a significant reinvestment of resources back into communities.

Conclusion

New York has taken a bold step in convening this Commission to undertake the first comprehensive look at the state's sentencing laws in forty years. I and many others hope that the Commission will be equally bold in its reforms, and recommend significant changes to enhance public safety, justice, and self-sufficiency for all New Yorkers.

Resources

Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders, by Barbara Bloom, Stephanie Covington, and Barbara Owen. Published by the National Institute of Corrections, 2003.

Developing Gender-Specific Classification Systems for Women Offenders by Dr. Patricia Hardyman and Dr. Patricia Van Voorhis. Published by the National Institute of Corrections, 2004.

Women Offender Case Management Model, by Orbis Partners. Published by the National Institute of Corrections, 2006.

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Evidence Based Analysis of Two Criminal Justice Policies

Designed to Reduce Risk, Increase Public Safety and Lower Reincarceration Rates

*** The Impact of College in Prison on Reincarceration Rates**

*** Toward a Predictable and Rational Parole Policy for Persons Convicted of Murder**

New York State Commission on Sentencing Reform

Testimony provided on November 13, 2007

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Research assistance provided by Carla Marquez, Ph.D. Candidate. Some of the research reported here has been undertaken in collaboration with the Prisoner Re-Entry Institute at the John Jay College of Criminal Justice, City University of New York.

I appreciate the opportunity to provide testimony to the Sentencing Commission and will tailor my remarks to focus upon *evidence based strategies to reduce reincarceration, promote the development of women and men in prison toward a sense of responsibility, save public tax dollars and diminish public risk.* Over the past decade I have had the opportunity, as a research psychologist, to work on two distinct but related criminal justice projects, both focused on strategies to reduce reincarceration rates and minimize the risk of release. Each project has been undertaken with a strong, interdisciplinary and diverse research team comprised of university based researchers, formerly incarcerated persons and/or persons in prison, with advisory consultation from prison administrators, the families of incarcerated persons and families of victims. Both projects involved statistical analyses conducted by NYSDOCS and qualitative interviews which we conducted with persons in prison and/or post-release.

Both projects focus on the strategic policy question: what programs and policies need to be in place in prison in order to reduce the likelihood of reincarceration; support the development of incarcerated people; encourage their sense of responsibility for the crime and the future; support the well being of their children; save tax payers money and systematically minimize risk to public safety?

- One project documents the impact of **college in prison**
- The other concerns a **recommendation for a predictable and rational process** for parole release determinations for men and women convicted of murder.

Both projects point to ways in which our criminal justice system can be reformed toward the positive development of women and men in prison, their transformation and successful re-entry.

College in Prison

In 1994, when the Pell grants were withdrawn from prisons nationwide, a light went out at Bedford Hills. Nationally, 350 college in prison programs dwindled down to eight. When college closed, the numbers of students who could be found in GED, ESL, ABE classes plummeted as did morale. Even correction officers commented on the dramatic dissolution of hope. With the leadership of a number of women prisoners, community volunteers and the then Superintendent, college was born-again and a decision was made swiftly to conduct a scientific evaluation of its impact on the women, their children, the prison environment and their post-release outcomes. A research team was established consisting of researchers from the Graduate Center at the City University of New York and women who were incarcerated at Bedford Hills Correctional Facility.

After four years of study, combining quantitative data provided by NYSDOCS and qualitative information we gathered, the study produced extremely strong evidence of the positive impact of college in prison. Four findings are worth mention:

- *Reincarceration Rates Reduced.* College in prison dramatically reduces reincarceration rates and facilitates personal transformation, acceptance of responsibility for the crime and encourages the development of leadership skills evident in prison and post-release.

To test this notion we undertook a systematic, multi-method analysis of the impact of college on women in prison, at BHCF, and requested that the NYDDOCS conduct a statistical cohort analysis of 36 month reincarceration rates for women who had been enrolled in college while in prison compared to demographically similar women who had not been enrolled in college while in prison. In the Fall of 1999, the research team approached the New York State of Correctional Services, requesting that a longitudinal analysis of reincarceration rates be conducted on those women from Bedford Hills Correctional Facility who had attended the Mercy College Program, and had subsequently been released. E. Michele Staley, Program Research Specialist III, conducted the analyses for the project and provided data on return-to-custody rates for all participants at any time since release, and then return to custody rates for all participants within 36 months of release.

Using the standard NYSDOCS measure of 36 months, out of the 274 women tracked longitudinally, 21 college participants returned to custody. ***Thus, women who participated in college while in prison had a 7.7% return-to-custody rate. In contrast, an analysis tracking all female offenders released between 1985 and 1995 revealed a 29.9% return-to-custody rate, within 36 months.*** Women without college are almost four times more likely to be returned to custody than comparable women who participated in college while in prison. Women with no college are twice as likely to be rearrested for a "New Term Commitment" (a new crime) than women with any college. Further, women with no college are 18 times more likely to violate parole than women with any college. In other words, college in prison reduces the amount of post-release crime and even more significantly heightens responsible compliance with parole expectations.

- *Tax Revenue Savings.* College in prison therefore saves taxpayers considerable

revenue. A cost benefit analysis is included in the attached materials, estimating conservatively the costs saved by educating 100 prisoners.

- *Peace/Discipline in the Prison.* College in prison, according to interviews we conducted with prison administrators, correctional officers and women in prison, contributes to a 'safer' and more peaceful environment in the prison, with fewer disciplinary incidents, and

- *The educational aspirations of the children of prisoners.* College in prison positively encourages the children of prisoners to pursue education more seriously.

While we were not the first to document the extremely cost effective, positive benefits of college in prison, our study was perhaps the first statistical cohort analysis to reveal just how substantially reincarceration rates are reduced and tax savings could be accrued.

College in prison is a fundamental element of highly effective criminal justice facilities that support the development and transformation of women and men in prison; that encourage reflection about the crime and the future; that create and sustain a climate of hope and support; that insure low returns to incarceration. While our study was focused on BHCF, our work with formerly incarcerated men who were enrolled in the Union Theological Seminary programs in prison confirm the impact in men's prisons.

<u>Creating a predictable and rational system for parole release determinations for women and men who serve long sentences for murder</u>

Our second project involves an analysis of parole denials for women and men who have been convicted of murder. In this report you will find data provided by the NYSDOCS Research Division documenting systematically and historically that persons convicted of murder have extremely low reincarceration rates – the women's return rate is miniscule – and most of the reincarceration is for parole violations and not new commitments.

Ironically, however, statistical data provided by the NYSDOCS and the Office of Policy Analysis of the Department of Parole reveal a systematic practice of parole denials for these women and men convicted of murder who are highly unlikely to recidivate. Particularly since 1996, New York State has been producing and accumulating a vast back up of cases of women and men convicted of murder who served their time, brought clean disciplinary records to the board, were prepared to discuss their transformation and leadership activities, their remorse and sense of responsibility – only to be denied parole, within minutes, and returned to the general population. Most were told that they were denied parole based on the nature of their original crime.

I won't detail here what we have learned from interviewing 34 such women and men – about the psychological, economic, and physical health consequences of these denials. Instead, for a moment, I want to leave you with the cries of one little girl, who received the call from her mother, denied parole a second time who cried, "Mommy, you're a liar! You said you'ld be at my middle school graduation" and the despair that bleeds throughout the facility when a woman – or a man - who has been a leader, a mentor, a therapist, a healer, exemplary, disciplined, caring, smart, generous … is turned down by the Board, for another 24 months.

What falls apart in that moment is not just the spirit of that incarcerated person, but the collective belief in rehabilitation and criminal *justice.* Hope shrivels to cynicism in the facility and beyond. The very integrity of criminal justice is on the line every time the State denies a deserving woman or man parole because 20 years ago they were engaged in an awful crime. We have arrived at a crucial policy moment in which there remains the question,

Is the goal of incarceration simply punishment – or should personal transformation and acceptance of responsibility for the crime play a significant role in determination of parole?

The Irony of Low Reincarceration Rates and High Parole Denials: The Case of Murder

Since 1995, there has been an "unofficial" practice of denying parole to people convicted of violent felonies, specifically people convicted of murder in New York State, based primarily on the nature of the original crime. Without taking into consideration how a person in prison has spent their time to create personal change and "give back" to the community, this policy stance has virtually eliminated the option of parole for this subset of people in prison. Forcing them to serve lengthy prison sentences with little hope of parole, many nevertheless maintain clean institutional records, participate in a variety of programs to better themselves, and become community leaders and role models for younger prisoners. Once released, these men and women have remarkably low recidivism rates. Even before the 1995 policy change in New York, the national trends were in the direction of a reduction in the number of interviewees granted parole nationwide. In New York State this number, for men and women convicted of Class A-1 felonies, dropped from 28% granted parole in 1993-1994 to just 3% in 2004-2005. We are beginning to learn about the consequences not only to the prisoners, but also for their families and those young women and men in prison who look up to these long termers and come to see that life transformation, going to college, clean disciplinary records, good attitude – bear little consequence at the parole board.

We have reviewed the official NYSDOCS documents on parole denials, reincarceration rates and technical violations for women and men convicted of murder, who have served more than eight years, and we have conducted interviews with 34 men and women who have served long sentences for violent crimes. Drawing from these data sources, this research examines closely the enabling conditions (programs and policies) that facilitate positive post-release

outcomes (work, family, re-incarceration, public assistance, return to college, etc.) and minimize risks to public safety.

Our analysis focuses on *public safety* and *public interest* implications of the release of people who have served long terms in prison as we identify critical programs in-prison and post-release that enable prisoners' move toward reflection, remorse and responsibility. We review below reincarceration rates by gender for persons who have served long sentences, with a particular focus on repeated parole denials, low reincarceration rates and returns to incarceration for parole violations.

Reincarceration rates by gender:
An analysis of women and men convicted of murder who have served long sentences for murder

We began the research with two simple questions:

When a person who has committed murder is released to parole after they have served their sentence of 15 to life or more, how many of them return to prison?

How many of them return to prison convicted of a new crime and how many return to prison because of a parole violation?

These are important questions because they help us to think about the public risk involved when the parole board is trying to decide whether or not to release such a person. To respond to these questions, we have integrated statistical evidence provided by NYSDOCS in varied technical reports tracking release and reincarceration rates from 1985 to the present.

The NYSDOCS report *1997 Releases: Three Year Post Release Follow-Up* Report" tracks 36 month post-release reincarceration rates, by most serious crime at commitment, combining males and females. According to this analysis, *those convicted of murder have the lowest recidivism rate* for a new crime of any other felony listed below. Confirming the 1997 data, a comparable post release follow up analysis was undertaken for the 2001 releases. That report revealed that 95 women and men were released with the conviction of murder; 21% returned to DOCS within 36 months. One returned for a new commitment while 19 returned as a parole violation.

TABLE 8.1							
2001 RELEASES: MOST SERIOUS CRIME AT COMMITMENT BY RETURN TYPE							
MOST SERIOUS CRIME AT COMMITMENT	TOTAL RELEASED	TOTAL RETURNED		RETURNED: NEW COMMITMENT		RETURNED: PAROLE VIOLATOR	
		#	%	#	%	#	%
TOTAL	28,784	10,677	36.9%	3,162	11.0%	7,515	26.1%
VIOLENT FELONY OFFENSES	7,516	2,637	35.1%	832	11.1%	1,805	24.0%
MURDER	95	20	21.1%	1	1.1%	19	20.0%
ATTEMPTED MURDER	243	70	28.8%	17	7.0%	53	21.8%
MANSLAUGHTER 1ST	340	83	24.4%	17	5.0%	66	19.4%
RAPE 1ST	229	78	34.1%	13	5.7%	65	28.4%
ROBBERY 1ST	1725	608	35.2%	183	10.6%	425	24.6%
ROBBERY 2ND	1545	635	41.1%	240	15.5%	395	25.6%
ASSAULT 1ST	316	79	25.0%	22	7.0%	57	18.0%
ASSAULT 2ND	510	169	33.1%	41	8.0%	128	25.1%
BURGLARY 1ST	158	55	34.8%	18	11.4%	37	23.4%
BURGLARY 2ND	1107	495	44.7%	184	16.6%	311	28.1%
ARSON 1ST,2ND	46	12	26.1%	2	4.3%	10	21.7%
SODOMY 1ST	138	40	29.0%	7	5.1%	33	23.9%
SEXUAL ABUSE 1ST	279	78	28.0%	11	3.9%	67	24.0%
DANGEROUS WEAPONS	743	207	27.9%	73	9.8%	134	18.0%
KIDNAPPING 1ST,2ND	41	7	17.1%	3	7.3%	4	9.8%
OTHER VIOLENT	1	1	100.0%	0	0.0%	1	100.0%
OFFENSES INVOLVING VIOLENCE/COERCION	1,934	746	38.6%	194	10.0%	552	28.5%
MANSLAUGHTER 2ND	92	16	17.4%	1	1.1%	15	16.3%
CRIMINALLY NEGLIGENT HOMICIDE	41	3	7.3%	1	2.4%	2	4.9%
ROBBERY 3RD	748	368	49.2%	101	13.5%	267	35.7%
ATTEMPTED ASSAULT 2ND	225	90	40.0%	29	12.9%	61	27.1%
CONSPIRACY 2,3,4	107	28	26.2%	7	6.5%	21	19.6%
OTHER WEAPONS	246	91	37.0%	22	8.9%	69	28.0%
OTHER SEX OFFENSES	278	76	27.3%	18	6.5%	58	20.9%
OTHER COERCIVE	197	74	37.6%	15	7.6%	59	29.9%
DRUG OFFENSES	12,179	4,910	40.4%	[illegible]	11.1%	3,565	28.5%
PROPERTY & OTHER OFFENSES	4,235	1,878	44.4%	633	14.8%	1,235	30.4%
BURGLARY 3RD	1412	759	53.8%	249	17.6%	510	36.1%
GRAND LARCENY	905	447	49.4%	162	17.9%	285	31.5%
FORGERY	405	191	47.0%	49	12.1%	142	35.0%
STOLEN PROPERTY	517	255	49.5%	76	14.7%	180	34.8%
DRIVING WHILE INTOXICATED	546	135	24.6%	54	9.9%	81	14.8%
CONTEMPT 1	153	58	37.9%	14	9.2%	44	28.8%
ALL OTHER FELONIES	395	132	33.4%	39	9.9%	93	23.6%
YOUTHFUL OFFENDERS	[illegible]	274	[illegible]	[illegible]	[illegible]	241	[illegible]
JUVENILE OFFENDERS	[illegible]	23	[illegible]	11	[illegible]	7	[illegible]

(NYSDOC, 2001 Releases, Albany, New York).

In order to understand how these reincarceration patterns intersect with gender, we requested from NYSDOCS a more current analysis of reincarceration rates for persons who have served long sentences, this time disaggregated by gender. The New York State Department of Correctional Services provided us the data presented in Table 2, displaying the 24-month returns to DOCS for men and women who served eight years or more and who were released during the 2000 to 2004 window.

Table 2

Twenty Four Month Rate of Return to DOCS by Length of Time Served and Gender

24-Month Returns to DOCS * TIME BEFORE 1ST RELEASE * INMATE GENDER Crosstabulation

INMATE GENDER				TIME BEFORE 1ST RELEASE			
				8-10 YRS	10-15 YRS	OVER 15 YRS	Total
MALE	24-Month Returns to DOCS	NOT RET	Count	1853	1512	760	3925
			% within TIME BEFORE 1ST RELEASE	77.9%	69.0%	65.3%	80.1%
		RPV	Count	330	279	110	719
			% within TIME BEFORE 1ST RELEASE	15.8%	14.6%	12.5%	14.7%
		NEW FEL	Count	132	184	20	256
			% within TIME BEFORE 1ST RELEASE	6.3%	8.5%	2.2%	5.2%
	Total		Count	2968	1980	926	4900
			% within TIME BEFORE 1ST RELEASE	100.0%	100.0%	100.0%	100.0%
FEMALE	24-Month Returns to DOCS	NOT RET	Count	66	43	24	122
			% within TIME BEFORE 1ST RELEASE	91.6%	97.7%	100.0%	96.8%
		RPV	Count	4	1	0	5
			% within TIME BEFORE 1ST RELEASE	5.6%	2.3%	.0%	3.8%
		NEW FEL	Count	1	0	0	1
			% within TIME BEFORE 1ST RELEASE	1.4%	.0%	.0%	.8%
	Total		Count	61	43	24	128
			% within TIME BEFORE 1ST RELEASE	100.0%	100.0%	100.0%	100.0%

As you can see, reincarceration rates for "long termers" range from 15% to 22% for men serving sentences of eight years and more. But again, to the extent that such persons return to DOCS, the vast *majority return for parole violations* and not for new crimes. In fact, these men are three times as likely to return for parole violations as they are for commission of new crimes.

- Of the 4900 men who served a minimum of eight years and who were released from 2000 to 2004, 80% did <u>not</u> return to DOCS within 24 months. This includes 85% of those who served over 15 years.

- Of those men who served 15 years or more, 2.2% were convicted of a new felony but 12.5% returned to DOCS for a parole violation.
- Fifteen percent of the men in the full sample returned to DOCS because of parole violations. Five percent returned for new felony convictions.
- Stated differently, 73% of those men who did return to DOCS did so for a technical parole violation on their first return.

The data for women are even more impressive. Women who have served eight years or longer have particularly low reincarceration rates: Four percent returned to DOCS for parole violations and *only one woman out of 128 returned for the commission of a new crime.* Of the 128 women who served a minimum of eight years in DOCS and were followed over a 24- month period, 95.3% did not return to DOCS.

- None of the 24 women who served 15 years or more returned to prison.
- None of the 42 women who served 10 to 15 years were recommitted to DOCS for a new offense and one woman (2.3%) was returned to prison for a parole violation.
- One woman out of the 61 women who served eight to 10 years was returned to DOCS after being convicted of a new offense (1.6%) and four were returned for parole violations (6.6%).

Parole denials: historic trends

Despite substantial evidence of transformation and acceptance of responsibility for the crime, as well as low reincarceration rates, women and men convicted of murder, between 1996 and the present, have been typically denied parole releases at least once. The New York State Office of Policy Analysis, Parole Statistics (2006) documents a consistent historic pattern of reduced granting of parole, particularly for persons convicted of murder 1st and 2nd and attempted murder 1st. (*Current Parole Statistics, October 2006 Office of Policy Analysis, April 2006,* State of New York Division of Parole)

- In FY 1993–94, release rates at initial interviews for persons convicted for murder 1st and 2nd and attempted murder 1st were 28%.
- In FY 2000-2001, release rates at initial interviews dropped to 3% and have remained at a 4% rate every year but one since that time.

Advocates of longer sentences and parole denials for murder have argued that the mid-1990s policy of cumulative parole denials actually explains the low reincarceration rates for persons convicted of murder. In order to try to respond to this line of argument, we reviewed the NYSDOCS data on 1985 – 1997 releases and reincarceration rates for murder in particular, to assess reincarceration rates for persons convicted of murder prior to the policy era of multiple parole denials. Turning to the NYSDOCS report *1985 – 1997 Releases: Original Commitment Offense by Type of Return*, the analysis of release/return rates for persons convicted of murder documents:

Total Released: 770

Total Returned: 147 or 19.1%

Returned for New Commitment: 28 or 3%

Returned for Parole Violation: 119 or 15.5%

Only 3% return for a new commitment.

Likewise, NYSDOCS analysis of persons released post-1996 (*1985 – 2001 Releases: Most Serious Crime at Commitment by Return Type*) indicates that with the intensification of parole denials, the low rate of reincarceration is similar to the rate prior to this policy shift.

1985 – 2001, analysis of release/return rates for persons convicted of murder:

Total released: 1022

Total returned: 203 or 19.9%

Returned for New Commitment: 32 or 3.1%

Returned for Parole Violation: 171 or 16.7%

From our reading of the official documents of the NYDOCS, we find no evidence that routinely and repeatedly denying parole to persons convicted of murder reduces reincarceration or enhances public safety.

***

Confirming the quantitative data trends documented by the Office of Policy Analysis, the 34 women and men we interviewed during 2006 - 2007 reported numerous parole denials, ranging from one to five. These denials, typically delivered by boards that had reviewed the case for only minutes, extended their time in prison from two to 10 years beyond the minimum sentence of the judge. Enormous consequences accumulate for these individuals, their families and for the younger prisoners who witness the denials, increasingly jaded about whether or not

good behavior "pays off."

For these 34, their contributions were not recognized by their first (or for some second, third or fourth) parole board. Hit by parole boards repeatedly based solely on the nature of their offenses, our 34 respondents were denied parole a combined total of 84 times[1]. These men and women, collectively, spent approximately 168 extra years behind bars. Using conservative estimates of $30,000 a year per incarcerated person, these parole denials translate into $5,040,000 tax dollars dedicated to keeping these 34 women and men locked up. And these calculations do not include the psychological, social, health and economic implications for their children, families and/or parents nor the taxes they could have been contributing were they released.

Prepared to discuss with the parole commissioners, their deep and significant transformations over the past decade or two, they found, instead, the entire tone of the proceedings focused on the past and not the present.

"The system's not there. I mean I feel like I should have been punished, but at some point the punishment needs to end. ....A lot of people get thirteen years to life with the expectation that they're going to go home after 15 years and some of them are in prison for twenty-five years and their not letting them go through the parole board because of politics. ...There's some expectation that you're going to be released in 15 years, maybe seventeen. But, you know, in the ballpark. Serving twenty-five years! I could have went to trial and got twenty-five years and maybe I would have got a life."-

They were disheartened to only be asked questions about the details of their crime and who they were twenty years ago. And the consequent parole denials, often received soon after the hearing, were a blow not only to the person and their families who had hopes they would be picking up their loved ones to take them home, but to the prison community as a whole (especially when the person is a model citizen). These 2-3 minute meetings and the arbitrary denials of parole that follow affect these people's lives substantially, leaving them to ask, "What more can we do?"

They turned back to their cells, continuing on their journeys until two more years would pass and they would meet the board once again.

"And so, I went to the third parole board hearing....and they said their piece. I said, 'I committed a crime and I deserved to be punished. I don't need anyone in this room to tell me that, If all this hearing is about is how much time I should serve, let's go off the record and tell me how much time you want from me, and, even though I wanted to be released yesterday

[1] Each "hit" generally amounts to an additional two years in prison and two years until the next parole board hearing.

and I might hear something that I don't want to hear, at least I'll know. Because I can't live like this from two years to two years to two years. I said that I believed that I deserve, that I believed the whole process deserves some certainty. Just tell me what you want from me. I can handle it. Whatever you tell me. I had twenty four years in—not that I wanted to do 30—but, if we could just be honest, just tell me what you want and I can live with that.....I said I think I deserve to know, my family needs to know."- Askari

Many of the respondents went to their first board with clean disciplinary records[2], impressive contributions to the prison community, accumulated educational credentials and strong letters. Some had started programs that are still in existence in prisons today (i.e. HIV/AIDS education). Others served on councils representing the inmate population at large, served as tutors, and worked as jail house lawyers filing briefs and spending hours in the law library to help others who could not help themselves. Most walked into the room ready to display evidence of their transformation.

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You will enter, now, a museum of the individual and sometimes composite words and affects of these 34 women and men, recalling the anguish and anxiety as they ventured onto their first, second, third, fourth and sometimes fifth "visit" to the board.

Can you look at me, now, today and then we'll talk about the nature of the crime?

I ironed my pants; combed my hair; I made eye contact; I waited to be told to sit; tried not to be angry; stared at my shoes; thought I would faint; got a hot flash; wanted to scream; wanted to kill myself; tried not to cry out: "I am not the 15 year old; 17 year old; the runaway; the prostitute; the 18 year old; crack head; kid in the back seat of a drive by; battered woman; knucklehead; scared kid... who committed that crime."

I would suggest that they look at who the person is sitting before them, not who the person was that got arrested. I mean, of course, you have to ask the mandatory questions about the crime or whatever, and I understand that; that's your job. But once you've done that, now who are you? Because there's no way that you could remain the same person unless you are like mentally challenged, for ten years. There's no way. Something is going to change, you know. And hopefully, I mean, some..in some cases, it's changed for the worse... but In most cases it's change for the better, for long-termers, anyway. And they need to look at that..... I got hit my fifth board for twenty-four months. If I didn't have a conditional release date, I wouldn't have came home, you know. They just would not look at who I am today. Everything was that night in 1987. 1000

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[2] Most had very few infractions while in prison and the majority acquired them during the first few years in prison.

They kept asking, "Well, why didn't you ... [do anything] ... ? Why didn't you call an ambulance? Why didn't you call the police?" and, you know, my response to everything was "Because I was a crack head," you know. I didn't answer them like that. I'm sure I answered them more appropriately than that. But it was just the truth. I was a crack head. I had the money, and I was leaving. Whatever else was going on the apartment I really didn't care. I wanted to smoke....And a lot of the why's, I didn't have an answer for. Because being sober for as long as I had been sober at that time, eight years and four months, the crime didn't make sense to me. So, I couldn't make it make sense to somebody else, because I didn't think like that no more. I wasn't that person anymore. I wasn't a crack head, you know. But I remember some of the questions and some of the answers that I went through during the mock parole board, and, you know, it seemed like it was going to be okay. And then I received the results the next day and got twenty-four months. (???)

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Question: When did you start thinking about getting out?

*When did I **stop** thinking about getting out ... [LAUGHS] ... ? After so many years at the parole board, after about my third hit, I stopped thinking about getting out. I was just going to be there. Because my crime was never going to change, and that's all that they was hitting me for. And they was hitting me with two years every time. So, the dream of getting out fizzled out. It just wasn't there. I mean, I didn't act up or become a disciplinary problem, or anything like that. But getting out wasn't real to me no more. By the time I went to the board for the fourth time, I was like, yeah, so what? You know, the first three times, I had on my white shirt; my pants was ironed. Had my little shoes on. You know, hair was proper and it never made a difference. They didn't look at I've changed. You know, I went to school. You know, I worked in a program that helped put the facility on the map, because Bedford was the first facility to have an HIV-AIDS program, you know. Then I worked in family violence, which also helped put the facility on the map. Bedford was the only program with a family violence program.*

By the fourth parole, there was no more iron your pants and put on your shoes, you know, looking like you're going to Catholic school with your white shirt on.....Basically, the same thing I did for the first, because their focus was always on my crime, and the answers never changed. I can't make people understand something I don't understand. You know, you keep asking me and asking me and asking me. I can't make you understand what happened that night. I can't make you understand why I didn't go for help or help her. I can't make you understand that, because I don't.....I just basically like gave the same answer, but more appropriately.

As I enter the room I want you to see my college work, my HIV/AIDs, my changes, my drug free self, my parenting, my work history, my daughter in college, the absence of disciplinary problems. Look at me for more than a minute even though I make good eye contact; dressed up; stared at my shoes; had a letter from the superintendent; knew it would never happen; prayed to

god; thought I was having a heart attack; went into a panic; started to sweat; had to be carried out; remembered my baby, my mother, the dead body, ...

I did twenty-four years upstate. Well, I was convicted in 1969; I didn't come out until 1993. And I came out on work release. I never made the parole board. There wasn't a parole board upstate. ... I was sent to work release...So, I thought that after being out and doing twenty-four years upstate, got a college education, come out, get a job, working, no problem adjusting, you know, that they would consider me parole eligible, but to my dismay they gave me two years. 121

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The third time: "They gave me twenty-four months." And now this time they're hitting me because..for lack of remorse. It's ten years later. I'm crying for me now. I want ... [a right for myself] ... I want something for my children. My baby was one. She's ten. You don't..I want some.. my kid.. my son is fifteen. There's things that I want as a parent, as a human being. And you tell me that.. and you look at me and tell me ... [how does it read] ... And for a long time I kept them things. But when I moved here, I threw them out, because I feel like I'm not going to have that evil in my house. I threw away every hit paper. I'm not going to bring that into my new home. It tells you that you're a detriment to society, X,Y,Z, you know, about how you..it's not conducive to society to let you out at this time. X,Y,Z, blah, blah, blah. And I'm looking at them like I live the same like you do. I live..I have the same fears you do. I have the same sorrows you do. I have the same..I laugh the same way you do. I put my pants on the same way you do...You don't do nothing different from the way I do it. 10002

And I knew you would say go home, you have changed so much; or hit me with another two years. What you said was "Given the nature of the crime, release at this time would be incompatible with the welfare of society"— How many times will I be tried for the same crime? I know, I did it, I have been punished. When is enough enough?

But the people that were long-termers that were there for a long time that you could see that they visibly changed...And I learned to love them. And I just enjoyed being with them. I worried about them; I cared about them. And it's desolate, because you see people change, but everybody gets dressed up to go to board, and nobody goes home. (1004)

Conclusions

"In view of its recommendation that indeterminate sentencing be continued for at least some categories of offenses, the Commission will consider the implications of proposing an amendment to Parole's discretionary release guidelines to require that less weight be given by the Board of Parole to the underlying offense and greater focus be given to the inmate's behavior while in prison (see, Executive Law Sec.259-i[2][c][A]."

(The Future of Sentencing in New York State: A Preliminary Proposal for Reform, New York State Commission on Sentencing Reform, October 15 2007. Footnote 105, 16)

Quite encouraged by the Commission's interest in amending parole's discretionary guidelines, I believe that the evidence provided in this report presses toward two major policy directions.

First, it would be extremely important for New York State to support the restoration of funding for college and pre-college programs in prison.

The positive effects of college in prison are now well documented in terms of:

- significantly reduced rates of reincarceration for new crime and for parole violations;
- substantial reduction of the tax burden imposed by prison costs;
- positive impact on the educational aspirations of children of women and men in prison;
- increased peace/fewer disciplinary incidents in the prison, and
- substantially improved post-release outcomes in terms of leadership, community engagement and "giving back."

While the focus for this reform would have include the federal government, New York State should be involved in the creation of state-wide mechanisms to restore college (e.g. the BHCF consortial model; the Bard model; Union Theological model) and to appeal to Congress to restore Pell grants for women and men in prison.

Second, the material presented here speaks clearly for the need for a predictable and rational process for parole release determinations for persons convicted of murder. Parole denials executed on the basis of the *nature of the crime alone* have damaging consequences for individual prisoners, their families and other women and men in prison. Parole denials, further, do not appear to reduce reincarceration or enhance public safety.

Instead, the data presented suggests that parole deliberations take into consideration evidence of personal transformation, education acquired while in prison, leadership roles taken up in prison, contributions to the prison community, acceptance of responsibility for the crime, likelihood of recidivism, post-release plans and a series of other indicators of "change." The evidence provided by NYSDOCS and the Department of Parole raise an important irony: the very persons most likely to be denied parole are also least likely to be reincarcerated for commiting a new offense. This irony is most obvious for women who have served long sentences for violent crimes and have an almost 0% chance of returning for a new commitment.

It is most encouraging that New York State has created the Sentencing Commission to reconsider the policies, programs and practices of the New York State criminal justice system. I appreciate the opportunity to speak with you and would be happy to be available in the future.

Thank you.

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Testimony of

Vivian D. Nixon
Executive Director
College and Community Fellowship

before

New York State Commission on Sentencing Reform

at

Association of the Bar of the City of New York
42 W. 44th Street
New York City, New York

on
November 13, 2007

I am Vivian Nixon, Executive Director of the College and Community Fellowship (CCF). In 2000, CCF became the first organization in New York State to offer higher education support to people who want to secure a future for themselves and their families after being involved in the criminal justice system. I am grateful to Commissioner Denise O'Donnell and the members of the Sentencing Commission for this opportunity to testify about they ways in which increasing opportunities for people who have had criminal justice involvement ultimately increases public safety and improves community well being.

I was were pleased to learn that Governor Spitzer had the foresight to issue Executive Order #10 establishing this Commission and directing it to find ways to repair a sentencing system that is complicated and ineffective. CCF supports many of the progressive and well thought out recommendations contained in the Sentencing Commission's preliminary report including:

a) allowing parolees to vote
b) increasing merit time
c) increasing work release eligibility
d) reducing barriers to employment
e) increasing access to housing
f) creating seamless release procedures that include necessary documentation, identification, and access to Medicaid and other benefits
g) increasing educational and vocational training opportunities for people in prisons
h) increasing access to higher education in prison

I would like to focus on how to improve upon the recommendations that involve higher education. The Sentencing Commission's report confirms that studies show that with every year of education the risk of recidivism declines. Yet, opportunities for people in prison and those who have been released to pursue higher education have been severely limited by the 1998 reauthorization of the Higher Education Act which NYS compounded by eliminating TAP eligibility for this population. Until these policies are changed or creative alternatives are implemented and supported, we are literally keeping people from accessing the very thing that has the greatest potential to permanently change their lives for the better. Furthermore, the Justice Policy Institute released research that shows a relationship between educational attainment and the likelihood of incarceration. They also found that the impact of policies related to education and public safety are concentrated among people of color, who are less likely to have access to quality educational opportunities and more likely to be incarcerated. Time will not allow me to discuss all of the individual and public benefits of education. Briefly, we know that higher education increases employability, reduces recidivism, and has a positive correlation with good health, overall quality of life, and deep social integration. Public benefits include increased tax revenues, increased workforce flexibility, and decreased reliance on government financial support.

The Commission's report reminds us that a limited number of people in prison have the requisite high school diploma or a GED that makes them eligible for post-secondary education. Nevertheless, if higher education opportunities had continued, NYS would have seen more than 14,000 people leave prison with college degrees between 1994 to 2007 as opposed to the 500 who will get degrees over the next 13 years if access to education does not increase. We need only consider how higher education would have expanded opportunity for those 14,000 people, their families, and their communities to understand the impact of the elimination of college programs in prison. Furthermore, I believe that the number of people in prison who successfully pursue GED's increases significantly when college opportunities are available as an incentive.

The report makes a strong case for increased access to higher education in prison. Future recommendations must include support for higher education opportunities as an integral part of reentry and reintegration processes. CCF has found that community-based programs that use higher education strategies can help to focus people on long-term goals while they deal with the basic issues of reintegration including employment, housing, substance abuse and medical treatment, and family reunification.

In today's high-tech labor market where creativity and advanced knowledge are in demand, a high school diploma is no longer the acceptable standard. People need documented vocational skills or post secondary education in order to compete for jobs that are not only lawful, but that provide living wages rather than wages that thrust them into the ranks of the working poor.

In conclusion, I would like to remind you that Executive order #10 served as the Governor's mandate to construct an "equitable system of criminal justice." The Commission's response to that mandate, by virtue of its refusal to offer even a passing mention of the horribly disparate racial impact of current sentencing laws, and by virtue of its lack of recommendations that might begin to repair the damage caused by mass incarceration, is disappointing. Several members of this Commission have contributed to a body of work that documents the racial disparities in the existing system. Those of us who live and work in New York's low income communities of color are waiting for a response that acknowledges that cumulative lack of access to jobs, education, and resources on the front end, as well as policies and laws that have had a grossly disproportionate impact on our communities, require broad and profound changes in the way we think and talk about people with criminal justice involvement and the way we implement polices that impact their lives.

CCF looks forward to a final report that shows how public safety is better served by reduced reliance on incarceration, enhanced victims' rights, and expanded opportunities for people and communities that have been victimized by disproportionate representation in the criminal justice system.

Again, I thank you for this opportunity to testify. The College and Community Fellowship is available at anytime to assist the Commission with the challenging work that lies ahead.

Respectfully submitted,

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Testimony of N.Y. State Acting Supreme Court Justice Laura Safer Espinoza

I am a New York State Acting Supreme Court Justice and have been the presiding judge of Bronx Treatment Court since its inception in March of 1999. This afternoon I am here to share with you what has been most successful and valuable about this important alternative to incarceration, as well as to recommend measures to overcome many of its failures and frustrations.

Since the beginning of our program, we have had approximately 800 graduates – meaning former defendants who have successfully participated in substance abuse and mental health treatment, as well as achieving employment, training and/or enrollment in full time education. The most recent studies have shown our retention rates to be close to 70%. At any given moment I am responsible for monitoring over 400 people in varying stages of treatment.

In New York we know that at least 45% of those defendants convicted of drug offenses normally recidivate within 2-3 years. Recidivism among our drug court participants, however, runs between 5 and 25%, with graduates showing the most dramatic reductions.

The efficacy of the treatment court model is not in question, either nationwide or in New York State.

Therefore, I am not here to convince you that the structure works, but rather to point out the features that make it work, to urge their expansion, and to ask for your help in removing some serious obstacles to improvement.

In a nutshell, treatment court works because it is based on a clinical model and employs a team approach. Treatment is matched to clients' medical and mental health needs, monitoring occurs through a very interactive court, and a graduated system of sanctions and rewards is applied. The judge receives input from treatment programs, court clinical staff, as well as the prosecutor and defense representatives. Then, as is the case throughout most of our legal system, the judge is responsible for final decisions. The space for this model to work is created by abandoning the adversarial process in these cases. Instead, we fulfill our responsibility to our communities by restoring healthy, productive men and women - mothers, fathers, and children- ready to reclaim their places.

The one critical area where this approach is not applied, however, is in the decision of who is initially eligible to participate in treatment court.

In that realm, in reviewing the pool of potential participants, District Attorneys are the sole gatekeepers. Under our legislative scheme judges do not have the power to offer

these non-incarceratory dispositions in many categories of cases; nor do they have the ability to dismiss or reduce cases for participants who have been fully compliant.

I see this as a tragic flaw, one that has barred the door to many people in need, for no other reason than the views of a particular District Attorney. In New York City alone, this has resulted in almost no cases being sent to treatment court in one borough, and many categories of cases being barred in other boroughs. Bear in mind that these are all non-violent cases where the alleged perpetrator is affected by substance abuse, and/or mental illness. I respectfully submit that the mission of addressing the root causes of crime, thereby reducing recidivism and promoting healthier communities, would be better served by increasing judicial discretion in this area.

Another area that urgently needs your attention is the provision of additional, quality programs for the clients who are eligible to enter treatment courts. There is an appalling lack of treatment capacity for the many 'dually diagnosed' – that is, people who are suffering from both mental illness and substance abuse. Particularly when residential treatment is indicated, clients can sit in jail, suffering further decompensation, for many weeks, even months, before a treatment bed is located for them. In many instances that I have personally tracked, people finally request sentences of incarceration, rather than continue to wait for a treatment placement that may never appear. Since they have not received much needed help, however, it is almost certain that we will see them again in the criminal justice system.

Furthermore, in the Bronx, the population is 40% Hispanic – the highest percentage in New York City. Close to 48% of our borough's population speaks a language other than English at home. Despite this clear need, there are very few programs that can accommodate non-English speakers. If a client is Spanish speaking, and in need of residential mental health treatment, there is not one program in New York City that can accommodate him or her. This is an incredibly shortsighted, cruel and frustrating failure to respond to individuals and communities in need.

There is a final area that I would like to urge you to consider. As you know, one of the major motivations for people to participate in treatment court, is the possibility that they may have their charges dismissed at the end of the process, in return for full compliance. The huge obstacles faced by people with felony records in obtaining employment, education, training, or even housing are well documented. New York State has tens of thousands of individuals who carry non-violent felony convictions on their records, with no hope of their removal, and we are creating many more in our courtrooms every day. Hopelessness and lack of alternatives certainly contribute to higher rates of recidivism.

The same logic that underlies treatment court – recognizing that society is better served by curing the underlying problems that bring people into the criminal justice

system, and returning them to their communities without felony convictions, ready to make a contribution – would also apply to an expungement mechanism for certain felony convictions in New York. Many states already have legislation that allows for certain convictions – in some instances including offenses considered violent under our statutory scheme- to be expunged for purposes outside the criminal justice system, after a significant period of law abiding behavior. The details and requirements differ, but the reasoning is the same.

Instead of closing doors in ways that can only increase recidivism, we should begin the discussion that would lead to a pathway for those who have demonstrated their ability to turn their lives around, to become fully productive members of our communities.

TESTIMONY BEFORE THE
NEW YORK STATE
COMMISSION ON SENTENCING REFORM

By Emani G. Davis

Co-Chair – Youth Advisory Board

NYC Initiative for Children of Incarcerated Parents

November 13, 2007

My name is Emani Davis. I am the co-chair of the Youth Advisory Board of the NYC Initiative for Children of Incarcerated Parents, a project of the Osborne Association that represents collaboration among numerous public and private criminal justice and child welfare agencies.[1] The Youth Advisory Board (YAB) was created to raise awareness about the experience of having a parent who is incarcerated. We work to ensure that youth are leaders in the effort to reform policy and change practice to safeguard children's well-being in the face of their parent's incarceration. Our members are dedicated to mentoring youth to realize their potential as leaders, speakers, and change-agents.

I recently returned to New York from Northern California, where I worked on a variety of youth development and community justice projects. I am currently a consultant to the Osborne Association in the FamilyWorks program in state facilities and Rikers Island.
One of the projects in which I was involved in San Francisco was a campaign for the Bill of Rights for Children of Incarcerated Parents.

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[1] Representatives of the following agencies have participated in the Initiative: NYC Administration for Children's Services, the Brooklyn District Attorney's Office, Bronx Defenders, Center for Family Representation, NYC Department of Correction, NYS Office and Children and Family Services, CT WOCAT (Changing the World One Child at a Time), NYC Family Court, NYU Center on Violence and Recovery, Family Justice, Hour Children, Incarcerated Mothers Program, Juvenile Rights Division, Legal Aid Society, Legal Information for Families Today (LIFT), NY State Permanent Judicial Commission on Justice for Children, Women's Prison Association, Correctional Association, Vera Institute of Justice, and others.

1. I have the right to be kept safe and informed at the time of my parent's arrest.

2. I have the right to be heard when decisions are made about me.

3. I have the right to be considered when decisions are made about my parent

4. I have the right to be well cared for in my parent's absence.

5. I have the right to speak with, see and touch my parent.

6. I have the right to support, as I struggle with my parent's incarceration.

7. I have the right not to be judged, blamed or labeled because of my parent's incarceration.

8. I have the right to a lifelong relationship with my parent.[2]

Prisons disappear parents from the lives of millions of American children. Ten million children have experienced parental incarceration in their lives and more than two million have a parent incarcerated right now. In New York State, there are more than 100,000 children with parents in jail or prison, and hundreds of thousands of children have experienced the arrest, incarceration, probation or parole of their mothers or fathers.

International human rights advocates have called parental incarceration "the greatest threat to child wellbeing in the United States." The needs of children with parents in prison – children who are innocent of any crime – are not met, and their rights are not recognized.

The Bill of Rights is providing a useful framework for addressing a range of arrest, sentencing, child welfare and corrections policies in numerous cities and states around the country, and has led to changes in arrest procedures, visiting policies, and several local and state legislative initiatives designed to minimize trauma and increase opportunity for children and families.

[2] The Bill of Rights of Children with Incarcerated Parents was developed by the San Francisco Partnership for Children with Incarcerated Parents. It has been internationally recognized as a human rights standard for America children and has broadly resonated across the U.S. with children impacted by incarceration, service providers, policy makers and criminal justice officials. The Bill of Rights is described in detail in Nell Bernstein's new book, *All Alone in the World: Children of the Incarcerated* (New Press, 2005).

Unfortunately, the Preliminary Proposal for Reform of the Commission on Sentencing Reform did not appear to take children into account when making its recommendations, so I would like to expand on the many opportunities you have missed.

- Although the report mentions increasing access to jobs, school and programs – all of which are important – it fails to mention the single most important factor in successful reentry: family connections.
- Sentencing recommendations did not include any consideration of the impact on sentencing on children.
- Following a parent's incarceration, children often lose emotional and financial support needed for positive growth and development. While a parent is incarcerated, the State should make child support payments of minor children and obligations should not accrue to the parent during incarceration.
- In siting prisons and making prison assignments, proximity to children should be taken into account.
- Parole guidelines should explicitly consider whether a parent has made efforts to maintain contact with his or her children, and should consider the importance of the parental role in determining release.
- In considering child support obligations, the state should place a higher value on the emotional support that a non-custodial parent can offer
- Subsidized guardianship: while New York provides for kinship foster care for children in the child welfare system who are being cared for by relatives, New York has no provision that provides financial support to relatives or guardians who have accepted a voluntary placement and are caring for children of incarcerated parents without placement in the foster care system. Many children are living in poverty, being raised by their mothers while their fathers are in prison, or by grandparents or other guardians who cannot afford visitation and other expenses related to caring for children. The costs associated with helping a prisoner's family to sustain itself and remain connected are outweighed by the reduced incarceration costs associated with maintaining family connections.

The Bill of Rights offers organizing principles and a framework for reform in New York, where numerous policies, systems practices, and public attitudes must change in order to meet the needs of children. Among the reforms that are critical to the wellbeing of children with parents in prison are the following:

- Arrest practices that support and protect children.
- Pre-sentence investigations and sentencing and parole policies and practices that consider the impact on children and families.
- Prison and jail visitation policies that are family-friendly and child-centered.
- Training of staff at all public institutions that serve or affect children, so that policies and practices recognize and address the needs and concerns of children.
- Access to specially trained therapists and counselors for children.
- Policies, practices and services across all systems that strengthen families pre- and post-release.

Increasingly tough sentencing laws have had a tremendous impact on children. Sentencing law does not require judges or prosecutors or defense counsel to consider children when they make decisions that will affect their lives profoundly.

Ask the child with a parent in prison what might have improved his life and his prospects and you're likely to get some version of this answer: Help For My Mom. Even if they have experienced years of trauma and abandonment, young people are likely to see their parents as troubled and in need of support rather than as bad and in need of punishment.

The impact on children of unnecessary or overlong prison sentences – as well as the fiscal impact of associated costs such as foster care or welfare for caretakers, warrants serious consideration by the Commission, as does the potential positive impact of a shift toward alternatives to incarceration as embraced by the report.

Children deserve to have their needs taken into consideration when individual sentences are handed down. The capacity of judges to consider children should be expanded, and they should be encouraged to use the discretion they already have to protect children's interests.

Parental arrest can push an already vulnerable family to the breaking point. Reconceived, it could also be an opportunity to intervene and offer support if questions about the existence status and needs of dependent children became part of the intake procedure for arrestees and efforts were made to connect them and their children with services and supports, the criminal justice system could play a role in bolstering families.

In New York, Probation officers are required to prepare a PSI (presentence investigation), and parole officers prepare an ISR (Inmate Status Report), traditionally aimed at helping judges and parole board members to understand the background and potential for rehabilitation of those who come before them. The PSI and ISR should be adapted and expanded to include a family impact statement, which would include an assessment of the potential effect of a given sentence or of parole release or denial on children and families and recommendations for the "least detrimental alternative" sentence or decision. The PSI might also include recommendations aimed at providing services and supports to children during a parent's absence.

In other words, every decision from arrest to sentencing to prison assignment to parole should assess the Risks and Needs of families and children. This makes sense especially when one considers that research continues to demonstrate prisoners who maintain strong family ties are more likely to succeed following release.

While the Commission's report is race neutral, the reality of the criminal justice system is not. Three out of 100 American children will go to sleep tonight with a parent in jail or prison. For African American children, the number is one out of 8.

"A criminal justice model that took as its constituency not just individuals charged with breaking the law, but also the families and communities within which their lives are embedded – one that respected the rights and needs of children – might become one that inspired the confidence and respect of those families and communities, and so played a part in stemming, rather than perpetuating, the cycle of crime and incarceration" *(adapted from the San Francisco Partnership for Children of Incarcerated Parents).*

I recognize that definite sentences are appealing for all the reasons stated in the report. But what would really make a difference for children with parents in prison? Lower recidivism is important; it is very damaging to children to see their parents come home only to return to prison again. But we want real parents, parents who got the help they needed, parents who will do more than refrain from crime but will be able to contribute to their families and to the communities in which we live and to which they will return. And we want a fair parole process, with guidelines that reward parents' efforts to take responsibility for the harm they have caused.

Almost every time a public figure recommends a more draconian sentence, they accompany it by claiming that they are "sending a message." This is, of course, a fantasy, because these messages never overpower the more powerful message that tells young people from disinvested neighborhoods that they have no future other than jail. We know you will always find the money to cage us, and never have the money to engage us. If that is the message: we got it.

We believe that YOU, as public officials and policy makers know that public safety is best protected when the cycle of incarceration is broken, when people in prison stay connected to their families, and when children receive the most important thing they need to succeed: strong and loving parenting. We believe that our elected officials and our neighbors want to rethink and reform criminal justice policies – from arrest through sentencing and incarceration, to resettlement – by ensuring that they take into account their impact on children.

For more information on the NYC Initiative for Children of Incarcerated Parents, contact Tanya Krupat, Project Director, The Osborne Association, 175 Remsen Street, Brooklyn, NY 11201, tkrupat@osborneny.org. www.osborneny.org

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HOW CAN NEW YORK'S EXISTING POLICIES AND PROCEDURES FOR PREPARING OFFENDERS FOR RE-ENTRY FROM PRISON TO THE COMMUNITY BE IMPROVED?

My name is Lisa M. Rappa. I am a formally incarcerated woman, an advocate and a member of the Coalition for Women Prisoners. From my experience in the system, I can tell you that DOCS' current programs dealing with reentry are inadequate. Please allow me to explain.

I believe that preparation for reentry should begin upon entry into the system. Vocational training during incarceration is one way to prepare for a successful reentry. It is true that when a woman enters DOCS, she is screened and placed on a waiting list for vocational training. However, in DOCS, ASAT/CASAT programming takes priority over training needs that will aid the women in a successful reintegration. ASAT/CASAT programming alone, with few other productive activities during jail, will not help us gain employment. Better training programs that help women gain productive, sustainable employment upon release will reduce DOCS' high rates of recidivism.

Lack of coordination and communication between DOCS and workforce systems is another obstacle for women gaining employment upon release. Although employers can gain many benefits by hiring formerly incarcerated people, including tax credits, not all employers have positive views of ex-cons. DOCS could smooth this relationship by facilitating certificate programs hosted by outside organizations or agencies so that women can leave with certificates and training from community-based agencies.

DOCS should improve contacts with community agencies to maintain correct information about agencies and non-profits and the services they offer. Phase III provides the only opportunity for women to prepare for reentry. Yet, inmates have little control of this process and it comes too late in the incarceration to let women establish contacts for themselves. One simple suggestion to improve this programming is to allow women to give written requests to Phase III staff to be sent out to these agencies.

Another important part of a successful reentry that often does not get addressed in release preparation is physical and mental health. While it is well known that inmates have higher rates of chronic and communicable diseases and mental health issues, DOCS suffers from ineffective screening and identification of illnesses. The failure to diagnose illnesses leads to poor and unsuccessful treatment and many people leave prison with various health and mental health problems that are barriers to employment. For example, people leave without medication, fall into a depression and are then unable to find or maintain a job. Mental stability is very important to positive functioning. Failure to properly diagnose also leads to inaccurate medical discharge papers that do not reflect the most important factors of an inmate's medical needs. In addition, inmates are unable to raise these issues with staff. Finally, DOCS should facilitate Medicaid applications so inmates are able to quickly take care of medical issues upon release and move on to the difficult task of finding secure housing and meaningful employment.

Cognitive-behavioral therapy (CBT) groups would be another productive addition to DOCS programming that would have a positive impact on women upon release. Cognitive therapy is about understanding negative thought patterns and their relationship to emotional and behavioral actions. CBT will help inmates become conscious of irrational thoughts that might have led up to their incarceration and learn to challenge old beliefs and learn healthier ways of living. Prison time, with its isolation and slow pace provides the opportunity for people to change their thoughts and behavior, reducing new crimes and recidivism.

DOCS fails to provide productive activities during incarceration, build constructive community ties, properly diagnose and treat illnesses in prison, ensure a real valuable continuity of care and provide behavioral therapies to shape positive thinking during incarceration. These are major areas that require significant reforms in the policy.

I hope the issues of improvement that I have addressed will be taken into strong consideration for improving policies and procedures. Thank you very much for your time and attention.

Written Testimony of Felipe Vargas, MA, MPS, CASAC
Director of Criminal Justice Programs, The Doe Fund, Inc.
Before The NYS Commission on Sentencing Reform,
Denise E. O'Donnell
Chair

Tuesday, November 13, 2007
9:30 AM-4:30 PM
New York City Bar Association
42 West 44th Street, New York NY

Good Afternoon, Commissioner O'Donnell, distinguished Commission members and guests. My name is Felipe Vargas and I Direct Criminal Justice programming at The Doe Fund, Inc., an organization that provides paid transitional employment to homeless people, probationers and parolees. I would like to thank you for the honor of allowing me to testify before this distinguish panel.

I am going to testify today about the need for comprehensive discharge planning while a person is still incarcerated to reduce the probability of recidivism once released. I am also going to advocate that programming to address the needs of anyone convicted of a crime and sentenced to a term of imprisonment be focused on the development of marketable skills both in prison and upon release.

In our society when we hold someone for at least one overnight to provide a medical or behavioral service best practice dictates that we provide adequate discharge planning for that person upon release from care. Such is the case for things such as chemical abuse, medical or mental health treatment. The goal of discharge planning is to prevent the person from returning to the previous state in which treatment was needed. Certainly, we would all agree that this makes practical sense.

Incarceration is both one of the punishments and the treatments that we prescribe for individuals who violate our laws. In short, imprisonment is intended to punish the person and prevent them from returning to the previous condition (unlawful behavior) upon release. Incarceration is utilized as a form of behavior modification. However, despite our advances in behavioral sciences we have not followed the best practice concept of discharge planning when discharging formerly incarcerated individuals post treatment. I believe this is so because of our historical need to focus on retribution. I think that we owe ourselves (society) and the individual more than just punishment. We should use the best at our disposal to increase the

probability that someone who has been incarcerated has the best possible chance of not reoffending. The vehicle for this is discharge planning and it is in the public interest that we do it effectively.

Discharge planning before release is not a new concept and one that has reaped benefits here in the City of New York. Several years ago a population labeled "Frequent Flyers" was identified. These individuals were people who literally spent their lives, often for decades, alternating stays in New York City jails, drug treatment facilities and the shelter system. Through investigation it was uncovered that one of the main situations that fed the "Frequent Flyer" problem was that Rikers Island lacked adequate discharge planning. At the time there was a practice where people would be released into the late hours of the night directly into drug and crime infested Queens Plaza with little to no money or linkages to appropriate services. Many of these individuals had histories of mental illness and chemical abuse. Needless to say, once at Queens Plaza most quickly became involved with the negative elements there.

A plan was put together, through a collaboration between the New York City Department Of Correction, Department of Homeless Services and service providers to identify these individuals, assess their needs and provide services immediately upon release to break the cycle. This collaboration has proven successful in decreasing recidivism among this population and due to its successes comprehensive discharge planning is done on a much larger scale in the City's jails today.

On a state level, since August of this year, the New York State Department of Correctional Services (DOCS), in collaboration with the Division of Parole, has set up a Reentry Unit at Orleans Correctional Facility for comprehensive discharge planning. This is a 60-bed unit where state prisoners from Erie County are transferred 90 days prior to release. While there inmates meet with service providers from the community, prospective employers and reconnect with family and loved ones. Prisoners are also assisted with public benefit applications. Moreover, linkages are made so that inmates can go straight from prison to service providers that they have already met on the day of their release. DOCS has also reached an agreement with the New York State Department of Motor Vehicles to underwrite the cost ($10) of providing Non-driver ID Cards to all newly released persons.

These efforts will certainly help to ease the transition of formerly incarcerated individuals as they adjust to society and in this way have a significant impact on reducing recidivism. Even more encouraging is the fact that DOCS has plans to open Reentry Units at several other facilities. We urge you to support these efforts through funding and legislation.

Actually, we have seen some excellent developments at DOCS, under the leadership of Commissioner Brian Fischer. In addition to the Reentry Units, DOCS is expanding educational and vocational programs that have shown to be effective in equipping prisoners with marketable skills. This includes the re-establishing of funding for college education. Studies have shown that obtaining a meaningful education while incarcerated reduces recidivism (Califano, 1997; Lawyer and Dertinger, 1993). In fact, the more education one receives while in prison the less likely they are to recidivate (Batiuk, 1997). In 1991, the NYS Department of Correctional Services conducted research to study whether college programs had an impact upon recidivism and found that a college degree was tied to reductions of recidivism of 55.7% (Clark, 1991).

According to a report by the New York State Bar Association's Special Committee on Collateral Consequences of Criminal Proceedings "Research from both academics and practitioners suggests that the chief factor which influences the reduction of recidivism is an individual's ability to gain 'quality employment." Moreover, the Independent Committee on Reentry and Employment reported that 89% of individuals who violate the terms of their parole or probation are unemployed at the time of the violation. We, at The Doe Fund, believe that all programming intended to reform people sentenced to terms of imprisonment should focus on developing their employability.

In addition to discharge planning I urge this panel to invest in programming for the formerly incarcerated that focuses on the attainment of gainful employment. Certainly, we acknowledge that many individuals are released with other needs such as a chemical abuse treatment, anger management, health issues and housing, just to name a few. What we are suggesting is that all needed services be provided but that the focus be on inclusion in the workforce. With the exception of those that are disabled or otherwise challenged the majority of formerly incarcerated individuals can benefit most from work-based reentry strategies.

We believe together with discharge planning programs that prepare the formerly incarcerated with job skills training and job placement services can have the most positive impact on the rehabilitation of those who serve time in our state prisons and jails. Most importantly, we believe that it can work to lower the recidivism rate. In short, full inclusion in our economic system should be the centerpiece of successful reentry.

I am not talking about creating new models. I am talking about supporting and expanding existing initiatives. Certainly, I would like to offer my program as an example of a successful reentry model.

We, at The Doe Fund, have been providing homeless men and women the chance to rebuild their lives through hard honest work for over 17 years. We offer a simple, yet highly effective formula: the men and women who come through our doors make a commitment to work hard, abstain from drugs, alcohol and criminal activity and we in turn make a promise to offer them an opportunity, through transitional employment, to earn above minimum wage, establish savings, obtain suitable housing and a private sector job. While the individual is in our programs we also provide wrap around services such as training and education, Relapse Prevention Groups, AA and NA, Drug Testing, Job Development, Placement and Retention Services. We also offer all graduates life-time assistance. All who graduate from our program leave drug and alcohol free, with a private sector job, savings and independent housing.

Throughout our history, by extension, we have always served criminal justice populations. Over 70% of those who have gone through our doors have felony convictions. In 2001, we opened our first criminal justice program to serve exclusively those on Parole or Probation who were not homeless but had a place to live, however, were still in need of transitional employment and wrap-around services to get their lives back together. It initially started with a small 30-person capacity program today we serve over 225, including a transitional housing program. I would like to share some numbers with you to give you an idea about the scope of our work. Our transitional employment program chiefly involves street cleaning and on a daily basis we clean over 150 miles of street. In 2006, 426 jobs were obtained by our trainees. We have an employment retention component to our services which has resulted in trainees retaining their jobs at a rate of 70% after 6 months of employment. Currently in our Criminal Justice Programs we have a success rate of 84% of our capacity.

I, of course, can go on and on about my agency. It is just one example of a successful program whose goals are to place a person in gainful employment. There are other programs who are successful in placing the formerly incarcerated in jobs such as CEO, The Fortune Society, The Osborne Association and the Exodus Transitional Community, just to name a few. Once again, the best way to work toward successful reentry is to give the person reentering full inclusion in our economic system. It is in the public interest and the best that we can do with our tax dollars.

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Submission to the New York State Commission on Sentencing Reform

Testimony by Dr. Andrew R. Conn

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Background

I am a well-known (admittedly by a specialised group) researcher in mathematics. I am a US citizen and have been a resident of NY State since 1990. I have never, fortunately, had any family or friends incarcerated (unless you count some of those I have tried to help, in extremely minor ways, relatively recently).

A phrase that recurs several times when arguing against reduced penalties or granting parole (it appears in your excellent preliminary proposal, [12], p.31, for example in " ... it could be extended to 19 and 20-year-olds upon a judicial finding that affording young offender status would not deprecate respect for the law." Well, based on the information I have gathered, nothing could engender less respect for the law and our penal system than knowledge as to how it works today.

As a concerned citizen I am ashamed of our penal and judicial system. I think one can judge a country best by how it treats its disadvantaged. Here, when one thinks of those imprisoned, how racially and economically biased the system is and in particular how vindictive, inhumane and excessive it is compared to almost any other Western Society I feel it is my duty to let my opinions be known to this commission.

What do I want to achieve

Once I became interested in learning more about our penal and judicial system I began to acquire knowledge of it and that knowledge is the source of my shame and my desire to make a difference. In this testament I intend to bring up some of the issues that particularly offend me. Please bear in mind that much of my knowledge is general within the USA rather than specific to NY State, but nevertheless I believe that the overall sentiments apply. Clearly, I am not a lawyer, prosecutor or defender. Nor am I a judge, policeman, parole or prison officer. Thus I hope you will consider this to be the testimony of a concerned citizen.

Specific Comments

Capital Punishment

I call this judicial murder. I can understand the mother of a murdered child, for example, wanting to end the life of the perpetrator, but that is no reason for a state or country to allow such barbarism. [I realise that NYS no longer has executions but from time to time people argue for its reinstatement]

I am not sure how widely this is known, but for example no country can join the European Union without ending executions first. In the USA and many other countries, violent crime is a serious problem. Such crimes have tragic and lasting ramifications for the families and loved ones of the victims. I would never seek to excuse or belittle these crimes. But the death penalty is a calculated denial of the right to life and the right not to be subjected to cruel, inhuman or degrading punishment - basic rights to which all human

beings are entitled, no matter who they are or what they have done. Furthermore, since 1973, more than 120 people in 25 states have been released from death row with evidence of their innocence. Twenty two defendants had been executed for crimes committed as juveniles since 1976.[17]. Russia commuted the death sentences of all 700 of its condemned prisoners to life; and the U.N. Commission on Human Rights has called for a moratorium on all executions. The number of countries that have stopped implementing the death penalty has grown to an all-time high of 105.

Some of the world's most respected leaders have also called for an end to the death penalty, including Pope John Paul II, Nelson Mandela, and the U.N. High Commissioner for Human Rights, Mary Robinson. But the U.S. ignores these appeals and even the more moderate steps called for by the international human rights community. The U.S. has further distanced itself by expanding capital punishment to broader classes of crimes, and applying it to society's most vulnerable offenders.[4]

Plea Bargaining

Plea bargaining has everything to do with expediency and nothing to do with justice. In fact, its daily misuse in the US is nothing short of horrific. A significant catalyst for my outrage in this arena was the PBS Frontline program on "The Plea", The web address is http://www.pbs.org/wgbh/pages/frontline/shows/plea/view. Everyone involved in our justice and penal system should watch it. One of the six parts concerns Patsy Kelly Jarrett who spent 28 years in (Bedford) prison because she wouldn't plea bargain for something she did not do. She is now out on parole. What purpose is served by locking up so many people as we do for an excessive number of years? Although it is not too easy for me to corroborate everything, far too frequently I have the impression that serious criminals are able to considerably reduce their incarceration by 'trading' crimes for information. Frequently, the worst offenders receive much lighter sentences than those they successfully accuse who are, in fact, considerably lesser criminals. Moreover, the system is vindictive! 'Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible. As a practical matter this means, as between two similarly situated defendants, that if the one who pleads and cooperates gets a four-year sentence, then the guideline sentence for the one who exercises his right to trial by jury and is convicted will be 20 years. Not surprisingly, such a disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one's peers. Criminal trial rates in the United States and in this District are plummeting due to the simple fact that today we punish people — punish them severely — simply for going to trial.' [18]

In spite of my first item above, the most egregious plea I am aware of is that of Gary A. Ridgway in Washington State. He pleaded guilty to 48 counts of aggravated murder and agreed to provide information to help locate remains lost for nearly two decades in exchange for prosecutors agreeing not to seek the death penalty. Had he only murdered one he would have been executed. Clearly justice was not the issue.

'A defendant faces a 90 percent chance of conviction if he goes to trial and makes his decision accordingly. He will reject any proposed deal that is worse for him than a 90 percent chance of conviction but may well accept one that is less attractive than a 50 percent chance of conviction, leaving him worse off than he would be in a world without plea bargaining. All defendants would be better off if none of them accepted the D.A.'s

offer, but each is better off accepting. . . . Individual rationality does not always lead to group rationality'.[13]. Inevitably those without money, a good lawyer and education, are by far, the most likely to come off worst.

Parole

'There is something wrong with a criminal justice policy that looks only to lengthy imprisonment as the answer to crime, and a criminal justice system that blithely follows along.'[15] I am in communication with and have visited a handful of incarcerated people. In a sense I didn't choose them. All but one of them is black. Several have been incarcerated for over thirty years and most of them will be there for longer. I know they are **all** extremely decent human beings who should no longer be incarcerated. In fact several of them should have been released many years ago. In all these cases they are denied parole because of the nature of their original crime. Moreover, their crimes were committed when they were much younger than they are now. Indeed, in just the last 30 years, the United States has created something never before seen in its history and unheard of around the globe: a booming population of prisoners whose only way out of prison is likely to be inside a coffin. 'Western Europeans regard 10 or 12 years as an extremely long term, even for offenders sentenced in theory to life' said James Q. Whitman, a law professor at Yale and the author of 'Harsh Justice,' which compares criminal punishment in the United States and Europe.

A survey by The New York Times found that about 132,000 of the nation's prisoners, or almost 1 in 10, are serving life sentences. The number of lifers has almost doubled in the last decade, far outpacing the overall growth in the prison population. Of those lifers sentenced between 1988 and 2001, about a third are serving time for sentences other than murder, including burglary and drug crimes.[11]

Our insistence on denying parole because of the nature of the original crime is a key contributor to these statistics. If one thing is crystal clear it is that the perpetrator can do absolutely nothing about the nature of the original crime. However, if the original sentence was, for example 15 years to life, that original sentence meant that in spite of the nature of the crime it is not unreasonable for the criminal to be granted parole after 15 years. In fact, a reasonable person would say that all things being equal a model prisoner would indeed be granted that parole as soon as possible. But that is far from the case today and to my mind that is not reasonable and it is not justice.

For the record, I strongly disagree with most of the sentiments of G. B. Alexander in [12], Appendix B. It is most unfortunate that this is the statement of the Chair and Chief Executive Officer, New York State Board of Parole. I believe that many of us could make a compelling argument that unless it is the role of the parole board to keep inmates incarcerated as long as possible, the board has been far from stellar over several decades. In the context of a board that had been more humane and generous in its interpretation of the role of parole I might have agreed with many more of Alexander's statements.

Life Without Parole

Life without parole, the most severe form of life sentence, is theoretically available for juvenile criminals in about a dozen countries. Human Rights Watch and Amnesty International found juveniles serving such sentences in only three countries besides our own. Israel has seven (I assume but do not know that they were somehow involved in suicide bombing), South Africa has four and Tanzania has one. The US has 2,225 of whom 59%

of the convictions were for first time offenders. Black children are sentenced to LWOP ten times more often than white children. An estimated 26% of child offenders were convicted of'felony murder', which holds that anyone involved in the commission of a serious crime during which someone is killed is also guilty of murder, even if he or she did not personally or directly cause the death. Every jurisdiction in the United States incorporates some form of the felony murder rule as part of its definition of murder. It was abolished in the United Kingdom in 1957. The Convention on the Rights of the Child, ratified by every country in the world except the United States and Somalia, forbids this practice, and at least 132 countries have rejected the sentence altogether. Thirteen other countries have laws permitting the child LWOP sentence, [9]. How can one not be ashamed of such statistics? Recently Texas changed its laws to allow for the sentence of juvenile LWOP. To its credit NY does not have life without parole for juveniles. Nevertheless this serves to indicate how vindictive, inhumane and unjust our system in the US really is, and to varying degrees NYS is adversely effected by this climate...not least by the politics. In addition NYS does have life without parole for non-juvenile offenders. This raises the issue of defining juveniles as adults 'If they are going to commit an adult crime then, they have to pay an adult price'. This is akin to redefining what is torture. These terms were defined for very specific reasons and cannot be redefined for expediency. Once again this seems to be an almost uniquely US abberation. Juveniles in most jurisdictions were defined as such because it was felt that they could not be held criminally responsible until they reached a certain age. Clearly such a decision cannot depend upon the nature of the crime.

Some comparisons with other countries and sentences for life. Since 1878, after the abolition of the death penalty in the Netherlands, life imprisonment has almost always meant exactly that: the prisoner will serve their term in prison until they die. The Netherlands is one of the few countries in Europe where this is the case. Though the prisoner can appeal for parole, it must be granted by Royal Decree. An appeal for parole is almost never successful; since the 1940s, only two people have successfully filed a request for clemency, both being terminally ill. Since 1945, only 34 criminals have been sentenced to life imprisonment (excluding war criminals). In Portugal life imprisonment is limited to a maximum of 25 years, but the vast majority of long-term sentences never exceed 20 years served. In Norway the maximum sentence that can be given is 21 years. It is common to serve two-thirds of this and only a small percentage serve more than 14 years. The prisoner will typically get unsupervised parole for weekends etc after serving 1/3 of the punishment, or 7 years. In extreme cases a sentence called 'containment' (Norwegian: forvaring) can be passed. In such a case the subject will not be released unless deemed not to be of danger to society. This sentence is however not regarded as punishment, purely as a form of protection for society, meaning there is no minimum term, and that as long as the protective aspect is fulfilled, the subject can be granted privileges far beyond what is extended to people serving normal prison sentences. In February 2007, the European Court of Human Rights announced a review on whole life sentences on the grounds that such sentences amount to a violation of human rights.

General Philosophy

The US has one of the most repressive and vindictive prison systems in the world. I have already alluded to some comparisons above. Some representative rankings in term of the percentage incarcerated is given in Table 1:

Country	Rates per 100,000
United States of America	750
Russian Federation	628
Puerto Rico	356
Chile	262
New Zealand	183
United Kingdom: England & Wales	148[1]
Australia	125
Turkey	112
Canada	107
Belgium	91
Norway	75
Italy	67
Japan	61

Table 1: Entire World - Prison Population

Of the 216 countries the USA has the highest rate, Canada is 125^{th} and Japan is 174^{th}. Finland is 167^{th}, [10]. I single out Finland because it used to have a repressive system modelled on Russia's. Relatively recently and relatively rapidly it changed to a system more in line with the rest of Scandinavia. It made almost no significant change to the crime rate (they were in line with the rest of Europe) but look at its penal institutions.

Whether categorized as 'open' or 'closed', it is hard to tell when you've entered the world of custody. This is a closed prison, but you may have noticed you just drove in, and there was no gate blocking you."Walls and fences have been removed in favor of unobtrusive camera surveillance and electronic alert networks. Instead of clanging iron gates, metal passageways and grim cells, there are linoleum-floored hallways lined with living spaces for inmates that resemble dormitory rooms more than lockups in a slammer. Guards are unarmed and wear either civilian clothes or uniforms free of emblems like chevrons and epaulettes. 'There are 10 guns in this prison, and they are all in my safe. The only time I take them out is for transfer of prisoners'. At the 'open' prisons, inmates and guards address each other by first name. Prison superintendents go by nonmilitary titles like manager or governor, and prisoners are sometimes referred to as 'clients' or, if they are youths, 'pupils'. Generous home leaves are available, particularly as the end of a sentence nears, and for midterm inmates, there are houses on the grounds, with privacy assured, where they can spend up to four days at a time with visiting spouses and children.'We believe that the loss of freedom is the major punishment, so we try to make it as nice inside as possible', said Merja Toivonen, a supervisor at Hameenlinna.[7]

We have to find ways to consider incarceration as a last resort. Most of those incarcerated must be incarcerated for shorter terms. Alternatives to incarceration must be the norm for genuine non-violent first offenders and we must reintroduce better education programs and effective treatment for the mentally ill and drug addicted. We must also make it much easier for released prisoners to reenter normal society and become productive citizens. Of

[1]Scotland is lower

course this is not easy, but the prevailing sense of revenge and unwillingness to help ex-felons makes it almost impossible. Especially when one considers that many of them, for a variety of reasons, have much more to cope with irrespective of their crime than most of us.

I commend the commission and the Governor in their beginning to address these issues. However, I am concerned that less than 25% of what I would consider reasonable modifications to the status quo is actually what happens—and then our politicians gradually dismantle the changes. I am not completely naive. I do understand that a small minority of prisoners need to be incarcerated for most of their lives under restrictive conditions.

Unequal justice.

'South Carolina prosecutors are 3 times more likely to seek the death penalty in white victim cases than in black victim cases. Prosecutors are 3.5 times more likely to seek the death penalty when a black defendant kills a white victim than in all other defendant/victim combinations combined. Cases involving female victims are 2.5 times as likely to result in capital prosecutions as cases with male victims. Prosecutors in rural districts are 5 times more likely to seek the death penalty than their urban counterparts,[16].

'The administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons',[2], p.60.

Last year, Sean P. Sullivan had 1,600 clients, all of them poor and charged with crimes. Last December, an appeals court in Brooklyn threw out the conviction of a Legal Aid client on the grounds that the lawyer had botched the case. The defendant, Kevin Maldonado, had been in prison for three years for a robbery he says he did not commit. Mr. Maldonado, now 25, was arrested in 1995 at Newtown High School in Elmhurst, Queens, where he had gone because his nephew had gotten into trouble. As Mr. Maldonado sat in an office, a student passed by and said Mr. Maldonado had been one of the five strangers who had robbed him in a stairwell two months earlier. The police were summoned and he was arrested. Mr. Maldonado, a construction worker with no criminal record, rejected a plea bargain that would have given him five years of probation. His first trial ended in a hung jury, and he was again offered probation. But, insisting that he had been at work at the time of the robbery, he demanded a retrial.

A new Legal Aid lawyer, Manuela Grobe, was assigned. But at the retrial, she did not call three defense witnesses who had testified at the first trial, according to trial transcripts and other records. And, like the first Legal Aid lawyer, she did not contact two alibi witnesses who would have testified that Mr. Maldonado was at work at the time of the robbery. He was convicted and sentenced to 5 to 15 years in prison.

It was only after Mr. Maldonado's family and co-workers hired a lawyer, Elliott B. Leibowitz, that the two additional witnesses were contacted. A nonprofit group called Appellate Advocates took the case and won the reversal. Michael Brovner, an assistant district attorney in Queens who was recently assigned to the case, said in February that he would demand a third trial.

Last month, Mr. Maldonado gave up his fight and pleaded guilty in exchange for a sentence of time served. He said he wanted to go to the Dominican Republic to see his

father, who is ill, before he dies. 'There's no justice in this country', he said in a recent interview. 'They be playing with people'.[6]

For some, free counsel comes at a high cost. Bright, who teaches law at Yale and Harvard universities, offers this caution: No constitutional right presents a greater divide between promise and reality. 'We wax poetically about justice for all, and on Law Day attorneys get together and reminisce about Fred Turner representing Clarence Gideon at his retrial and winning an acquittal', Bright says. 'And yet you go into courthouses all over the country, and what you see is not at all what is being celebrated. What you see is people being processed like widgets on an assembly line'. In the United States justice has been distributed according to race, ethnicity and wealth rather than need. This is not equal justice, [1].

Approximately 16 months ago, the Commission on the Future of Indigent Defense Services concluded that New York States indigent defense system was in crisis. That finding came as no surprise to anyone even remotely familiar with the criminal court. Those facing charges in the criminal courts of this state are overwhelmingly and disproportionately people of color, and they are usually represented by lawyers with limited funds and enormous caseloads. Is it any surprise that guilty pleas rule the day? [19]

The list seems almost endless and evidence as to the inequity of our system is everywhere, yet it seems to concern only a few. Of course there are some inequities in all systems but with the proclivity for our system to give long sentences and the fact that we have a very diverse ethnic population, the effect is much much worse than say in Western Europe. Consequently we should be making much more effort to do something about it. Instead, we seem to be making much less!

Victim Impact Statements

Victim statements are rarely objective and I fail to understand why they have a role in justice and sentencing. It is easy to understand why a victims family may want revenge (which is how I view much of the real justification for inordinately long sentences — after all I do not believe that human beings, including criminals, are fundamentally worse in the USA than say in the Netherlands). Such statements are relatively recent even in the US (the first becoming law in California in 1982) but they are not a part of sentencing in almost every other country. Incidently, admittedly on limited evidence, I have the impression that when they are forgiving of the perpetrator they are largely ignored. Victim Impact Statements do little to further the traditional goals of sentencing: deterrence, incapacitation, rehabilitation and retribution ([5], [3]). In short: victim impact evidence is simply not consistent with the traditional goals of sentencing. It furthers none of the historically considered ambitions of punishment. The best that can be said for victim impact evidence is that it is somewhat conducive to the retribution goal. ([5] p. 403)

Registered Sex Offenders

I consider that many aspects of Registered Sex Offenders laws amount to modern witch hunts. There is little evidence that the general public needs to know. They mostly are promoted by and themselves promote fear. I think it is fine for such lists to be available for those who have the need to know, as is standard in Europe but, as seems to be the case far too often—in the USA we go overboard, promoted mostly by politics and not science or even intelligent thought. Public lists are almost unheard of outside the USA. We have over 600,000 offenders listed publically. There are many reasons to not only

question their use but also to question how many should be on them. This is a typical European attitude: in this case from Scotland Yard and The Metropolitan Police. 'Just because you are a convicted offender does not mean you are still offending', a spokeswoman said. 'Why would we pursue them in this way? These are people who have served their time'. Scotland Yard's position was backed up by the Home Office, which said it was 'not intending to disclose lists of registered sex offenders to individuals or organisations not directly at risk or concerned with law enforcement', [14].

Disenfranchisement and the counting of the population.

I believe that it is self-evident that there are serious problems with the way felons are disenfranchised but nevertheless counted as voters. For example, in the six local counties that make up Elizabeth Little's 45th Senate district there are 13 prisons. This amounts to more than 14,000 inmates, all of whom get counted as residents. Without the prisoners, the district's population would fall below the minimum allowable level, which would mean it would have to expand, perhaps by swallowing the northern end of Saratoga County. Since most prisoners are from downstate urban areas represented by Democrats and most prisons are in upstate rural areas represented by Republicans there is a simple explanation for the status quo. My own preference would be to allow felons to vote, but in many case even ex-felons are not allowed to vote.

'To condemn millions to eternal political silence is to stab our democracy in the heart, and to provide cause for bitterness and alienation. Felons may face many other disabilities: They cannot sit on juries, serve as teachers, firefighters or – often – even barbers or plumbers. They cannot receive food stamps or live in public housing. Add to all this the knowledge that whatever they do, no matter how much they have changed, their voices will never be heard in the public arena.' [8].

I am delighted to read your 'A majority of the Commission members believe that parolees should be encouraged to fully participate in civic activities and the restoration of the right to vote is fundamental to that participation.'([12], p.52)

Finally I would like to reiterate my appreciation of what you are trying to do. I was generally very impressed with the content of [12] and I hope you succeed in making the commission permanent. I am sure that even those with whom I disagree are as concerned to have a better system as all of us. However, when you say ([12], p.59), 'New Yorks sentencing system certainly is not in a state of crisis', this is a relative assessment. In my opinion, relative to most of the Western World our sentencing system is in a state of crisis.

Thank you for giving me the opportunity to speak today.

Andrew R. Conn

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Statement of Sandeep Varma, LCSW, CASAC

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New York Therapeutic Communities, Inc.
Stay'n Out & Serendipity Programs

New York, NY

And

Chair of the Criminal Justice Committee,

The Association of Alcoholism and Substance Abuse Providers

of NYS

Albany, NY

Before the New York State Sentencing Commission

November 13, 2007

Members of the Sentencing Commission;

Good morning/afternoon. Thank you for giving me the opportunity to be here. My name is Sandeep Varma, and I am Executive Vice President of New York Therapeutic Communities, Incorporated and the Chairperson of the Criminal Justice Committee of the Association of Alcoholism and Substance Abuse Providers of New York State.

New York Therapeutic Communities is a not-for-profit agency that operates substance abuse treatment programs for men and women in the criminal justice system. Our programs operate both within the prison system and in community-based residential settings. The Therapeutic Community, or TC, treatment model that we use has been shown to be particularly effective in reducing substance use, relapse and recidivism among criminal justice system clients .

As Executive Vice President, I have direct oversight responsibility for day-to-day operation of these programs. The success of our program graduates in re-entering society as productive citizens is a source of great personal satisfaction for me and all the members of our agency.

I am here today to speak to you about the important contribution that community-based treatment providers are making in the area of public safety and the need for a strong commitment in the form of State funding to support the continuation and expansion of these efforts.

The link between substance use and crime is well established. Drug and alcohol abuse and addiction are implicated in the crimes and incarceration of 80 percent--some 1.6 million-- of the 2 million men and women behind bars in America. In New York, the estimate has been even higher, affecting some 85% - or 53,000 of the States' nearly 63,000 inmates. This number doesn't factor in New York City's 14,000 inmates, who without proper discharge planning, are more likely to re-offend and end up as State inmates.

It is for this reason, that expansion of critical programs that provide inmates with meaningful substance abuse treatment and re-entry opportunities– be continued.

We now have 40 years of research to demonstrate that treatment works, whether it is voluntary or involuntary. Contact with the criminal justice system is an opportunity to get substance-abusing offenders into treatment. Not only does treatment dramatically reduce drug use and improve the health, legal status, employability and social functioning of those that receive services, but it produces significant economic benefits for taxpayers, in the form of reduced expenditures for criminal justice, health and social welfare. Treatment also results in improved public safety, by reducing the incidence of crime related to substance abuse.

For this reason, I am here to speak to you today about treatment as a public

safety--as well as a public health--issue.

When Ronald Williams initiated the Stay'n Out program in 1977, the concept of providing treatment for substance abuse in a prison setting was greeted with some skepticism. Today, in-prison treatment in general-- and the use of the therapeutic community method in particular-- is widely recognized as a valid and important means of combating drug use and the crime with which it is associated. The Stay'n Out program is acknowledged as having been the model for the New York State Department of Corrections' Comprehensive and Substance Abuse Treatment, or CASAT programs that now offer in-prison substance abuse treatment services to more than 5,100 inmates each year. Stay'n Out has also been widely emulated in other correctional settings, nationally and internationally. Since its inception in 1977, the program has successfully treated thousands of men and women, helping them to lead productive lives, free of involvement with drugs and crime.

Stay'n Out continues to serve inmates of the State's correctional system, with 60 beds for men at Arthur Kill Correctional Facility, located in Staten Island, and 40 beds for women at the Bayview Correctional Facility, located in Manhattan. The program operates under contract with the New York State Department of Correctional Services. Both Stay'n Out Programs are licensed and monitored by the New York State Office of Alcoholism and Substance Abuse Services (OASAS). The Preliminary Report references the issue of licensing of DOCS treatment on page 28 of its' report. We would support a requirement that all DOCS treatment be licensed by OASAS and that all Counselors working within DOCS be credentialed as CASAC's.

In addition, our Serendipity programs, a 50 bed male residential treatment facility and a 40 bed women's treatment center, located in Bedford-Stuyvesant, Brooklyn, provides continuity of care for graduates of our in-prison programs when they return to the community, and also serves as an alternative to incarceration for individuals referred from various sources in the criminal justice system. The Serendipity Programs are licensed and funded by the New York State Office of Alcoholism and Substance Abuse Services (OASAS). Additionally, our organization provides out-patient substance abuse treatment services for Probationers in New York City who are at risk of violation due to their substance abuse. These on-site services, at 2 NYC Department of Probation reporting centers are producing great results in just the 2nd year of operation. These 2 programs are serving more than 250 clients.

The effectiveness of Stay'n Out in reducing substance use, relapse and criminal recidivism has been well documented. An evaluation of Stay'n Out by an independent evaluator, National Development and Research Institutes, found that, after release to parole, only 27 percent of Stay'n Out graduates were re-arrested, compared with a 41 percent re-arrest rate for inmates who had received no in-prison treatment. A subsequent evaluation by our funding source, the Department of Correctional Services, confirmed the program's effectiveness. Particularly impressive was the success of our female program participants, of whom only 7 percent were reincarcerated during the 12 months

following their release. For male program graduates, the return rate was 15 percent for the same period, still a good record for ex-offenders with substance abuse histories.

It is the unique model of providing treatment to inmates while in custody and then having the necessary infrastructure to continue these services when an inmate is released that makes our program effective. This combination has proven itself over time and has been emulated in other States, serving as a national model for effective substance abuse treatment for inmates.

Significant reductions in recidivism have been achieved by other treatment providers, both in New York State and in other localities, utilizing the Stay'n Out program model. Integral to our approach in the use of the therapeutic community treatment modality, which works to change participants' attitudes, behavior and lifestyle, and emphasizes the value of work and personal responsibility as key to achieving and maintaining a sober and productive lifestyle. This emphasis on work and personal responsibility may help to explain why we have had such success in moving our program graduates into the work force.

It is for this reason, among others mentioned, that it's even more critical to continue contracted programs that provide substance abuse treatment and re-entry services to inmates.

As we know, the relationship between criminal behavior, substance abuse and mental health problems are all interconnected.

The consideration of the role of community-based treatment for criminal justice clients is critical. While Stay'n Out was instrumental in demonstrating both the value and the viability of prison-based treatment, subsequent experience has taught us that treatment for substance-abusing offenders is most effective when part of a broader continuum of care. Recent research has demonstrated the vital role of continued treatment in a community setting in ensuring a successful return to society for those with criminal justice histories.

As an organization with more than three decades of experience in the provision of substance abuse treatment within the criminal justice system, New York Therapeutic Communities therefore recommends an increased commitment of State dollars to expand the availability of treatment for substance-abusing offenders, both within correctional environments and in community settings.

In terms of specific recommendations for you to consider, NYTC, Inc. would encourage the respective State Agencies involved to;

- Expand programs such as Stay'n Out, to provide coordinated services from a custody setting to a community based setting
- Mandate the coordination of benefits (such as Medicaid, SSI, etc) prior to release
- Establish a system, through the use of community-based substance abuse

treatment providers, to evaluate and develop continuing care plans for all substance abusing inmates scheduled for release

- Dedicate one or more Correctional Facilities specifically for this purpose
- Provide funding to community-based service providers for programs related to re-entry for inmates.
- Develop a broad range of services to be funded through any sentencing reform initiative to include all modalities of treatment, including residential services
- Funding should be applied equally to special populations such as women, women with children and mentally ill substance abusers
- Encourage the expansion of Sentencing reforms to include larger number of drug-offenders and additional funding for community-based service providers to provide substance abuse treatment, housing and vocational services.
- Expansion of the State's Re-entry Planning Council, at present – it is comprised exclusively of State agencies – we would ask that a mandate be developed to include community-based service providers.
- Expand Alternatives to Incarceration (ATI) and drug and alcohol and other treatment programs (and ask for increased funding of these programs)
- Lengthening the Willard Program, to include mandatory and coordinated community-based aftercare
- Restore Tuition Assistance Programs (TAP) and increase educational programming in prisons
- Restore the right to vote for individuals on parole
- Expand work-release eligibility
- Reduce the number of technical parole violations
- Complete Medicaid enrollment for people in prison prior to release
- Issue ID cards to people in prison prior to release
- Judges should be given the discretion to divert addicted New Yorkers, especially those who possess or sell small amounts of drugs, from prison to community-based treatment.

Finally, We must also act to break the cycle of addiction and crime, by addressing the addiction disorders that underlie the vast majority of these offenses. Treatment is the most effective means of accomplishing this. This can be even more cost-effective when providing services to woman involved in the criminal justice system. A successfully treated woman has a "multiplier" effect, in that she has the capacity to break the cycle of addiction and crime within the family system, in effect having the capacity to act as a prevention mechanism, with respect to her children. This is why it's more important now than ever before to continue all program services to individuals involved with the criminal

justice system, particularly the most under-served group, the addicted inmate.

Programs like ours are an effective use of State resources, as they allow for long-term cost savings through reduced expenditures in so many ways.

Testimony of William Eric Waters
Before the New York State Commission on Sentencing Reform
November 13, 2007

My name is William Eric Waters. I work for the Osborne Association, an organization that provides services to people who have been in conflict with the law, that is: people with pending criminal cases; people in prison; people who have been in prison; and their families. The Osborne Association is committed to transforming lives, communities and the criminal justice system.

Today I want to talk about parole in New York State, the process of going before the parole board to be considered for release to parole supervision (Executive Law 259-i(c) and parole supervision and discharge from parole (Executive Law 259-j). I have both a professional and personal connection to these two laws. I served 24 years in the New York State prison system. I went to three parole board hearings and one executive clemency parole board hearing. Attached to my written testimony is something I wrote, "Upon Completing Twenty Years," which was published in an anthology, *Undoing Time*, edited my Jeff Evans. This piece, which is part of a larger work, was written after I went to my first parole board hearing on a 20-year-to-life sentence and speaks about that parole board experience. Two years prior to that initial parole board hearing, I had appeared before an executive clemency parole board. I was denied executive clemency. I had never been in prison before, so that executive clemency parole board hearing, I thought, was a preview of what I thought an actual parole board hearing would be like. It was not. Suffice it to say that that executive clemency parole board hearing was honest and transparent.

When I appeared before that first parole board after having served 20 years, almost as soon as the interview began, I got a sense that this parole board was not looking to fill its mandate, that is, to determine at that moment, whether or not I would, if released to parole supervision, be able to live and remain at liberty without violating the law. Instead, it seemed to be looking for reasons outside of Parole's guidelines not to release me to parole supervision. After that hearing, which lasted about 10 minutes, I learned, two days later, that I was denied parole. There was really only one reason why I was denied parole. In its decision the Commissioners wrote that my crime of conviction, felony-murder, "precluded" release to parole supervision. Ironically, one of my two codefendants in this crime, a robbery-murder, the actual killer, who was also sentenced to 20 years to life, appeared before a different parole board in the same month as I, was released to parole supervision. Six years later, he was discharged from parole.

Two years after that initial parole board appearance, I went before my second parole board. The result was the same. I was denied parole and scheduled for my third parole board hearing in 24 months, the maximum amount of time the parole board could hold anyone before another parole board hearing.

Four years after that initial parole board appearance, I went before my third parole board. As the saying goes, the third time was the charm. I was released to parole supervision. I have been under parole supervision for seven years and six days. I have not had any bad experiences on parole or with parole officers. I have had two parole officers in this time.

In 2004, my parole officer submitted the paperwork to the Division of Parole to have me discharged from parole. This application was denied. I was told that I would be

reconsidered to be discharged from parole in another two years. Before that time period was up, the Division of Parole learned that it no longer had the authority to discharge someone like me from parole, which means that I am now on lifetime parole.

Both parole officers I have had, when they still believed that I could be discharged from parole, moved the paperwork for this to happen. When I report monthly, my current parole officer, whom I was assigned to when first released, repeatedly states that it's a waste of time and resources to keep me under parole supervision. This applies to hundreds of people now subject to lifetime parole.

As part of an Ad Hoc Committee on Lifetime Parole, in meetings I attended with a number of people now subject to lifetime parole*, with the current chair and CEO of the Parole Board, George Alexander, as well as his predecessor, Robert Dennison, and the current Executive Director of the Division of Parole, Felix Rosa, we posed these two questions: (1) In light of the 1998 amendment to Executive Law 259-j, how can Parole fulfill its mission of supervising people on parole to the successful completion of their sentences when a new category of lifetime parole was created by that 1998 amendment? And (2), until such time that this law is restored to its previous form, how will parole supervision look for people now under lifetime parole?

The way I am supervised on parole after more than seven years only looks slightly different from how I was supervised after a year on parole. In other words, there is no formal mechanism to revisit the conditions of parole supervision and change the level of supervision for someone who no longer needs to be under parole supervision, someone

* I have attached a letter from Diana Ortiz, who served 22 ½ years in New York State prisons, that speaks about her parole board experiences.

who would not even be on parole if Parole had the authority to considering discharging him.

What I need to emphasize about the parole decision-making process, is that when the parole board finally decided to release me, the same reasons that existed for not releasing me at that first and second parole board hearings still existed. In other words, I was parole-ready after 20 years in prison. I was parole-ready after 22 years in prison. I was not less of a threat to public safety at 24 years in prison than I was after 22 and 20 years in prison. What I walked away from those experiences with was a sense that this whole process was not fair. It was almost as if I was being told that having been convicted of a crime I was not entitled to fairness in this process. When you look at the rationale of an indeterminate sentence, which I had, that is, its underlying philosophy of change, what the parole board did in my case, as well as thousands of others, undermined not only the parole law and guidelines, but a sense of fairness and the original intent of Executive Law 259-i(c). When then Governor Carey signed this into law in 1977, in a memorandum in support of it he stated that people in prison subject to this law would have a "reasonable expectation" of being released to parole supervision after having served the minimum amount of time under this indeterminate sentencing scheme, assuming that they had done the right thing in prison. In other words, those static things, crime of conviction and criminal history, would not weigh heavily in the decision-making process. Even my sentencing judge, who responded to a letter I wrote her five years into my sentence, stated that after serving 20 years in prison I'd still be young, that I should take advantage of programs in prison, keep my nose clean, and that I would be more than likely released after 20 years.

Seven years and six days ago I was released to parole supervision. It was the most important and happiest day of my life. It was the day that the nation learned that George Bush was its next president. And although some people may think that this is a day that things started to go wrong in the history of the nation, for me, it was the day that things finally started going right in my life.

In 1998, Executive Law 259-j, which allowed the parole board to discharge people from parole, was amended to not allow people convicted of certain crimes, murder in particular, to ever be discharged from parole. What is most significant, in having this public hearing, and this sense of transparency, is that the exact opposite happened in 1998. When Executive Law 259-j was amended, there were no public hearings; there was no transparency in this process, to the extent that the Division of Parole did not even know that one of its laws that guided the agency had been amended. It was still discharging people from parole who were technically no longer eligible to be discharged. In addition to the fact that this law does not make any sense in terms of enhancing public safety, I believe it is in violation of the Ex Post Facto Clause of the United States Constitution, when applied to people convicted of their crimes prior to the effective date of the law.

In conclusion, although this Commission is looking at moving most crimes under a determinate sentencing scheme, it is almost as if we are admitting that the people empowered to apply and enforce these laws will not be fair. When we look at the failure of our indeterminate sentencing scheme, because it was subject to politics, and because it

was written in such a way that parole commissioners had a lot of wiggle room not to be true to the spirit of Executive Law 259-i(c), we should be mindful of the fact that when we etch sentences in stone, we deny one of the legitimate penological goals, that is, rehabilitation (or change). If the ends of justice can be served after twenty years, why hold someone for 24 years?

Executive Law 259-i(c) could be written in such a manner that commissioners' politics do not enter into the equation.

Executive Law 259-j needs to be revisited and returned to its pre-1998 form, that is, allowing the Division of Parole the authority to consider releasing people from parole after a three-year period of uninterrupted parole supervision.

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

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

Easy Waters

Wallkill, New York

When the year began, my hope was that it would be my last one in prison. I stayed busy and tried to buy into the illusion that time passes quickly when you're occupied. I tried not to keep track of the days, but I was more conscious of time than at any point since the beginning of my imprisonment. I even bought a watch, my first in twenty years. I thought that counting every minute would somehow slow time down. But it didn't. The months passed, neither slowly nor quickly. They just passed, like all the time I had spent in prison had passed. Before I knew it, it was July.

My institutional parole officer could have been cast in a gangster film. He wore gold chains and a pinky ring and had a Brooklyn accent that even I—a born and bred Brooklynite—had a few problems understanding.

"This is an initial parole board appearance you'll be making," the PO said. "You spent a lot of time in maximum security before your security classification was downgraded to medium."

"Yes, fifteen years," I said.

"That's a lot of time." He looked down at a folder, my life according to the Division of Parole. "I have some things in your folder. How's that?"

"I went to an executive clemency parole board hearing in 1994."

"I see." He leafed through the papers. "I'll probably just add to what's here. It's quite extensive."

We went through my criminal history.

"I see you have an assault as a juvenile in 1976."

I had to think about that one. "That was just a fight between me and another teenager. Wasn't that dismissed?"

"Yes."

This guy had smashed my hand through a window of one of those old El trains. I still had visible scars on my left wrist, like I'd been nailed to a cross.

"There was also this robbery in 1976."

"Wasn't that dismissed too?"

"Yes."

I had been falsely accused of a crime. The witness had come to court one day, broken down, and said that I wasn't the person. She just wanted somebody to pay for the crime that had been committed against her..

"There's this juvenile robbery for which you were put on probation."

"Yes." I couldn't say anything about that one. I was guilty.

"You had a pattern of violent behavior leading up to the instant offense."

That was untrue, but I couldn't challenge it. I knew it was not a question of truth. "Doesn't it matter that I didn't kill anyone?"

"The law says you're equally guilty."

"I know that, but the law also says that's a 'fiction of law.' A state of facts that really don't exist."

"Still, that's the law."

"I know, and I accept that. I'd just like to think that the fact that I didn't kill anyone and that I've never been armed with a weapon in my life would mean something. And that I've spent twenty years in prison for the instant offense."

"Well, we could let you go, give you another chance. You've got life on the back. If you screwed up we could pull you back in. Will you screw up? Probably not."

The interview continued for about an hour. When we got through all the stuff I had done, the PO wasn't as harsh. He said I had a fifty-fifty chance of making parole, depending on who the commissioners were. He mentioned the names of a few commissioners he thought would be inclined to let me go, even this black woman whose reputation

preceded her. She was one of the most feared commissioners sitting on the panel.

Before the interview concluded, the PO told me that because of all the time I had spent in prison, I would be referred to the Office of Mental Health for evaluation.

The psychologist was standing by her desk when I entered the office. She was about five feet, ten inches tall and slim. She had curly red hair and light blue eyes that practically twinkled. Her skin was very white, almost the color of Ivory soap. And she was young—too young to understand what I had been through and the evil I had seen. She introduced herself and offered me a seat.

"You're going to the parole board?"

"Yes."

"Normally, referrals are made for homicides and sex offenses."

"I have a homicide-related conviction," I said.

"How long have you been imprisoned?"

"This is my twentieth year."

She looked up from the papers in front of her. Twenty years was like a magic number. It got people's attention every time.

"What have you been doing the past twenty years?" she asked. "What programs have you participated in?"

I mentioned my educational achievements. She asked what my degrees were in and I told her.

"It seems like you've made good use of your time."

"I've tried."

"Have you refused any mandatory programs?"

"No."

"Any drug abuse in your life?"

"No."

"Alcohol?"

"No. I never even smoked a cigarette. Drank a couple of cups of coffee in 1977."

"Do you have any family?"

"One sister and a nephew."

"And your parents?"

"They both passed away. My mother in 1978, my father in 1982."

"So you were imprisoned when they passed away?"

"Yes."

"Are you in contact with your sister?"

"I call her once a week."

"That's good." She paused for a moment, wrote some things down on a pad that she kept close to her chest. No reading upside down for me. She looked up. "How do you feel about your crime?"

"What do you mean?"

"How do you feel about it? Do you feel remorse?"

I sighed. "It's not that simple. I'm a nonkilling accomplice in a felony murder—a robbery-murder. I didn't know my codefendant was armed. I had no idea he was going to kill. Don't get me wrong. I'm not deprecating the seriousness of the crime. What happened was tragic and I'm sorry about that. I just want somebody to admit that felony murder isn't murder as people normally envision it, especially when you're a nonkilling accomplice."

"Do you feel that you're not guilty?"

"I'm not guilty of murder. I didn't know that the law made no distinction between the actual killer and a nonkilling accomplice. I would have pleaded the affirmative defense or—"

"Excuse me, what's the affirmative defense?"

"It's a defense to felony murder, for nonkilling accomplices. In a nutshell, a nonkilling accomplice shows that he wasn't armed, didn't know his codefendant was armed, didn't solicit or command the killing, and didn't think serious physical harm would result from the commission of the felony. In short, if a nonkilling accomplice can prove these things, he escapes punishment for the homicide and will be punished only for the underlying felony, whatever that might be. Robbery, in my case. Had I known and really believed that no distinction was made between the actual killer and a nonkilling accomplice, I would have copped a plea."

"Were you offered a plea?"

"Yes, eight and one-third to twenty-five years for manslaughter."

"Why didn't you take it?"

"I didn't kill anyone."

"What would you have pleaded guilty to?"

"Robbery. That's all I was guilty of."

"How much time could you have received for that?"

"Eight and one-third to twenty-five. The same as for manslaughter. Both are Class B felonies and carry the same sentence."

"How much time did the actual killer receive?"

"Eighteen months. He was a juvenile under the existing law. Today he could get nine years to life, with the changes in juvenile offender laws."

"Have you ever heard anything from him?"

"Yes. In 1980, after he went home and came back to prison for another homicide. He wrote me and said—excuse me, but this is a direct quote—'Gene, I'm sorry for fucking up your life.' The end."

"Are you angry?"

"I try not to be."

"Are you bitter?"

"I try not to be."

"Do you have problems sleeping?"

"No."

"Do you experience depression?"

"I've been locked up for twenty years. Sometimes I'm depressed. That's natural, I think. But I'm not depressed in the clinical sense."

"No, you're not clinically depressed. Would you like to add anything?"

"Yes. When I think of my upcoming parole board appearance, I think about who I was and who I am. I would like to be seen in the present, not in the past. I don't want the thirty-five-year-old to be judged again for what the sixteen-year-old did. I don't want the man to be punished for what the teenager did. They're two different people."

She nodded her head—in agreement, I hoped.

"If you could ask for one thing, besides parole, what would it be?"

Was that a shrink question? "Certainty," I answered. "I'd like some certainty in my life. I'd like to know exactly when I'm getting out of prison. I've done twenty years. Still, I don't know if the parole commissioners will consider that enough time. When is enough, enough? This hearing is for them to decide whether I should do more time. I don't think I can do more time. Maybe if I knew exactly how much more time I had to do, I could deal with it better."

"Anything else?"

"A million things. But I think I've covered everything that needs to be said."

"It was . . . educational, talking with you," she said. "Thank you—and good luck."

"Thank you."

It was hard to believe that twenty years had passed and that I had been in prison for all of them. As prisoners, we talked about how quickly time has passed, after it's gone. But in the moment, it never passes quickly. In two weeks, I was going to my parole hearing. I was never more nervous in my life, not even when I was going to trial. I had always enjoyed perfect health, but suddenly I felt ill. I couldn't sleep. I got headaches. I broke out in hives. I caught a bout of diarrhea. I was scared shitless! Scared because I knew what could happen, what would probably happen. I didn't think I could do any more time. Doing twenty years was something I never prepared myself for, but I really did do twenty years, one day at a time. I definitely wasn't prepared to do two more years, the maximum time the parole commissioners could hold any prisoner before a reappearance before the parole board.

Before I knew it, I was sitting in a waiting room, waiting to see the parole commissioners. My whole body was tense.

"Eugene Washington!"

When my name was called, I thought I would just break up. I walked the short distance to the room, but for me it was like a mile, that "last mile" condemned prisoners walk to their execution.

I entered the room. There were three commissioners sitting behind a long desk, a stenographer to the left of them, and the institutional parole officer to their right. The chair I was to sit in was a couple of feet in front of the table.

I sat down and looked at the commissioners: a black man, a black woman, a white woman. The black woman was the commissioner my PO had said would be inclined to give someone like me another chance.

She introduced herself and the other commissioners. I focused on her. It was her show. Usually, when I look at older black women, I see my mother. But this black woman looked different. My mother was slim. This woman was enormous, like she could carry the weight of the world on her shoulders—and had. I was wondering if she had an ax to

grind for that reason. She wasn't looking at me like a black woman would look at a man young enough to be her son. I knew I was in deep shit.

"Mr. Washington," she said. "Do you know why you're here today?"

No, I've waited twenty years for this moment and don't know why I'm here. "Yes. To be considered for release on parole."

She then cited the facts of my crime. All I could say was yes. The facts were not in dispute.

"You went to trial?" she asked.

"Yes."

"Why?"

"I didn't think I was guilty of murder."

"But you were there?"

"Yes, but I didn't kill the victim. I didn't even know my codefendant was armed."

"Under the law that doesn't make a difference."

"I know."

"You had a lawyer?"

"Yes."

"What did he advise you to do?"

"To plead guilty to manslaughter."

"Why didn't you?"

"Because I didn't kill anyone."

"But you were there?"

"Yes."

She then went on to my educational achievements, briefly noting them. She also read a reference letter from one of my professors, who had praised me as the brightest guy in the class.

"You applied for executive clemency?"

"Four times."

"Why were you denied?"

"I was told that executive clemency is an extraordinary form of relief and that the governor did not see the need to intervene in the normal judicial process."

"That's true. There are no extraordinary circumstances in your case that would warrant executive clemency. Why did you apply?"

"I believed I was a worthy candidate, that in light of who I am and

who I have become, the twenty-year sentence was no longer appropriate."

"You know, you committed a couple of crimes as a juvenile."

"Yes."

"Why did you commit those crimes?"

"I was young. I was foolish. I was susceptible to peer pressure. How can I explain who I was then? Like most teenagers, there was the arrogance of youth and the contempt in which I held my elders, meaning anybody over twenty-one."

"Did you think about the consequences?" the black man asked.

"No."

"You didn't care?"

"I was fifteen. When I committed my crime, I was sixteen. I didn't think about consequences, how people would be affected, how I would be affected. I had no sense of my own mortality. I didn't think I'd end up in prison for twenty years. I wish I could undo what I did."

"If you're released," the black woman asked, "you're going to live with your sister, Jasmine Washington?"

"Yes."

"What does she do for a living?"

"She's an insurance agent."

"Does she live alone?"

"No, my nephew lives with her."

"Her son?"

"No."

"Whose son is this?"

I didn't want to talk about Cam with these fucking people. "My younger sister's."

"Where is she?"

"She's deceased."

There was a moment of silence, though I knew it wasn't for Cam. Fucking people!

"How many bedrooms are there in this apartment?" the black woman commissioner continued.

"Jasmine recently moved to a three-bedroom apartment, thinking that I'm coming home."

"Any pets in the home?"

"A cat."

The black woman commissioner asked the white woman commissioner if she had any questions. I looked in her direction. She shook her head.

"Do you think we've covered everything?" the black woman asked.

I paused for a long time. I wanted to summon up the speech of my life. Actually, I wanted to give her a piece of my mind. I didn't like the tone of this interview. My stomach was in knots. Finally, I said, "Yes."

"Do you have anything you'd like to add?"

"Yes. I really do wish I could undo what happened. It was a tragedy and I'm sorry." I paused, paying respects to the victim. "I know that I can remain at liberty without violating the law. I would like to be given another chance."

"We will discuss this among ourselves and reach a decision," the black woman said. "Have a good day."

"Thank you."

I was surprised I could walk. I felt like I had been sucker punched. I opened the door and let myself out. In the waiting area, other prisoners were gesturing to me, asking me nonverbally how it had gone. I shrugged my shoulders, although I expected the worst. Talk about anticlimactic. I had waited twenty years for this.

I didn't sleep that night, or the next. In Friday's mail call, I got the decision. I felt the envelope. It was thick, which meant that there was a Notice of Appeal form inside: I'd been denied parole. I opened it up anyway and read:

> PAROLE DECISION: DENIED. HOLD FOR 24 MONTHS.
> NEXT APPEARANCE: 09/98.
> BASED ON THE NATURE AND CIRCUMSTANCES OF THE INSTANT OFFENSE INVOLVING THE IN CONCERT PLANNED ROBBERY OF THE VICTIM WHEREIN ONE OF YOUR CODEFENDANTS SHOT THE VICTIM CAUSING HIS DEATH. YOU WERE CONVICTED AT TRIAL. WE NOTE PRIOR JUVENILE COURT DELINQUENCY WITH PROBATION SUPERVISION AT THE TIME OF THE INSTANT OFFENSE. WE NOTE YOUR ACADEMIC ACCOMPLISHMENTS AND PROGRAM PARTICIPATION. HOWEVER, THE PATTERN OF ARMED ROBBERY CULMINATING IN THE INSTANT OFFENSE PRECLUDES DISCRETIONARY RELEASE.

Two more years.

That night, I called my sister, Jazz.

"What happened?" she said without even saying hello, her enthusiasm coming across the line.

"They denied me."

"What?"

I read the decision to her.

"I can't believe this shit!"

"I can't believe it either."

"What do they want from you?"

"I don't know."

"How many people did you see?"

"Three."

"Were they white?"

"Two Negroes—a man and a woman—and a white woman."

"Blacks are worse!" Jazz said.

"There's one thing the earth cannot bear: a slave when she becomes queen."

"What?"

"That's from the Bible." Like the devil, I could quote Scriptures when I had to.

"Amen."

We were silent for a moment.

"I'm going to appeal," I said.

"How long does that take?"

"About four months."

"Four months!" She paused. "Do you want me to get you a lawyer?"

"That'd just be a waste of money. I'm the best lawyer I know."

"Do you need anything?" Jazz asked.

"No."

"We'll come see you next weekend."

"OK. Bye."

"Love you, Little Brother."

"Love you too, Jazz."

Two more years.

When the lights went out, I buried my head in the pillow and cried. I hadn't really cried since Camilla's death. When I stopped, I heard the

voices in my head, louder and clearer than ever before. They were telling me to be a villain. *Shut the fuck up!*

The following day, I walked around in deep pain. It hurt most because two black people had been involved in the process. Couldn't they see that I had done everything humanly possible not to be broken and to triumph? Couldn't they see that I had my act together, that I wasn't that sixteen-year-old that had broken the law, but rather a man who'd spent more than half his life in prison for a homicide he hadn't committed? Couldn't they see me in the present and not in the past?

Two weeks later, I turned thirty-six. I celebrated my twentieth birthday in prison in the law library, putting the finishing touches on my appeal.

The main reason I could never be a Christian was that I was unforgiving. I couldn't forgive the people who I had thought were my friends, who had hung me out to dry. I couldn't forgive myself for being so stupid, for being a stand-up guy, for not copping a plea. All these years I tried not to indulge in self-pity. I was sinking so low I felt like I was going to fall through the earth into a body of water and drown. Only my anger, like a life preserver, kept me above water.

I had been in prison long enough to know how to get things done. I rarely asked for favors, but I now cashed one in: I spoke to a counselor and had him look up my codefendant, Clarence, in the state computer. I learned that Clarence had been released earlier in the year. Because of the other two homicides he had been involved in as a juvenile, he was denied parole repeatedly and forced to do all his time minus good time. He never should have been released, but he had to be. The peculiar logic of the law said it was "necessary" to keep me imprisoned while letting the actual killer roam the streets in search of new victims.

Two days later I called Jazz again.

"I called Parole," Jazz said. "I talked to this woman named Constance. She was nice. She said what had happened to you was unfortunate, but that the commissioners are human—they have bad days, they wake up on the wrong side of the bed."

"Jazz, *I'm* human, and I've had seven thousand bad days. Every day I wake up in the wrong *bed!* But I try not to let that dictate how I'm going to deal with people that day."

"Yes, but that's how it works. That's the fucking system."

I wrote a number of people I had met over the years—my professors, people throughout the prison system, and my appellate lawyers—and had them all write the chairman of the Division of Parole. They all came through. Jazz, in her inimitable way, followed my instructions to the letter and took them a step further. Every day she wrote a letter to the chairman. She also had everyone in our family write letters, and many of her friends, too. On her own, she went to Albany and met with the Parole chairman. She traveled there every day, in the morning and the afternoon, until, on the third day, the chairman decided to see her.

"I was going to march on his office with about a hundred people," she told me. "He must have thought I was a crazy woman, until I started explaining your case. I said all I wanted—all your supporters wanted—was a careful review of your case."

"How did he take it?"

"He was making promises like a politician."

"Yeah."

For three years I had been monitoring parole board activity. There was seemingly no rhyme or reason to parole board determinations. For example, Abdullah, a first-time felon who had so brutally beaten a homosexual to death with a two-by-four that the man had to have a closed-casket funeral, made parole his first time up after twenty years. Lamont was granted parole after his first appearance, even though he was participating in a work release program when he was arrested and imprisoned for selling drugs for the third time. He wasn't home sixty days when he wrote somebody bemoaning the fact that there were fewer crackheads on the streets now than there were four years ago. Harvey, at fifty, had a criminal history dating back to 1968. He had served seven years for a homicide and was back in prison for his fourth bid, this time for selling drugs. During his latest term, which also spanned seven years, he received fifty disciplinary tickets. He had a mental health history. He had no marketable skills beyond selling drugs. Even the institutional parole officer, who compiled his parole summary for the parole panel, told him not to expect to be paroled. Harvey complained to me how he had never been given a break, although he had been granted parole three times already. He was granted parole a fourth time this past November. The day after he learned that he had made parole, he was talking about

"holding court in the streets," that he wasn't coming back to prison, that they'd have to kill him. I believed him. He had one of those wild, beaten looks, with a stitched scar that resembled a zipper across his forehead, probably from being pistol-whipped. It looked like you could unzip his forehead, reach in, and pull his brains out. He had spots of missing hair on his dented dome, like a wild dog with mange. If I were a parole commissioner, one look at him and I would have almost certainly denied him parole.

It seemed if you were convicted of a drug-related offense, no matter how extensive your criminal history was, and even if you were a certified 730 (loony toon) case, you received a get-out-of-jail-free card. Conversely, if you were of sound mind—something hard to maintain after twenty years in prison—had availed yourself of educational and vocational programs, and had marketable skills, you were denied parole. I could not understand being denied parole while some of these characters were granted parole. Maybe, if you were educated, parole commissioners saw you as dangerous. You would not spin through the revolving door. They would never see you again. But wasn't that supposed to be the whole idea?

In November, when my minimum period of imprisonment was up, when I had exactly twenty years in, the two-year hit came down on me like a collapsed building, brick by brick. On that day, I could have walked out of prison. I had visualized the moment, had thought about it so hard and so long that my head ached, trying to make it become a reality. Clarence was already home for the second time. I had thought I would be home for Thanksgiving.

I filed my appeal. It was the most powerful legal stuff I'd ever written. I raised a number of issues: that the parole board did not consider all the factors mandated under the executive law to determine whether I should be granted parole; that the parole board had illegally applied a new parole policy to me because I had a homicide-related offense, and that the determination was predetermined; that the parole board improperly denied me parole in part because I had exercised my constitutional right to a trial; that the parole board should not have focused on my juvenile robbery petition, more than twenty years old; and finally, that the twenty-four-month hold was excessive and unnecessary. Still, there were no guarantees.

Six months later the Appeals Unit denied my administrative appeal. Later I would learn that nearly every prisoner received the same response, with slight variations. I filed a motion in court challenging my parole denial. It too was denied in a cursory manner. I then appealed to the appellate court and in the twenty-second month of my twenty-four-month parole hold I received a paradoxical decision. It stated that the board had improperly denied me parole because I had exercised my constitutional right to a trial and that usually the court would reverse and order a new hearing, but would not in my case because the board had not denied me parole for exercising this right. Two months later I made my second parole board appearance and again was denied parole for the maximum twenty-four months. I appealed again and the Appeals Unit and two courts gave me virtually the same decisions they had during my first round of appeals. I make my third parole board appearance in a couple of months.

This merry-go-round of crime and punishment and more punishment is spinning out of control. I just want to get off before it is too late. The whole prison system is out of control. If it ever had a purpose, it was forgotten long ago. Now the system runs on a perceived need. From this perception it has come to life, it runs on its own mythology, on its own fictions of law that are etched in stone.

November 13, 2007

Dear Sentencing Commission Members:

My name is Diana Ortiz. I was 18 years old when I was arrested for Murder 2nd degree. I was not the shooter nor was I present during the attempted robbery or the shooting of the victim. The shooter served five years before his sentence was overturned and he was released. I was released from prison two years ago after serving 22 ½ years.

I appeared in front of my first parole hearing in 2000 after serving 17 years. The parole/political climate had changed and everyone convicted of a violent crime was being held. I expected to be held at my first hearing because of the seriousness of the offense. I had already believed that none of the mitigating circumstances, my age at the time, my role, or any of my accomplishments would be taken into serious consideration. I did take advantage of the appeal process and was granted a De Novo hearing. The appeal judge's recommendation was not considered and the decision to hold me for reappearance in two years was upheld. I appeared in front of my second scheduled hearing and I was held for an additional two years, because "I would not live at liberty without violating the law". This is one of the four statements that is used for parole denials. By this time I had a Bachelor's Degree and was working toward a Master's Degree in English Literature. I held a clean disciplinary record and coordinated several programs dealing with children. I also had strong letters of support for my release. I was shocked that I was denied parole once again.

I appealed the two-year hold and while I was awaiting the decision I was transferred to a minimum security facility. I appeared in front of a fourth parole hearing and one commissioner dissented in my favor for release, but I was held. On appeal again, I was granted a new hearing and was unanimously released. I took a long time to come across a panel that was willing to consider all facts and knowing the political climate was willing to do what they believed was fair and just.

I had always believed that the parole board hearing was going to be a fair process for all parties. The trial judge considered all the evidence and sentenced me to what he believed was appropriate for my role in the crime. I didn't know that I would be judged and resentenced as each panel felt fit.

The parole board decisions for people convicted of violent offenses were being categorically denied parole release. I was not the same young, naïve woman that I was 22 ½ years ago. I am educated and matured; I had hoped that these factors would have been considered. There should be specified guidelines for each crime so that politics and emotions would have little to do with decision-making. My family always wondered, "Why aren't they letting you out".

I was finally released two years ago. I was able to rid the feeling of being undeserving and unforgivable. I am presently working for the Osborne Association as a Program

Coordinator. I oversee two programs that are designed to strengthen the relationships between parent and child. I am also attending Hunter College pursuing a Master's Degree in Social Work. I have my own apartment and own two small dogs.

However, I am still a part of this system. I am on life-time parole, because of the amendment to Executive Law 259j. Although I was not the shooter and I have served more than the minimum sentence that was imposed at sentencing, I am still proving that I have and can continue to live at liberty, not needing the supervision that has been imposed and will be imposed until death.

When meeting me, most people are surprised that I spent so much time in prison and that I am on parole supervision. I am once again put into a category and I hope that there will be another amendment made to Executive Law 259j.

Thank you for your time and consideration.

Sincerely,

Diana Ortiz

Recommendations for Parole Reform in New York State

New York State has an opportunity to affect significant policy changes in the way the parole release and supervision system is administered in New York. Under the Pataki administration, persons who are serving sentences for violent crimes have been routinely denied parole release solely on the basis of the underlying crime, without regard to their institutional record of rehabilitation or their potential for successful reintegration into the community. For these individuals, as well as their families, the resulting uncertainty about when, and under what circumstances, release may be expected to occur has bred despair and cynicism. In addition, the policies are expensive. The per person cost of parole supervision is estimated to be one-tenth the cost of incarceration ($3,000 v. $30,000). The Pataki administration policies have resulted in a sharp decline in annual parole releases. Given that each person who is kept in prison, rather than being released on parole, costs the State $27,000, the annual cost to the State of these parole policies is substantial.

Below are some recommended areas of reform:

- **Restore predictability and rationality to parole release determinations.**

To restore hope and rationality to the system, we offer the following recommendations:

  - Board of Parole release guidelines should be updated and modified to require the Board to give appropriate weight to the extent of an individual's rehabilitation and the lack of risk to public safety if the individual is released. In particular, the guidelines should reflect the research showing that persons who have served sentences for many categories of violent crimes – and particularly women – have low rates of recidivism. For example, according to available data, the average return rate for individuals released for murder (21.5 percent) was drastically lower than the overall average return rate (42.2 percent) between 1985 and 2000. Moreover among the 2000 releases with murder convictions, only 3.6 percent were returned for a new commitment. Most of the returns were for technical parole violations.

  - Merit-based criteria for Board of Parole membership and a screening panel should be established. Such criteria should include a demonstrated background in criminal justice issues. In addition, Board members should be provided with access to professional development programs in which information current research, penological theory, and parole practices are presented and discussed.

- **Expand eligibility to programs that facilitate successful rehabilitation and release on parole.**

Persons convicted of violent felony offenses are barred from participating in programs that would facilitate their successful, timely reintegration into the community. To remedy this, we suggest the following:

  - Persons convicted of violent felonies should be eligible to participate in work release programs. Work release can serve as an effective tool to demonstrate readiness to transition to the community. An individual who is successful on work release has established that he or she is able to be released into the community without being a threat to public safety.

Vernon Manley
Former Member
New York State Board of Parole

Anita Marton
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Susan Wright
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Testimony at the Public Hearing
New York State Sentencing Commission

November 13, 2007

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Let me begin by saying thank you to the sentencing commission for allowing me to testify at this hearing. If not the opportunity to testify here rather than at one of the other forums, I wouldn't have been able to attend because I am currently on parole, ***again***; but I'll get into that in a minute.

I'll spare you the percentages, ratios, and the numbers, because you've probably heard them all, but I will tell you that to my mother, I was 100% of her world that was locked away for a crime that at best relied on shaky evidence, the withholding of exculpatory evidence, and the testimony of an admitted drug dealer that received not a day in jail or prison for his '***truthful***' (and, I use that term loosely) testimony.

You see, on February 24, 1992, I was convicted in Nassau County of Penal Law § 220.43 (an A-I felony) for aiding and/or abetting in the sale of 2.221oz. of cocaine; and was sentenced to a legislatively mandated 15 years to life in prison. I was told that it was a mandatory minimum sentence which to me doesn't mean anything because in the case of the drug dealer caught selling the cocaine, his sentence was probation. I was arrested six months after the crime when after numerous unsuccessful attempts were made to set me up in some new drug deal.

In December of 2002, I was fortunate to be granted clemency by Governor Pataki. I have been at liberty (somewhat) since January 16, 2003, after serving 4083 days or if you prefer for me to do the math, 11 years, 2 months, and 3 days. When I had made the final cut and appeared in front of the board of pardons, they were unabashedly interested in what I lost when I was in prison. Let's see, I worked for my father in his multi-million business that I was the heir-apparent to; my younger brother died 10 days before my co-defendant's crime; owned two apartments that were foreclosed on, my father died in 1999, and I wasn't allowed to go to his funeral; and my mother died in 2000. Incidentally, because I was in prison with a question as to when and if I will be released, my father disinherited me. I also should state that I spent more tens of thousands of dollars then I care to think about in an attempt to seek justice.

I had sent a letter to Governor Pataki on March 18, 2005, asking why I wasn't being considered for merit time as per his reform of the Rockefeller Drug Laws (Executive Law § 259j). The law says specifically that all first time non-violent A-I felonies are to be considered for termination of parole after two years if there are no violations during that period and "**must**" be terminated after three years. I had been on parole for 2 years and 2 months. I called an official in Governor Pataki's clemency bureau six weeks later and the conversation went like this.

I said, "I wrote a letter to Governor Pataki asking why I wasn't being considered for early termination of my parole obligation according to Executive Law § 259j."

The person on the other side said, "Well, he's just going to pass the letter on to me anyway. What's the matter, you're not happy to be out?"

I said, "Of course I'm happy to be out, but what does that have to do with my being considered for merit time?"

At this point the party on the other side of the conversation said, "Shut up and do your time." And then I was hung up on.

This just gives you an indication of how inmates are treated because this conversation was enough to give me a flash back to how I was spoken to for those 4,083 days. I thought I could stop walking on egg shells. Wrong.

Since the two year termination of parole was discretionary and three years must be automatic termination, the advice from my attorney was to wait till the three years was served. During January 2006, a petition was made by my attorney to the Nassau County Court which was subsequently withdrawn when I was terminated from my parole obligation on February 9, 2006. The reform doesn't exclude those who received clemency. So much for Governor Pataki's reform of the Rockefeller Drug Laws.

Since my release I earned my Master's Degree from Hunter College in Rehabilitation Counseling and passed all the stringent requirements for my certification as a Certified Rehabilitation Counselor and have been employed at New Spirit II, Inc. as a Vocational Services Coordinator and Drug and Alcohol Counselor since December 2003; however, I was asked by the State Education Department of New York after applying for my license as a mental health counselor (LMHC) to supply a *Certificate of Relief From Disabilities*. I was directed to call the Director of Executive Clemency. When I called, I was told that there is no way I was finished with my parole and if I wanted a *Certificate of Relief*, I would have to wait a few years before being granted one because it requires, "a mountain of paperwork."

On April 6, 2006, I was served with a letter that explains that terminating my parole was a mistake and that I was put back on parole. Needless to say, this was a complete shock after believing that I was now able to get on with my life. With the help of my attorney we had resubmitted the petition with the addendum of the termination.

After a reply from the Attorney General, Judge David Sullivan decided that I should be kept on parole. He stated that I was not able to benefit Executive Law § 259j; adding that having been granted clemency was reward enough and my release predated the reform of the Rockefeller Drug Laws.

I have been fortunate to make some major accomplishments since my release and also realize that I am the anomaly of those that are released after such a long time behind bars; however, I still face the same frustrations and continue to try and help others in the attempts to gain the things that most people at liberty take for granted. While not here to speak specifically about re-entry, the discharge planning in prison stinks. When I was released, while not in a typical fashion, I had no proof of who I was except the prison ID I was given. I went to the motor vehicle bureau and was told that I need six points of identification. When I showed my prison release ID, I was told, "Okay, now you need seven points." No health insurance. No direction except you gotta do this – you gotta do that. I've learned to laugh when I think that I should automatically be given a Certificate of Relief from Disabilities. When I asked for help, I get a '*you figure it out.*' And you see the result.

The only way out, I believe, is to somehow take the politics out of the decision to sentence someone based on the crime committed rather than the Zeitgeist. As an example, there is a recent case that appears to be the zenith of hypocrisy. It might be poor salesmanship to bring up the name Robert Chambers, dubbed by the press as the "Preppie Murderer." Robert Chambers received a sentence of 5 to 15 years for the heinous murder of Jennifer Levin. The press is asking for his head to be put on the preverbal block and beheaded because he is looking at a life sentence for selling illegal narcotics that will in effect bury him in the belly of New York's prison system for the rest of his life. I see something wrong with a life sentence for selling drugs when a manslaughter sentence can only get 5 to 15 years.

The Rockefeller Drug Laws should be repealed; or in the alternative, they should be reformed to reflect the real need of New York. I met many others that have stories to tell of their circumstances under which they were convicted and sentenced. I am certainly not naive enough to think that there aren't any people without guilt of dealing drugs; however, few, if any, of the real *kingpins* (and I use that term loosely) are prosecuted and sentenced to the life sentences dealt out to the lowest players (usually the chemically dependent) in the drug law enforcement game that is played with people's lives and the break up of their families.

Addiction is a disease, not a law enforcement issue. If an addict commits a crime, that crime should be prosecuted and the sentence should be proportionate ***sans*** the politics and rhetoric that the media can pressure on our judicial system. Those that are chemically dependent should have available treatment outside of the threat of a system that has a punishment only mentality.

~~You see, there are a few lessons that I've learnt from my incarceration.~~ Probably the most important lesson is that our legal system doesn't know how to reward, only punish. And with as many as are incarcerated in New York with such limited ability for release even after you've done all you could to be granted parole, the system will continue to debase a person's dignity until there is nothing left except a tired of beating your head against a wall, useless shell of a person. Treating addiction with incarceration is tantamount to curing dandruff with decapitation. We've thrown away more talent by incarcerating the chemically dependent than drug use has destroyed.

Although I'm not proud and quite ashamed of my use of drugs at an earlier time of my life, my conviction and sentence have damaged me, those that I love, and those that care about me so much more it defies even the most eloquent story teller. My resurrection after 4,083 days of a social coma has not been an easy one; however, I am lucky enough to have a tremendous support structure set up. Without this support of the few friends left, and the limited family that hasn't died or given up on me, my chances of making any kind of success are next to impossible; certainly as most that don't have these supports, impossible.

PUBLIC TESTIMONY PRESENTED TO
THE COMMISSION ON SENTENCING REFORM
November 13, 2007

New York City Bar Association
42 W. 44th Street
New York, New York

PRESENTED BY GEORGE L. OLIVERAS
Co-director CURE-NY
P.O. Box 1314
Wappingers Falls, NY 12590

CURE-NY

Citizens United for Rehabilitation of Errants, Inc.
PO Box 1314 Wappingers Falls, NY 12590

November 13, 2007

Good afternoon. Thank you for the opportunity to present at today's hearing. My name is George L. Oliveras. I am a board member of Citizens for Restorative Justice and also Co-Director of CURE-NY. Both of these organizations are a part of the recently formed Coalition on Rehabilitation and Re-entry.

I'm here to talk about temporary release programs, specifically work release, being expanded to once again include those with violent felony convictions.

The purpose of the work release program is to reduce recidivism by helping people in prison return to a productive life while at the same time, reintroduce them back into society as law abiding citizens. With work release, incarcerated persons, who have demonstrated readiness for this return to society by positive programming and behavior, would be considered for participation in the program. A survey done by corrections in 1985 and 1986, before those with violent offenses were excluded, showed that repeat offenses among participants are lower than among those freed without having participated in work release. (See attached article)

As stated in Executive Order # 9 "Temporary release programs provide an important opportunity for inmates committed to state prison to transition back into their home communities under supervision, and to assume responsibilities that will facilitate their ability to lead law-abiding lives."

Participation in temporary releases programs is a privilege and only those who have utilized their time productively should be considered. Almost all of the people who are in prison will eventually be leaving prison. In order to best ensure the safety of our communities and to make whole again the incarcerated person and his or her family, tax dollars need to be redirected from incarceration to re-entry. This will help provide for the successful transition of those preparing for and engaged in, transition from prison to community.

A needs and risk assessment, as part of an individualized re-entry plan developed throughout a person's incarceration, could help determine the appropriateness of an individual for work release. Participation in temporary release programs allows the parole commissioners an additional and very important tool in predicting a person's ability to live at liberty without violating the law.

On Thursday, March 14th, 2002, at 9:00 AM the gates of Fishkill prison opened and I walked out, leaving the only life I had known for 27 years. I didn't even now how to buckle my seatbelt for the ride home.

For me, the trauma of re-entry after spending those 27 years in prison, could have been much less severe had it been a gradual process instead of such a shocking and disorienting experience. Not just the initial trauma, but the long term too. This alone could make it impossible for some to get through the first few months outside successfully.

While still inside I had many friends, dozens of men over the years, who were on work release. They were given the opportunity to be outside working and earning money while being exposed to freedom and the responsibility that goes with it. At the same time they were experiencing feelings of anxiety and pressure from so much that was new and unknown. Many felt a certain degree of relief when it was time to return to prison for two days, back into their comfort zone. They were around people they knew and a life that was familiar.

As time went on I saw the change starting to take place. These men got more confident and comfortable with their life outside and started separating themselves from the prison life; feeling more a part of their new world than prison. They were busy figuring out how much money they were saving, the best places for them and their families to live and learning the value of a dollar. Gradually the transition was taking place. By the time they made parole they were positioned for a smooth transition into their community and family life.

I saw the benefit these men had by participating in the work release program. I was aware of how much help it could be for me too in getting over the rough spots that were sure to exist. I had been making mental notes of their experiences, imagining myself going through many of the same things. Unfortunately, one year before becoming eligible for work release Pataki ended it for all persons like me with violent felony convictions.

When paroled, I was thrust into a new home, a new job, a new neighborhood and a whole new way of life with little or no preparation. Work release would have allowed me to develop my social skills and learn my way around gradually (especially being released into an upstate community after being born and raised in NYC). Using a credit card, a cell phone, the ATM and reading a map were overwhelming challenges to say the least.

Suddenly I was going to a diner instead of a mess hall, dinner instead of chow, a doctor's appointment instead of a callout and to the store instead of commissary. The language was as new as the attitudes I encountered. These may seem like small things, but when you are flooded with new sensations and new experiences you can feel like you are drowning. In one week you can change from a strong, confident person to someone that is not sure about anything, someone without an identity. You are suddenly nobody.

By not making these changes gradually you lose a support system made up of the guys you left behind. You are allowed no contact with them and there is nobody on the outside that can know what you are going through. It is not a situation that is optimum for adjusting.

Safer communities, saved dollars and formerly incarcerated persons made whole again are all reasons to once again allow those convicted of violent felony offenses eligibility for participation in temporary release programming.

In order to best accomplish these things I suggest that:

1. An amendment be made to the current Executive Order to include community ready individuals serving time for violent crime convictions to participate in the temporary release programs.

2. That re-entry, reintegration process include temporary release programming as a mandatory requirement for community ready individuals with violent felony convictions, before they return to their community.

3. Continuous support through funding be invested in temporary release programs that will also address the needs of those convicted of violent felony offenses.

4. Work release facilities and work release programs be expanded.

5. Joint efforts by state agencies to educate communities to the statistical successes of those coming out of prison and the evidence supporting the use of temporary release programs.

6. Financial incentives be offered to employers who hire people on work release and the formerly incarcerated.

Thank you for your time and your consideration of my suggestions.

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March 28, 1994

New York Widens Work Release To Reduce Prison Overcrowding

By MIREYA NAVARRO

Work release, a program allowing some inmates a large measure of freedom before parole, is increasingly being used in New York State to relieve prison overcrowding, officials acknowledge. As a result, prisoners who would not have been eligible five years ago are enrolled, including some who have repeatedly been denied parole.

As the state's Correction Commissioner makes room for newcomers in a prison system 29 percent over capacity, he says he is being forced to take too many chances with work-release participants. "We've expanded the work-release program to greater numbers than I feel comfortable with," said the Commissioner, Thomas A. Coughlin 3d. "We used to err on the side of conservatism. We now are forced to err on the side of liberalism."

Many other states facing overcrowding have expanded not only work-release programs but also electronic monitoring and other release provisions. But none have used work release so extensively as New York, which sent 24,200 prisoners into the program last year, up from 8,000 in 1989. Seven Work-Release Centers

The program, conceived to help convicts readjust to society as they approach parole eligibility, allows participants to leave prison for one of seven work-release centers, five of them in New York City, where they sleep, get counseling and undergo regular drug testing while they look for jobs or go to work.

As the program expands, there are worrisome signs. Last year 4,000 prisoners ran away, compared with 400 in 1989. Most were returned to custody, but more than 1,000 are at large, department figures show.

Between 4 and 5 percent are arrested for new crimes while in the program, compared with 2 or 3 percent in 1990, said James B. Flateau, a spokesman for the State Correctional Services Department. He said that the department did not keep statistics on the kinds of crimes committed by those inmates but that there were "all sorts," including homicides. Still Looking for Job

In an incident last month, 19-year-old Ramon Garcia, under the alias of Louis Medina, exchanged shots with a female police officer as he and two other suspects tried to rob people in a Brooklyn beauty salon, the police say. Mr. Garcia was serving three to nine years in prison after a 1992 conviction for robbery, Mr. Flateau said; he had entered the work-release program in December and was still looking for a job.

Another New York inmate on work release, James Revell, 23, was charged this year with robbing a gasoline station in Trenton and shooting a cabdriver at one of the gas pumps. Mr. Flateau said the inmate had been sentenced in 1990 to four to eight years in prison for robbery and had been on work release since January, working as a laborer.

The pressure to release inmates in New York and elsewhere has mounted as the cumulative impact of tougher sentences for drug offenders is felt, correction officials say. New York, though it has added more than 30,000 new prison beds in the last 11 years, has not kept up with the need. Of the state's 65,000 inmates, an average of 6,300 are now on work release at any given time.

In recent years, as the State Legislature split between senators who want to build more prisons and Assembly members who favor solutions like sentencing reform and alternatives to incarceration, an answer has been to expand work release.

Commissioner Coughlin contends that the state's prison population is swollen with nonviolent drug offenders who are more in need of treatment than confinement. He advocates increasing the capacity of drug treatment programs but also adding prison beds by transforming unused psychiatric centers into prisons; both matters are at issue in the Legislature's current budget negotiations. Letters and Petitions

None of this makes much difference to Darren McNamara's mother and three siblings. Three times the family successfully fought parole for the man convicted of bludgeoning the 22-year-old aspiring actor to death with a baseball bat. But the last time parole was denied, the killer, unknown to the family, was already living at home in Queens most days and holding a job making eyeglasses while on work release.

Since finding out last fall, the family has sent letters to public officials, circulated petitions and, most recently, filed a lawsuit seekking to send John Bonizio, who was sentenced to 6 to 18 years in 1984 for first-degree manslaughter, back to prison. They argue that a program that allows a convict to live away from a prison in effect grants parole to inmates unfit for it.

"It maddens me to no end that I have to fight the department here," said John McNamara, the victim's brother and a lawyer, who says his family has spent tens of thousands of dollars on the effort. "It's so upside down. I would think they would be our closest allies."

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Mr. Coughlin said Mr. Bonizio has done well on work release, but the Commissioner acknowledges that he probably would have been turned down for the program in the past because "there are so many parole board denials." Mr. Bonizio was denied parole in 1989, 1991 and last year because of the savagery of the attack on Mr. McNamara and Mr. Bonizio's "extensive involvement in organized criminal activity," Parole Division records show. Disciplinary Problems

Mr. Coughlin said the shortage of prison space had forced him to allow the participation of prisoners who have had disciplinary problems, like fights, disobeying orders or possession of contraband, like drugs or homemade weapons. In the past, he said, nobody but those with clean institutional records would have made it into work release.

Inmates are eligible for work release if they are within two years of parole consideration. They are chosen for the program by Mr. Coughlin and his staff on the basis of factors including the inmate's attitude and behavior in prison and whether the crime involved violence. But other than two offenses that exclude an inmate from consideration -- a prison escape or a sex crime -- "there are no rules," Mr. Coughlin said.

Participants who have a home can stay there up to five days a week. Once inmates are within six months of parole eligibility, they can report to the work-release center as little as once or twice a week to submit urine samples for drug testing and see a counselor who tracks their overall performance. Mr. Coughlin said most of those who flee while on work release are drug addicts who want to avoid drug tests that could send them back to prison.

Although inmates are given at least six weeks to hunt for a job, many participants said they were allowed up to three months to look.

But many complain it is difficult to find work because they get no help. Unemployment runs high among participants -- 25 to 28 percent, including those who are laid off or dismissed -- and prisoners who fail to find a job eventually return to prison.

Those who succeed in getting employment perform a wide range of occupations, from unskilled labor to hair stylists, chefs and even security guards, correction officials said. Those who work with few exceptions must do it in the communities they come from, and they can keep the money but must pay taxes and their own expenses. Looking for a Fresh Start

Many inmates keep their jobs after release. One 29-year-old inmate at the Queensboro Correctional Facility, a work-release center in Long Island City, Queens, has been working for 11 months on a construction site and plans to continue in the $320-a-week job if he is paroled next month. The inmate, who spoke on the condition that his name not be used because he is trying to start a new life, now lives seven days a week with his girlfriend, who is pregnant with their first child.

After two convictions for selling drugs and five years in prison, he said he was ready for a fresh start.

"It's an excellent program if you want to do what's right," he said while at the center for a drug test last week. "I decided that I wanted something other than prison."

A survey conducted by the correction department in 1985 and 1986 showed that repeat offenses among participants are lower than among those freed without having participated in work release, department officials said. They said 8 percent went back to prison, compared with 27 percent for nonparticipants within a period of one to three years. The study, however, was made before participation in the program was so broadly expanded.

New Jersey has a program similar to New York's but much less extensive; 258 of the 25,162 inmates in the state prison system currently take part. There is no work-release program in Connecticut.

In New York, officials estimate that the program also saves the state $96 million each year in operational costs and an additional $330 million in construction costs for extra prison beds.

But John McNamara argues that prisoners like Mr. Bonizio do not belong in such a program. In addition to manslaughter, the inmate was convicted of trying to bribe an undercover police officer in connection with gambling operations and of possession of gambling records, both linked to organized crime, Parole Division records show.

Mr. Bonizio, 36, was accepted for the work-release program in February 1992 and transferred to the Queensboro center from the Mid-Orange Correctional Facility in Warwick. Officials at Queensboro say he leaves the center at 7:30 A.M. on Wednesdays and returns on Monday nights from home with his wife and 12-year-old daughter and his job.

In a telephone interview, Mr. Bonizio said he understood the McNamaras' anger but insisted that prison programs like work release have insured that he is prepared to return to society safely. In his 10 years in prison, he got a bachelor's degree in business management.

Mr. Bonizio, who said he never intended to kill his victim, just "scare him off," is to be eligible for parole in 1995.

"It's probably the most important program that the state of New York offers to people like me," he said of work release. "Whether Mr. McNamara likes it or not, I'm going to be released."

But John McNamara is not waiting. He has filed a lawsuit against the department charging abuse of discretion in allowing Mr. Bonizio to take part in work release and challenging the legality of his weekly five-day furloughs from Queensboro.

Evidence-based Assessment of DOCS Transformation Programs

By Dr. Rudy Cypser
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The platform of the 33 organization ***Coalition for Rehabilitation and Reentry*** includes the request to:

- Evaluate and then expand or replicate transformative programs that effectively teach life skills and social development - e.g. A.A. and N.A., the Merle Cooper Program, Rehabilitation Through the Arts, Network, and Alternatives to Violence.
- Encourage and expand attention to victims of crime, and the awareness of offenders and communities to their needs. Further utilize Victim Awareness Panels, Victim/Offender Mediation, and Victim Restitution/Compensation programs.

Commissioner Brian Fisher asked on September 25, 2007: "Are the programs we are providing now really meeting the needs of the inmates? How do we know? If they're not working, do we have the wrong programs or do we have the wrong people working on the programs? What works? ... Why are they successful? Is their success related to something we can do, us, you? "

The NYS Commission on Sentencing Reform, in its October 15, 2007 report, states: "Over the past 30 years, numerous research studies have identified critical components of effective correctional interventions and documented extraordinarily successful programs, which are commonly referred to as "evidence-based practices."

"It is essential that New York's policymakers harness this growing body of knowledge of what works in corrections and infuse our institutional and community programming with scientifically validated, evidence-based practices. This should include adopting the principles of best practices of effective correctional programming as identified in this body of research, including: ... enhancing intrinsic motivation; and utilizing "cognitive-behavioral" programming that focuses on attitudes, interpersonal skills, anger management, thinking style, moral reasoning and the link between thought and behavior."

In line with the above, diverse criteria have been used to assess the degree of positive transformation possessed by an individual. These, for example, include abilities to:

- have an awareness of self-worth and personal dignity
- have an awareness of being an interdependent part of a constructive community.
- communicate with peers and authorities.
- be assertive without offense.
- cooperate in joint ventures.
- search for alternative solutions.

- o think before reacting in a hostile situation.
- o empathize and understand another's viewpoint
- o feel concern for others.
- o practice patience when under stress.
- o control anger.
- o resist threatening or demonizing others.
- o trust some others, and to develop trust in others.
- o make important decisions thoughtfully.
- o direct their own intellectual and spiritual growth.

The degree that an individual possesses these abilities might be called a ***transformation index***. It is accordingly suggested that:

1. DOCS staff should develop or otherwise obtain a methodology for at least roughly estimating such a *transformation index* of an incarcerated person. That methodology should attempt to measure key indicators, including abilities comparable to those listed above.

2. Samples of participants in DOCS programs should be assessed, to estimate their *transformation index*, both before and after major programming, including education programs, vocational training, addiction-treatment program, and college programs, as well as the transformation programs and concern for victims programs cited at the beginning of this paper.

3. All DOCS facilities should maintain chronological records of program participation and levels of disciplinary violations for every incarcerated person.

4. Parole should maintain chronological records of levels of supervision violations, and levels of criminal behavior of all under their supervision.

5. DOCS should correlate all of the above to search for possible cause and effect relationships between program participation, the transformation index, in-prison levels of disciplinary violations, post release levels of supervisory violations, and post release levels of criminal behavior.

This monitoring and evaluation effort should be on-going, with semi-annual reports of interim findings. Interim results should be available to program designers and program managers, for a continual evolution of programming.

Such measurement might be seen by some as too expensive. However, the potential psychological benefit from this overt emphasis on rehabilitation effectiveness, and the potential benefit in program redirection could both have a major positive consequence to the effectiveness of the NYS criminal justice system.

A "Step-Down" Community for the Elderly, Sick, and Handicapped

by Cora (Betty) Cypser
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Katonah, NY 10536

Each year, the average age of the people incarcerated is getting older; and their illnesses are getting more severe. The elderly, sick, and handicapped are an increasing cost burden. If they are to be considered for release, how can we help their reentry back into society?

Are we to expect that they will return to a life of crime? Statistics say NO. Consult Rozann Greco's paper. <http://www.aging.state.ny.us/explore/project2015/briefs04.htm> There is very little recidivism by the elderly or infirm who are released back into society. On the other hand, their needs are very great. What are the options?

These are not simply statistics; they are human beings still seeking a degree of personal fulfillment. Some were the young who had been mislead by poor social environments into gang warfare or drug use. Many are the adults who still lack reading and social skills, employability, and support systems. They are part of the half of the incarcerated who have reading difficulties, autism, attention deficit disorder, etc. They are part of the eleven percent of the incarcerated who are diagnosed with mental health problems. Some of them committed horrible crimes 50 years ago and have regretted their actions ever since.

There are two areas that can help their transformation: First, there is the legal area. We can encourage our state legislators to pass the POPS Bill, (the NYS geriatric and older prisoner act of 2007) providing for geriatric parole, electronic detention, correctional nursing care and selective early release. Second there is the policy area of DOCS to change the lives of these people and their families. What could be done?

DOCS might really adopt and institutionalize the written policy of the Correctional Service of Canada: *"The greatest protection that can be offered to the community is to assist offenders, throughout the sentence, to change their criminal behavior and to help them learn to live by the rules of society. This preparation includes programming to meet specific needs and providing opportunities to demonstrate progress through transfers to reduced security or conditional release, including temporary absences, work release, or statutory release."*

Many of the elderly, sick, and handicapped could be released into a sophisticated 'step-down" and parole community which might have the following characteristics: Remodel a prison into a facility with programs of education, physical and mental health, addiction treatment, and personal transformation all tailored for elderly, sick and handicapped persons. Programs that could be investigated as useful for reentry might include:

(1) **Education**. Work for the restoration of NYS TAP grants for incarcerated persons. For privately supported prison education programs check out the example of Kenneth Gibson, the President of Donnelly College, 608 N 18th Street, Kansas City KS 66102 (phone 913-621-8707) which holds a college program at Lansing Correctional Facility, Lansing KS, under Warden David McKune. Then there is the Milwaukee Area Technical "College of the Air" Program, providing satellite-delivered college education to correctional facilities. Both of these are examples which would have the potential for increasing the employability, self-esteem and responsibility of incarcerated persons.

(2) **Employment**. Also housed at Lansing Correctional Facility is a 100% work release metal fabrication company, Zephyr Products founded by Fred Braun (913-651-7949). Can NYDOCS similarly arrange for private companies to employ incarcerated persons, either on or off correctional facility premises?

Could a "step-down" facility have specified areas for chicken farms or vegetable farms or horse farms?