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PROFILES IN PAROLE RELEASE AND REVOCATION:

Examining the Legal Framework in the United States

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PROFILES IN PAROLE RELEASE AND REVOCATION:

**Examining the Legal Framework
in the United States**

New York

By

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1. Background; Sentencing System

a. Sentencing Framework

New York law allows for both determinate and indeterminate sentencing, though indeterminate sentencing is more common.² New York's original indeterminate sentencing laws were passed in 1876. The New York Division of Parole ("Division") and a Board of Parole ("Board") were established in 1930; up to that point, prison officials decided when release would be granted.³ In 1971, the Division merged with the Department of Corrections to form the Department of Correctional Services. In the wake of the Attica Prison riot and demands from the courts and others for protection of the procedural rights of releasees, the Division was re-established in 1977 as an autonomous agency within the Executive Department. In 2011, the Department of Correctional Services and the Division of Parole combined to form the Department of Corrections and Community Supervision ("DOCCS" or "the Department") for the stated goal of creating "a more seamless, more comprehensive operation through a continuum of care from the moment an offender enters the correctional system until he or she successfully completes the required period of community supervision." However, the Parole Board continues to be an independent decision-making body.⁴

New York also has a Permanent Commission on Sentencing, established in 2010 for the purpose of "clarifying and simplifying New York State's sentencing regime." New York's Commission is unusual, because it was established by a chief judge rather than by the state legislature. The Commission proposed a transition to fully determinate sentencing in December 2014, but as of this writing, such a change has not occurred.⁶

b. Does the State Have a Parole Board or Other Agency with Discretionary Release Authority?

The New York State Board of Parole releases eligible inmates serving indeterminate sentences.⁷

<http://www.doccs.ny.gov/ParoleBoard.html>

c. Which Agencies are Responsible for the Supervision of Parole?

The Department of Corrections and Community Supervision is responsible for the supervision of parole.⁸

<http://www.doccs.ny.gov/doccs.html>

d. Which Agency Has Authority Over Parole Revocation?

The New York State Board of Parole has authority over parole revocation.⁹

2. Parole and Other Prison Release Decisions

a. Release Eligibility Formulas

New York permits both determinate and indeterminate felony sentencing depending on the crime for which an inmate is convicted.¹⁰ Some offenders may be sentenced to a determinate or indeterminate period of parole supervision, without first serving time in prison.¹¹ Most prison sentences are indeterminate,¹² and thus have a minimum and maximum length set by the sentencing judge. There are five categories of felonies for the purposes of indeterminate sentencing. For most felonies, the minimum possible sentence is one year.¹³ The maximum possible sentence is as follows:¹⁴

- Class A felonies: At least 15 years to Life¹⁵
- Class B felonies: Not to exceed 25 years
- Class C felonies: Not to exceed 15 years
- Class D felonies: Not to exceed 7 years
- Class E felonies: Not to exceed 4 years

General rules of release eligibility. An inmate with an indeterminate sentence may be paroled at “any time” after the expiration of their minimum term of incarceration.¹⁶ The minimum term of incarceration can be reduced through time credits.¹⁷

Determinate sentences involve a fixed length of prison time with no eligibility for parole release; however time credits can be applied to the sentence and result in early release when 6/7 of the full sentence is complete.¹⁸ This type of early release is called “conditional release,” and is supervised in the same manner as parole. Inmates may be conditionally released by DOCCS, not the Board of Parole.¹⁹ Determinate sentences also normally require a period of “post-release supervision” which is an additional part of the sentence. Conditional release is also available to those serving indeterminate sentences after they have completed 2/3 of their minimum sentence.²⁰

Presumptive release exists for certain non-violent offenders who have received a certificate of earned eligibility from the State Commissioner of Corrections and Community Supervision.²¹ This allows inmates to return to the community under supervision after 5/6 of their prison term is finished, at the discretion of the Board.²²

Release/ Supervision	Determinate Sentence	Indeterminate Sentence
Discretionary parole	N/A	After minimum term set by judge
Post-release supervision	Part of sentence	Part of some sentences
Conditional release (due to good time credit)	Automatic at 6/7 maximum term	Automatic at 2/3 maximum term
Presumptive release	N/A	Available at 5/6 min. term for some offenders. ²³

Violent offenders. In 1995 and 1998, the legislature eliminated indeterminate sentencing and parole release for all violent felony offenders in the state.²⁴ With good time credit earned, these offenders must serve 6/7 of their sentence.²⁵ These statutes also established new terms of post-release supervision. Previous convictions for certain violent crimes also affect eligibility for presumptive release.²⁶

Sex offenders. Felony sex offenders also face determinate sentences, and face additional years of incarceration for violent or non-violent predicate offences.²⁷ If released, these individuals will face a period of post-release supervision. The person shall then be under the jurisdiction of DOCCS for the remaining portion of such maximum or aggregate maximum term.

Life sentences. Class A felons who receive an indeterminate sentence can be given a term of between 15 to 25 years and life. They are eligible for parole after they have served their minimum sentence.²⁸ Offenders may be sentenced to life imprisonment without parole upon conviction for first-degree murder and certain other crimes specified by statute.²⁹

Recurring eligibility after denial and exceptions. The board shall specify a date not more than twenty-four months from such determination for reconsideration, and the procedures to be followed upon reconsideration shall be the same as in the initial hearing.³⁰

b. Good Time, Earned Time, and Other Discounts

There are two main varieties of post-conviction time credit. Good behavior allowance lets an inmate earn a decrease of up to one-third of their maximum term of incarceration.³¹ Inmates can also earn a merit time allowance of up to one-sixth the minimum term for completing certain work, education and treatment programs.³² Both of these time-credits are given, withheld or rescinded at the discretion of the Commissioner of Corrections and Community Supervision, and decisions regarding them are not reviewable except for a violation of law.³³

c. Principles and Criteria for Parole Release Decisions

Parole release in New York is permissive and discretionary with the board,³⁴ however an inmate may apply for conditional release and must be released when their good time credit equals the remaining time on their un-served sentence so long as they were not convicted of certain violent crimes.³⁵ Inmates qualifying for “presumptive release,” will not go before the Board, and also must be conditionally released.³⁶ Inmates may also obtain a certificate of “earned eligibility,” whereby after completion of a specified program, they earn presumptive release, subject to certain limitations.³⁷

General statutory standard for release decisions. The primary standard upon which the decision to release is made is: “a reasonable probability that, if such inmate is released, he or she will live and remain at liberty without violating the law and that his or her release is not incompatible with the welfare of society and will not so deprecate the seriousness of his or her crime as to undermine respect for the law.”³⁸

Statutory factors the board must consider. The board must look specifically at twelve factors, which are not exclusive:

- (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;
- (ii) performance, if any, as a participant in a temporary release program;
- (iii) release plans including community resources, employment, education and training, and support services available to the inmate;

- (iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law;
- (v) any current or prior statement made to the board by the crime victim or the victim’s representative, where the crime victim is deceased or is mentally or physically incapacitated;
- (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to [the felony drug offender sentencing statute];
- (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and
- (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.³⁹

d. Parole Release Guidelines

The Board does not use parole release guidelines.

e. Risk and Needs Assessment Tools

Statutory mandate. The Board is required to consider a risk assessment as one factor in determining parole release.⁴⁰

Main risk instrument. New York utilizes the Correctional Offender Management Profiling for Alternative Sanctions or “COMPAS” risk assessment tool.⁴¹ The instrument is available as part of the addendum to this report.

Transparency. There was a study done on the use of COMPAS in New York in 2012, examining its effectiveness and predictive accuracy.⁴² However, no other information about the COMPAS’ use in New York is readily available to the public.

Sex offenders. As of this writing, there is no sex offender specific risk assessment in use during the interview phase. However, the Board is working with DOCCS to incorporate the Static-99 into monthly inmate progress reports for these offenders.⁴³

f. Medical or Compassionate Release

The Board may parole most inmates for medical reasons.⁴⁴ To be eligible, an inmate must have a condition that is debilitating or incapacitating and creates a reasonable probability that the inmate is incapable of presenting a danger to society. However, those convicted of certain crimes of homicide are not eligible for medical release, and certain inmates must serve at least half of their sentence before gaining release eligibility.⁴⁵ There is an extensive review process preceding any medical release, involving notification to the sentencing court, prosecuting attorney, doctors' evaluations and continuing supervision by a doctor. Prior to release, the Board must notify the sentencing court, district attorney, attorney for the inmate, and where necessary pursuant to statute, the crime victim. Moreover, medical release is limited to a six-month period after which a new determination of eligibility must be made.⁴⁶

g. Executive Clemency Power

The governor has the power to grant reprieves, commutations, and pardons for all convictions except treason and cases of impeachment.⁴⁷ New York has an Executive Clemency Bureau within DOCCS that assists the governor with clemency applications.⁴⁸

h. Emergency Release

There is no statute that allows for the emergency release of prisoners in circumstances of overcrowding.

3. Parole Release Hearing Process

a. Format of Release Hearings

With the exception of inmates who are considered presumptively parole eligible, inmates are entitled to a parole interview (rather than a hearing) prior to any release determination by the Board. An inmate's first parole interview must occur at least one month prior to the expiration of their minimum sentence.⁴⁹ Two or three members of the Board conduct each interview, review the inmate's file and supporting documents, and determine whether the inmate should be released.⁵⁰ DOCCS facility staff and a hearing reporter are also present at the interview. No release interviews require the presence of the full Board.

b. Information Before the Board

Before an interview, a Parole Board Report is prepared. The Parole Board Report reflects the following information:

- Present offense specifics such as the conviction or adjudication, offense level, and sentence structure
- Description of the present offense
- Personal characteristics: identification information
- Summary of the prior offense history (legal history)
- Inmate statement: comments and attitude regarding the offense which resulted in the conviction or adjudication, as well as statements regarding the legal history
- Institutional adjustment information: a summary of program and treatment participation, as well as disciplinary history, and
- Release plan: place of residence, employment, educational and treatment plans upon release.⁵¹

Inmates must also collect and organize documentation and/or letters that support release or offer reasonable assurance of employment or resources in the community and provide them to DOCCS facility staff so that the Board may review it.⁵²

c. Prisoner's Procedural Rights

The Board's policy handbook notes that inmates are not authorized by statute to have counsel at release interviews.⁵³ Inmates may present support letters, but have no right to cross-examine witnesses or call their own witnesses.⁵⁴ Parole eligible inmates receive copies of the non-confidential portions of their Board Report, their case plan, their COMPAS risk assessment results, and recommended special conditions.⁵⁵

d. Victim/Other Participation in Parole Release Process

Victims receive notification of parole proceedings.⁵⁶ They have a right to present either a written, recorded (audio or video), or live statement to members of the Board responsible for making the release decision. The victim's name and statement are confidential, and these rights extend to every consideration of the inmate regarding parole.⁵⁷

When weighing the seriousness of the offense, the Board considers the recommendations of the sentencing court, the district attorney, and the attorney for the inmate.⁵⁸ There are no statutory or regulatory provisions requiring public notification of parole proceedings, however, under certain circumstances the public may access an inmate's file and attend the parole hearing.

e. Burden of Proof or Standards of Persuasion to be Applied by Board

There is no evidentiary burden of proof or standard of persuasion used in parole hearings.⁵⁹ However, the Board must find a “reasonable probability” that an inmate may be released without violating the law.⁶⁰

f. Issuing Parole Release Decisions

If the Board denies parole, they must inform the inmate of the factors and reasons supporting their decision in writing within two weeks of the interview.⁶¹

g. Administrative or Judicial Review of Parole Denial

Denial of parole release is appealable through an administrative procedure.⁶² The notice of appeal must be submitted to the Board’s Appeals Unit in writing within thirty days of the initial determination.⁶³ An inmate appealing a Board decision may be represented by counsel. The inmate may hire a private attorney or if indigent may have an appointed attorney pursuant to statute. The appeals unit reviews the case and issues a written recommendation to the Board.⁶⁴

If the appeals unit grants review, a three-member panel of the Board that did not participate in the initial decision considers the case and may affirm, modify, or reverse the determination made at the initial hearing. It must provide written explanation if the determination is different from that of the Appeals Unit.⁶⁵

Administrative appeals must be based on the written record; oral argument is prohibited.⁶⁶ An appeal of a Board interview denial may only address the following questions:

- Whether the proceeding and/or determination was in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or was otherwise unlawful;
- Whether the board member or members making the determination relied on erroneous information as shown in the record of the proceeding, or relevant information was not available for consideration; or
- Whether the determination made was excessive.”⁶⁷

Judicial review of parole release decisions is available under Article 78 (entitled “Proceedings against Body or Officer”). Parole release decisions will not be disturbed unless there is a showing of arbitrary decision-making or capriciousness, irrationality bordering on impropriety, or a violation of statutory requirements.⁶⁸

h. Parole Rescission

Rescission may occur for various reasons including new and significant information that was not available or provided to the Board after the Board interview; new case developments that occur after the Board gave a release date; serious violation of facility rules; or change in mental condition after the Board provided a release date that would indicate release of the inmate was not in the best interest of society.⁶⁹ The Board may issue a temporary suspension of a release date pending a rescission hearing. A majority of the Board must be satisfied that substantial evidence was presented at the hearing to form a basis for rescinding the release date.⁷⁰

4. Supervision Practices

Supervision rates. On December 31, 2015, there were 44,652 individuals on parole in New York, for a rate of 285 parolees per 100,000 adult residents. This is lower than the 50-state average rate of 304 parolees per 100,000 adult residents.⁷¹

a. Purposes of Supervision

According to the DOCCS website, “public safety and community protection are best ensured when offenders who are returning to the community are aided, assisted and supervised by a professional parole officer. Parole officers work to develop a supervision plan for each releasee. They also assess and evaluate the adequacy of each releasee’s community adjustment and intervene when the releasee’s behavior threatens that adjustment. The parole officer, in consultation with his or her supervisor, determines when and under what circumstances delinquency action is warranted. The parole officer works to ensure that individuals released from prison by order of the Board of Parole and by statute live and remain at liberty in the community without violating the law.”⁷²

b. Are All or Only Some Releasees Placed on Supervision?

All parolees as well as those conditionally released under a determinate sentencing scheme are supervised.⁷³

c. Length of Supervision

Maximum supervision term. All parolees subject to an indeterminate sentence remain in the custody of DOCCS and must serve out the remainder of their maximum term or period of post-release supervision under the conditions of their release.⁷⁴ Inmates serving determinate sentences are sentenced to a specific period of post-release supervision.⁷⁵ The default sentence for non-sex offenders includes up to a five-year period of supervision, however the statute specifies particular terms of supervision for each class of offense. Sex offenders may face a period of supervision of up to twenty-five years, depending on the conviction.⁷⁶ Some individuals, for example, those sentenced as Class A-1 felons or persistent offenders, are subject to lifetime supervision.⁷⁷

Drug offenses require termination of parole after two years of unrevoked release, three years for Class A drug felons.⁷⁸

Sentence of parole supervision. An offender can be sentenced to a term of parole supervision without first having been incarcerated. Only offenders convicted of certain enumerated crimes and who have criminal histories that do not contain certain types of offenses will qualify for a sentence to parole supervision. The court must find (i) that the defendant has a history of controlled substance dependence that is a significant contributing factor to such defendant's criminal conduct; (ii) that such defendant's controlled substance dependence could be appropriately addressed by a sentence of parole supervision; and (iii) that imposition of such a sentence would not have an adverse effect on public safety or public confidence in the integrity of the criminal justice system. This type of parole begins with a 90-day drug treatment program after which the offender is released to standard parole supervision.⁷⁹

Early termination from supervision. The DOCCS may grant a merit termination of sentence to eligible parolees after one year of presumptive release, parole, conditional release or release to post-release supervision. Merit termination of sentence may be granted by DOCCS after two years of presumptive release, parole, conditional release or release to post-release supervision to a person serving a sentence for a Class A felony offense.⁸⁰

DOCCS must grant a termination of sentence to most felons after two years of unrevoked release. If a felon is serving a sentence for a Class A felony, they must remain on unrevoked release for three years before DOCCS is required to terminate the sentence.⁸¹

Extension of supervision term. There is no legal mechanism for the extension of the supervision term beyond the maximum term.

Incentives "goal parole." Merit termination and other early termination of parole is based on good conduct during the parole period.

d. Conditions of Supervision

The Board has original authority to set the conditions of parole, and there are twelve standard conditions, which include that:⁸²

1. A releasee will proceed directly to the area to which he has been released and, within 24 hours of his release, make his arrival report to that office of the Division of Parole unless other instructions are designated on his release agreement.
2. A releasee will make office and/or written reports as directed.
3. A releasee will not leave the State of New York or any other state to which he is released or transferred, or any area defined in writing by his parole officer without permission.
4. A releasee will permit his parole officer to visit him at his residence and/or place of employment and will permit the search and inspection of his person, residence and property. A releasee will discuss any proposed changes in his residence, employment or program status with his parole officer. A releasee has an immediate and continuing duty to notify his parole officer of any changes in his residence, employment or program status when circumstances beyond his control make prior discussion impossible.
5. A releasee will reply promptly, fully and truthfully to any inquiry of or communication by his parole officer or other representative of the Division of Parole.
6. A releasee will notify his parole officer immediately any time he is in contact with or arrested by any law enforcement agency. A releasee shall have a continuing duty to notify his parole officer of such contact or arrest.
7. A releasee will not be in the company of or fraternize with any person he knows to have a criminal record or whom he knows to have been adjudicated a youthful offender except for accidental encounters in public places, work, school or in any other instance with the permission of his parole officer.
8. A releasee will not behave in such manner as to violate the provisions of any law to which he is subject which provides for penalty of imprisonment, nor will his behavior threaten the safety or well-being of himself or others.

9. A releasee will not own, possess or purchase any shotgun, rifle or firearm of any type without the written permission of his parole officer. A releasee will not own, possess or purchase any deadly weapon as defined in the penal law or any dangerous knife, dirk, razor, stiletto, or imitation pistol. In addition, a releasee will not own, possess or purchase any instrument readily capable of causing physical injury without a satisfactory explanation for ownership, possession or purchase.
10. In the event that a releasee leaves the jurisdiction of the State of New York, the releasee waives his right to resist extradition to the State of New York from any state in the Union and from any territory or country outside the United States. This waiver shall be in full force and effect until the releasee is discharged from parole or conditional release. While a releasee has the right under the Constitution of the United States and under law to contest an effort to extradite him from another state and return him to New York, a releasee freely and knowingly waives this right as a condition of his parole or conditional release.
11. A releasee will not use or possess any drug paraphernalia or use or possess any controlled substance without proper medical authorization.
12. *Special conditions.* A releasee will fully comply with the instructions of his parole officer and obey such special additional written conditions as he, a member of the Board of Parole or an authorized representative of the Division of Parole, may impose.

Case law indicates that conditions will only be stricken if "arbitrary or capricious" and not "rationally related" to keeping the parolee law-abiding.⁸³

Sex offenders. Sex offenders may be required to register, depending on the offense. Certain special conditions may be applied to sex offenders restricting internet access and communications with minors.⁸⁴

Modification. The Board, an authorized representative, or a parole officer may alter the conditions of release, so long as the change is not capricious or arbitrary.⁸⁵ Parole officers may not modify conditions imposed by the Board. If a parole officer seeks modification of a Board condition, they must request it in writing.⁸⁶

Incentives. All parolees begin their parole on intensive supervision, which is lowered to a standard level of supervision after 12 months of good behavior and compliance with work/school and other requirements. However, sex offenders must remain on intensive supervision for the duration of their parole.⁸⁷

e. Fees and Other Financial Sanctions

Supervision fees. Every parolee must pay a supervision fee, generally \$30 per month. Parole officers may waive supervision fees in certain circumstances if a parolee is unemployed or if paying the fee would cause hardship.⁸⁹ If they parolee does not pay said fee, however, there is no penalty – i.e. parole is not revoked.

Drug and alcohol testing fees. There is no drug or alcohol-testing fee.

Restitution. In some cases, payment of restitution on a specific schedule is a condition of parole.⁹⁰

Child support. While nothing in New York law prevents the Board from ordering payment of child support as a special condition of parole, there is no statute specifying it as a general condition.

5. Parole Revocation

Parole revocation proceedings. In 2015, 1,275 parolees/ releasees returned to prison on a new court conviction and 8,229 returned for violation of conditions of parole. This represents 18.9% of the supervised population.⁹¹

Absconders. In 2015, there were 3,275 absconders from community supervision. This was 7.2% of the total supervision population.⁹²

a. Principles and Criteria of "When to Revoke"

Declarations of delinquency, discussed below, may trigger statutory parole revocation.⁹³ The parole revocation regulations govern revocation decisions.⁹⁴

b. Revocation Guidelines

New York has developed parole revocation regulations that consider criminal history, crime of conviction, the number of prior parole violations, and current violative behavior. The guidelines are structured to ensure that those violators with a history of violent behavior receive the most severe penalties and those with substance abuse problems receive the necessary treatment. There are three major categories of parole violations, which each result in a certain sanction or range of sanctions.⁹⁵

c. Use of Risk/Needs Assessment Tools in Revocation Decision-making

A risk and needs assessment tool is not used in a revocation hearing.⁹⁶

d. Preliminary and Final Revocation Procedures

Arrest or summons. When a parole officer believes that a parolee under supervision has lapsed into criminal activity, or has violated the conditions governing their release in an important respect, a parole violation warrant may be issued by the Board or a designated officer of Community Supervision. It may be enforced by said parole officer or any other law enforcement official authorized to serve legal process.⁹⁷

Preliminary hearing. If a parolee is taken into custody due to an alleged parole violation, a hearing must be held within 15 days from the date of execution of the parole violation warrant, if the parolee has not waived their right to such hearing.⁹⁸ The hearing must determine if there is probable cause to believe that a violation of parole occurred. A hearing officer⁹⁹ must review the violation charges with the alleged violator. If the alleged violator pleads guilty to the substance of any charge or admits to charged conduct, the hearing is concluded. If not, the officer must direct the presentation of evidence concerning the alleged violation, receive the statements of witnesses and documentary evidence on behalf of the prisoner, and allow cross-examination of those witnesses in attendance.¹⁰⁰

Declaration of delinquency. A declaration of delinquency is made by a waiver by the releasee of the preliminary hearing, a finding of probable cause at a preliminary hearing, a finding by a member or supervising parole officer (bureau chief) that there is reasonable cause to believe the releasee has absconded from supervision, or a finding that the releasee has been convicted of a new crime while under his/her present parole, conditional release or period of post-release supervision. A declaration of delinquency triggers a final revocation hearing or accelerated placement, if agreed upon, into a parole diversion program for an intermediate sanction. The parolee can be re-released and/or the declaration of delinquency can be cancelled by concurrence of three board members or an administrative law judge. If not cancelled before the revocation hearing occurs, an adverse finding at the final revocation hearing will lead directly to revocation of parole.¹⁰¹

Final hearing. A revocation hearing must be scheduled to be held within 90 days of the probable cause determination.¹⁰² Either a hearing officer or a board member may act as presiding officer during this hearing.¹⁰³ The presiding officer must read the charges and the alleged violator must plead guilty, not guilty, or guilty with an explanation. If the violator pleads guilty, the presiding officer must direct the presentation of mitigating evidence. If the violator pleads not guilty, the presiding officer must direct the presentation with respect to evidence of each charge. After the state presents evidence, the alleged violator may present evidence on mitigating circumstances related to each charge.¹⁰⁴

e. Offender's Procedural Rights

The parolee must be served with a notice of violation, apprising them of their right to a preliminary hearing and giving them notice of the time and place of such hearing, within three days of being incarcerated on the warrant.¹⁰⁵ The parolee must be notified of the date, time and place of the final hearing at least fourteen days in advance of the final hearing.

The alleged parole violator is entitled to a number of due process protections including:

- (i) The right to appear at the hearing and provide testimony;
- (ii) The right to present witnesses and submit documentary evidence;
- (iii) The right of confrontation and cross examination; and
- (iv) The right to submit mitigating evidence for the purpose of being restored to supervision;

In both the preliminary and final hearings, an alleged violator may be represented by counsel.¹⁰⁶ Counsel for the parolee may present evidence, question witnesses and make argument on the parolee's behalf.¹⁰⁷ In the event the alleged parole violator is indigent and cannot afford counsel, an attorney must be assigned to represent them.¹⁰⁸

f. Victim/Other Participation in Revocation Process

There are no special provisions pertaining to victim input regarding revocation. Excluding those currently involved in the case, there is no judicial, prosecutorial, law enforcement, or general public notification regarding revocation.

g. Burden of Proof or Standards of Persuasion to be Applied by Board

The presiding officer must be satisfied by a preponderance of the evidence that one or more of the charged violations took place.¹⁰⁹

h. Revocation and Other Sanctions

There are a variety of sanctions available to be applied at the discretion of the presiding officer, ranging from release back to supervision, to reincarceration up to the duration of the parolee's maximum term.¹¹⁰

i. Issuing Parole Revocation Decisions

The decision whether to sustain a violation in an important respect is made by the presiding officer.¹¹¹ The final decision must be served in writing on the parolee and his counsel, specifying which violations the parolee has been found guilty of, the evidence upon which the finding of guilt was made, and the sanction to be applied.¹¹²

j. Administrative or Judicial Review of Parole Revocation

Appeal of a revocation determination is limited to a handful of issues: whether the determination was supported by a preponderance of the evidence; whether the proceeding and/or determination was in violation of lawful procedure, was affected by error of law, was arbitrary and capricious or was otherwise unlawful; whether the board member or members making the determination relied on erroneous information as shown in the record of the proceeding, or relevant information was not available for consideration; or whether the determination made was excessive. New evidence is considered through an application for a Board rehearing rather than an appeal.¹¹³

Three board members who did not take place in the initial decision must review the appeal and decide what action to take by a majority vote. A decision may be upheld, modified, or reversed. Judicial review is available if the appeals unit fails to issue findings and a recommendation within four months of the date the perfected appeal was received. In that circumstance, by regulation, the Board will not raise the doctrine of exhaustion of administrative remedy as a defense.¹¹⁴

Parolees may also seek judicial review through Article 78 of the Civil Practice Law and Rules, which governs proceedings against a body or an officer. Issues that may be raised include:

- whether the body failed to perform a duty enjoined upon it by law;
- whether the body proceeded, is proceeding, or is about to proceed without or in excess of jurisdiction;
- whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
- whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.¹¹⁵

An appeals court will generally review whether or not a parole revocation decision is supported by substantial evidence.¹¹⁶

k. Re-release following revocation

Revocation of parole shall not prevent re-parole or re-release. If the parole violator was serving a period of post-release supervision in connection with their determinate sentence, they are automatically re-released to the community after serving the time assessment. Other violators are re-released after serving the time assessment imposed absent a serious disciplinary infraction.¹¹⁷

6. Parole Board

a. Source of Authority and Jurisdiction

The Board of Parole has statutory authority to determine which inmates may be released on parole, to determine conditions of parole supervision, to facilitate all supervision of parolees and to revoke parole or community supervision status.¹¹⁸

b. Location in Government

The Board is a quasi-autonomous agency administratively located within the Department of Corrections and Community Supervision.¹¹⁹ Its exercise of all decision-making functions and other powers are independent of the DOCCS.¹²⁰

c. Purpose (Vision/Principles/Rationale)

The Board's stated mission is "to ensure public safety by granting parole when appropriate under the governing standards, revoking community supervision when necessary, and discharging inmates from their sentence when it is in the best interest of society."¹²¹

d. Appointment and Qualifications of Board Members

Board members are appointed by the Governor with the advice and consent of New York's Senate.¹²² The governor selects a chair who serves at the pleasure of the Governor, or until their term expires.

Qualifications. To qualify for Board membership, an appointee must have at least a Bachelor's degree and five years of experience in a related field. Board members are prohibited from holding any other public office or appointment within a political party. There is no requirement that they work full-time, however the functions of the board require full-time commitment.

e. Tenure and Number of Board Members, Ease of Removal

The Board consists of up to nineteen members whose terms run for six years, and are not statutorily staggered.¹²³ The governor can remove any member of the Board for cause, after an opportunity to be heard.

f. Training and Continuing Education

The Board of Parole Counsel's Office and the Chairperson both provide training as well as facilitate training of the Board on various subject matters.¹²⁴

g. Workload

In 2015, there were 4,936 Board releases to supervision. The total parole population on December 31, 2015 (including out of state parolees and those confined in facilities such as local jails) was 45,677. The active parolee population at that time was 35,477.¹²⁵

h. Reporting and Accountability of Parole Board

The Board must transmit a report to the Governor and Legislature annually by statute.¹²⁶ By statute, the Chair of the Board shall maintain records of all parole interviews and hearings for a period of twenty-five years from the date of the parole release interview or until expiration of the maximum term of sentence.¹²⁷ DOCCS maintains case records; an inmate, a releasee, or counsel may have access to those records prior to an appearance before the Board, prior to an appearance before a hearing officer, or prior to a timely administrative appeal of a Board decision. Diagnostic opinions which could lead to a disruption of an inmate's institutional program or supervision; materials which would reveal sources of information obtained on a promise of confidentiality; or information that could result in harm, physical or otherwise, to any person may not be disclosed.¹²⁸

END NOTES

- ¹ The authors thank Tina M. Stanford, Chairwoman of the New York State Board of Parole, for comments on an earlier draft of this report.
- ² N.Y. Penal Law § 70.00 (McKinney).
- ³ N.Y. State Dep't of Corr. & Cmty. Supervision, *New York State Parole Handbook* §1, Q. 1 (Nov. 2010), http://www.doccs.ny.gov/Parole_Handbook.html [hereinafter: *Parole Handbook*].
- ⁴ N.Y. State Dep't of Corr. & Cmty. Supervision, *DOCCS Fact Sheet: Merger of Department of Correctional Services and Division of Parole*, <http://www.doccs.ny.gov/FactSheets/DOCCS-Parole-Merger.html> (last visited Sept. 21, 2016).
- ⁵ N.Y. State Permanent Comm'n on Sentencing, *About Us*, <https://www.nycourts.gov/ip/sentencing/index.shtml> (last visited Sept. 21, 2016).
- ⁶ N.Y. State Permanent Comm'n on Sentencing, *A Proposal for "Fully Determinate" Sentencing For New York State*, N.Y. Courts (Dec. 2014), <https://www.nycourts.gov/ip/sentencing/Determinate%20Sentencing%20Report%20Final%20Delivered.pdf>.
- ⁷ N.Y. Exec. Law § 259-i (McKinney).
- ⁸ N.Y. Penal Law § 70.40 (McKinney).
- ⁹ N.Y. Exec. Law § 259-i (McKinney).
- ¹⁰ N.Y. Penal Law § 70.00 (McKinney).
- ¹¹ N.Y. Crim. Proc. Law § 410.91 (McKinney).
- ¹² N.Y. Penal Law § 70.00 (McKinney).
- ¹³ *Id.* at (3).
- ¹⁴ *Id.* at (2).
- ¹⁵ Unless an inmate is sentenced to life without parole, they may be eligible for parole after serving a sentence of roughly 15-25 years less time credits.
- ¹⁶ N.Y. Penal Law § 70.40 (McKinney).
- ¹⁷ *Id.*
- ¹⁸ N.Y. Penal Law § 70.40 (McKinney).
- ¹⁹ N.Y. Correct. Law § 205 (McKinney).
- ²⁰ N.Y. Penal Law § 70.45 (McKinney).
- ²¹ N.Y. Correct. Law § 806 (McKinney).
- ²² *Id.* A certificate does not entitle an inmate to release. See N.Y. Penal Law § 805 (McKinney).
- ²³ Note that this is only available to non-violent offenders who have not committed any serious disciplinary infraction and have not engaged in frivolous litigation. See *id.*
- ²⁴ N.Y. Penal Law § 70.20 (McKinney).
- ²⁵ N.Y. Penal Law § 70.40.
- ²⁶ *Parole Handbook*, *supra* note 3 at § 2, Q. 12; N.Y. Correct. Law § 205 (McKinney).
- ²⁷ N.Y. Penal Law § 70.80 (McKinney).
- ²⁸ N.Y. Penal Law § 70.00 (McKinney).
- ²⁹ N.Y. Penal Law § 60.06 (McKinney).
- ³⁰ N.Y. Exec. Law § 259-i (McKinney).
- ³¹ N.Y. Correct. Law § 803 (McKinney).
- ³² *Id.* The merit time allowance may be up to one-third of the minimum period imposed for an A-1 felony offense (generally a sentence for murder).
- ³³ N.Y. Correct. Law § 803; N.Y. Penal Law § 70.40 (McKinney).
- ³⁴ N.Y. Penal Law § 70.40.
- ³⁵ *Id.*
- ³⁶ N.Y. Exec. Law § 259-i (McKinney).
- ³⁷ N.Y. Correct. Law § 805 (McKinney).
- ³⁸ N.Y. Comp. Codes R. & Regs. Tit. 9, § 8002.1.
- ³⁹ N.Y. Exec. Law § 259-i.
- ⁴⁰ *Id.*
- ⁴¹ 83 N.Y. Jur. 2d Penal and Correctional Institutions § 364 (2015).
- ⁴² N.Y. Div. of Criminal Justice Servs., *New York State COMPAS Probation Risk and Need Assessment Study* (2012), http://www.criminaljustice.ny.gov/crimnet/ojsa/opca/compas_probation_report_2012.pdf.
- ⁴³ Correspondence with Tina M. Stanford, Chairwoman, N.Y. State Bd. of Parole (Jan. 23, 2017).
- ⁴⁴ N.Y. Exec. Law §§ 259-r, 259-s (McKinney).
- ⁴⁵ *Id.* Those convicted of second-degree murder, first-degree manslaughter, or sex offenses must serve at least 1/2 of the minimum term of an indeterminate sentence or 1/2 of the term of a determinate sentence prior to eligibility for medical release.
- ⁴⁶ *Id.*
- ⁴⁷ N.Y. Exec. Law § 15 (McKinney).
- ⁴⁸ N.Y. Exec. Clemency Bureau, *Overview*, <http://www.ny.gov/services/apply-clemency> (last visited Sept. 21, 2016).
- ⁴⁹ N.Y. Exec. Law § 259-i (McKinney). See also N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.2.
- ⁵⁰ N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.
- ⁵¹ *Parole Handbook*, *supra* note 3 at § 2, Q. 19.
- ⁵² *Id.* at § 2, Q. 18.
- ⁵³ *Id.* at § 2, Q. 5.
- ⁵⁴ *Id.* at § 2, Q. 15.
- ⁵⁵ Jan. 2017 Correspondence with Tina M. Stanford, *supra* note 43. Recall, for example, that victim information and statements are confidential. N.Y. Exec. Law § 259-i.
- ⁵⁶ N.Y. Crim. Proc. Law § 440.50 (McKinney).
- ⁵⁷ N.Y. Exec. Law § 259-i (McKinney). When considering the victim's statement, the statute specifically prohibits information regarding threatening behavior by the inmate or those under his or her direction, though it does not limit the information the victim may provide.
- ⁵⁸ N.Y. Exec. Law § 259-i(2)(c)(A) (McKinney).
- ⁵⁹ *Id.*
- ⁶⁰ N.Y. Comp. Codes R. & Regs. Tit. 9, § 8002.1.
- ⁶¹ N.Y. Exec. Law § 259-i(2)(a).
- ⁶² *Id.* at (4).
- ⁶³ N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1.
- ⁶⁴ N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.2.
- ⁶⁵ N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.4.
- ⁶⁶ N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.2.
- ⁶⁷ N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.3.
- ⁶⁸ See *Russo v. N.Y. Bd. of Parole*, 405 N.E. 2d 225 (N.Y. 1980).
- ⁶⁹ N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5; *Parole Handbook*, *supra* note 3 at § 2, Q. 34.
- ⁷⁰ N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b).
- ⁷¹ Danielle Kaebler & Thomas P. Bonzcar, Bureau of Justice Statistics, *Probation and Parole in the United States, 2015* at 16 (Appendix Table 2) (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/ppus15.pdf>.
- ⁷² N.Y. Dep't of Corr. & Cmty. Servs., *FAQ*, <http://www.doccs.ny.gov/faq.html> (last visited Jan. 25, 2017).
- ⁷³ N.Y. Penal Law §§ 70.40, 70.45 (McKinney).
- ⁷⁴ N.Y. Penal Law § 70.40 (McKinney).
- ⁷⁵ N.Y. Penal Law § 70.45 (McKinney).
- ⁷⁶ *Id.* The period of supervision is one year for a class D or E felony, between one and two years for a class B or C felony. Terms are slightly higher for individuals sentenced as recidivist drug offenders or violent offenders, but are never longer than five years.
- ⁷⁷ See, e.g., N.Y. Penal Law § 70.10 (McKinney).
- ⁷⁸ N.Y. Correct. Law § 205 (McKinney).
- ⁷⁹ N.Y. Crim. Proc. Law § 410.91 (McKinney).
- ⁸⁰ N.Y. Correct. Law § 205.
- ⁸¹ *Id.* Note that the Board was also granted the ability to terminate parole under a separate statute; however, N.Y. Correct. Law § 205 has replaced this statute (N.Y. Exec. Law § 259-j). See, e.g., *People ex Rel. Williams v. Kirkpatrick*, 111 A.D.3d 1327 (N.Y. App. Div. 2013) (slip opinion).
- ⁸² N.Y. Exec. Law § 259-i (McKinney); N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.2.
- ⁸³ See *Griswold v. State of N.Y. Div. of Parole*, 63 A.D.3d 1460 (N.Y. App. Div. 2009).
- ⁸⁴ N.Y. Exec. Law § 259-c (McKinney).
- ⁸⁵ See *Boehm v. Evans*, 79 A.D. 3d 1445 (N.Y. App. Div. 2010).
- ⁸⁶ Jan. 2017 Correspondence with Tina M. Stanford, *supra* note 43.

END NOTES

⁸⁷ Parole Handbook, *supra* note 3 at § 3, Q. 22. During intensive supervision, a Parole Officer makes frequent home visits and parolees are required to report frequently. Regular supervision is characterized by some contact and continued verification of employment.

⁸⁸ Parole Handbook, *supra* note 3 at § 3, Q. 33.

⁸⁹ *Id.*

⁹⁰ N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.4.

⁹¹ N.Y. State. Dep't of Corr. & Cmty. Supervision, *Community Supervision Legislative Report 2016* at 22, http://www.doccs.ny.gov/Research/Reports/2016/2016_Legislative_Report.pdf. Bureau of Justice Statistics numbers are very similar, stating that 1,276 individuals returned to incarceration on a new sentence and 8,226 individuals returned due to revocation or "other" reasons. See Danielle Kaebler & Thomas P. Bonzcar, Bureau of Justice Statistics, *Probation and Parole in the United States, 2015* at 21 (Appendix Table 4) (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/ppus15.pdf>.

⁹² Community Supervision Legislative Report, *supra* note 91 at 6.

⁹³ N.Y. Comp. Codes R. & Regs. tit. 9, § 8004.3.

⁹⁴ N.Y. Comp. Codes R. & Regs. tit. 9, § 8004.

⁹⁵ Parole Handbook, *supra* note 3 at § 4, Q. 12.

⁹⁶ Correspondence with Tina M. Stanford, Chairwoman, N.Y. State Bd. of Parole (Nov. 21, 2016).

⁹⁷ N.Y. Exec. Law § 259-i (McKinney); N.Y. Comp. Codes R. & Regs. tit. 9 § 8004.2.

⁹⁸ N.Y. Exec. Law § 259-i(3)(c)(iv) (McKinney).

⁹⁹ The Board must appoint hearing officers to conduct parole revocation proceedings. The Board must establish standards and prerequisites for becoming a hearing officer designed to ensure that the officers have the ability to conduct revocation hearings fairly and impartially. N.Y. Exec. Law § 259-d.

¹⁰⁰ N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.7.

¹⁰¹ N.Y. Comp. Codes R. & Regs. tit. 9, § 8004.3.

¹⁰² N.Y. Exec. Law § 259-i(3)(f)(i) (McKinney).

¹⁰³ N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.15.

¹⁰⁴ N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.19.

¹⁰⁵ N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney).

¹⁰⁶ N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.5(a).

¹⁰⁷ N.Y. Exec. Law § 259-i(3)(f)(iv) & (v) (McKinney).

¹⁰⁸ N.Y. Exec. Law § 259-i(3)(f)(v).

¹⁰⁹ *Id.*

¹¹⁰ N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.3.

¹¹⁴ N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.4.

¹¹⁵ N.Y.C.P.L.R. § 7803.

¹¹⁶ See *Lozada v. N.Y. State Div. of Parole*, 61 A.D. 3d 1393 (N.Y. App. Div. 2009) citing *Matter of Layne v. N.Y. State Bd. of Parole*, 256 A.D. 2d 990 (N.Y. App. Div. 1998).

¹¹⁷ N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.6; Correspondence with Tina M. Stanford, *supra* note 96.

¹¹⁸ N.Y. Exec. Law § 259-c (McKinney).

¹¹⁹ N.Y. Exec. Law § 259-b (McKinney).

¹²⁰ *Id.* The department is autonomous; provided, however, that administrative matters of general applicability within the department be applicable to the board.

¹²¹ N.Y. Corr. & Cmty. Supervision, Directive 8600 § II (Jun. 2015), <http://www.doccs.ny.gov/pdf/Board-of-Parole-Directive.pdf>.

¹²² N.Y. Exec. Law § 259-b (McKinney).

¹²³ *Id.*

¹²⁴ Nov. 2016 Correspondence with Tina M. Stanford, *supra* note 96.

¹²⁵ N.Y. State. Dep't of Corr. & Cmty. Supervision, *Community Supervision Legislative Report 2016*, http://www.doccs.ny.gov/Research/Reports/2016/2016_Legislative_Report.pdf.

¹²⁶ N.Y. Exec. Law § 259-c(13) (McKinney); Nov. 2016 Correspondence with Tina M. Stanford, *supra* note 96.

¹²⁷ N.Y. Exec. Law § 259-i (McKinney).

¹²⁸ N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5.