NEW YORK STATE
BAR ASSOCIATION

Report of the New York State Bar Association **Task Force on the Parole System**

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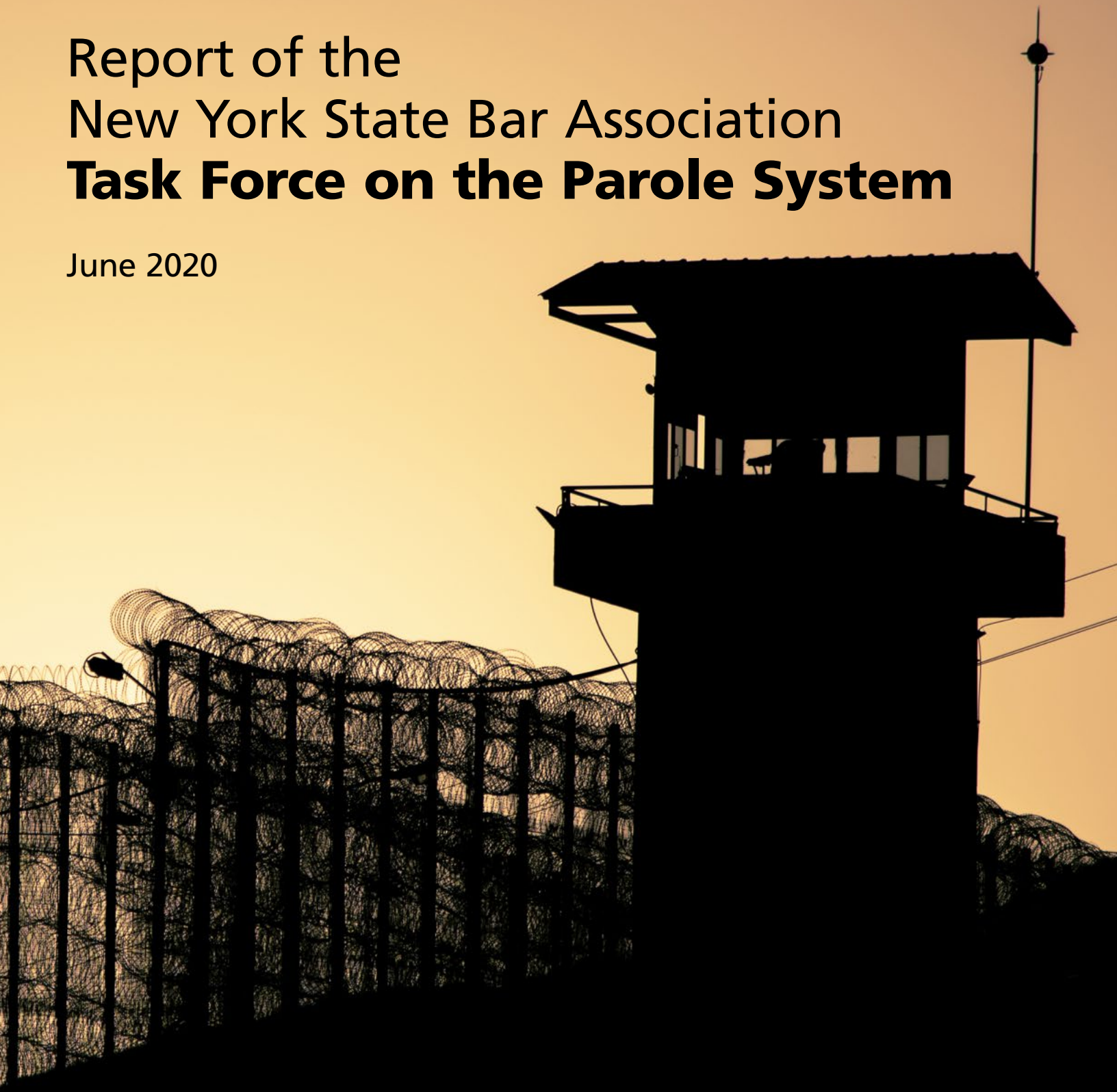

Approved by the New York State Bar Association House of Delegates on June 27 2020.

New York State Bar Association Task Force on the Parole System
May 27, 2020 Report and Recommendations[1]

The New York State Bar Association's ("NYSBA") Task Force on the Parole System ("Task Force") continues to conduct a detailed review of parole rules, regulations, practices and procedures in New York and other states. This report builds on and supplements the findings and recommendations contained in the Task Force's initial November 2019 report. Since the November 2019 report, the Task Force has continued to examine the issues surrounding the parole system and to solicit input from various stakeholders, including in response to the unprecedented public health crisis caused by the rapid spread of the highly contagious novel coronavirus. This includes meetings and correspondence with the Governor's office on suggested parole-related measures to slow the spread of virus.[2]

In addition, the Task Force has considered additional areas of potential reform to improve the parole and post-release supervision process. This report focuses on four categories of findings and recommendations.

First, although the Parole Board has recently revised the set of standard conditions with which individuals on parole must comply, certain additional modifications should be made to avoid unfairly burdening individuals in ways that make it less likely that they will make a successful transition to life in their community.

Second, given the unique nature of parole proceedings and their importance to the affected individuals, it is critical that statewide standards for public defenders and assigned counsel specific to parole proceedings be developed and that adequate systematic training be provided. This could be done by creating and staffing of regional parole resource and training centers to provide much-needed legal resources and training to public defenders and assigned counsel focusing on parole proceedings.

Third, ensuring the availability of adequate supportive housing to provide necessary services to enable individuals on parole to successfully reintegrate into society is an essential part of reforming New York's parole system**.** Safe and stable housing is a foundation to successful reentry from prison but due to a statewide patchwork of laws governing formerly incarcerated individuals' access to public housing and social services, as well as varied levels of funding for those services, people in prison are often released either to homeless shelters rife with violence and drug use or to street homelessness. Either form of homelessness places them at risk of returning to incarceration both through violations of parole conditions and through conduct that leads to rearrest and reincarceration. To address these issues, Congress should amend the definition of chronic homelessness in 42 USC §11360(2) to state that people in jail and prison who have insufficient financial resources to pay for stable housing upon release are deemed to be "chronically homeless," to make it easier for them to qualify for supportive housing.

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[1] The members of the Parole Reform Task Force are listed in Appendix A.

[2] A copy of the Task Force's April 16, 2020 letter to Governor Cuomo is attached as Appendix B.

Furthermore, New York State should create robust funding for emergency and transitional housing that addresses the special needs of homeless individuals who are formerly incarcerated.

Fourth, the current parole statutory and regulatory scheme provides that if release onto parole is denied, the parole applicant must have a new parole appearance scheduled within 24 months, and, in the meantime, has the right to appeal the denial of parole. But before an unsuccessful parole applicant can file an Article 78 proceeding to challenge the denial of parole, the applicant must first exhaust a process of administrative appeal to the very same Parole Board that denied parole. Because of the delays inherent in that administrative appeal process, most unsuccessful parole applicants are unable to pursue an Article 78 proceeding before a new parole hearing has been scheduled, effectively mooting the Article 78 proceeding and shielding the Parole Board determinations from outside review. A solution to this problem would be to remove the requirement of exhausting administrative appeals and permit individuals denied parole to appeal directly to the New York State Supreme Court through an Article 78 proceeding without any further consideration by the Parole Board.

I. New Parole Conditions and Regulations Are Needed

In New York State, most people sentenced to state prison for felony crimes are eventually released to the community to serve a certain portion of their sentence on parole or post-release supervision. The release onto supervision can be granted by the New York State Parole Board for individuals serving indeterminate sentences as an early release mechanism for good behavior while incarcerated and is known as parole. Individuals who receive a determinate sentence to be followed by a period of post-release supervision are released into supervision by operation of law when they have served the legally required minimum amount of time in prison.[3]

Whatever the mechanism, individuals released to parole must follow a set of conditions that are provided to all paroled persons in New York State, known as general or standard conditions of release. Compliance with these rules is enforced during supervision by an individually assigned parole officer employed by the NYS Department of Corrections and Community Supervision ("DOCCS"). Standard conditions have been promulgated by the Parole Board by regulation 9 N.Y.C.C.R. §8003.2, and include such conduct as obeying all laws, keeping appointments with the assigned parole officer or parole office, abstaining from alcohol and drug use, maintaining employment and notifying the parole department regarding changes in residence, program status or employment. In addition to complying with the standard conditions, persons on parole are also subject to individualized special conditions imposed by the Parole Board upon a person's release from prison. Special conditions may also be imposed by the assigned parole officer at any time during the supervision. These conditions are usually directed toward the supervised person's specific circumstances stemming from the case for which they were sentenced or from individualized risk factors determined from time spent in custody. Special conditions given to the supervised person by the parole officer almost always include set curfew hours and may include directions to attend mental health or substance use treatment, or anger management; avoid certain places such as bars or areas where children congregate; or stay

[3] Since the term "parole" is commonly used to refer to both forms of supervision, this report will use that term to refer both to parole granted by the Parole Board and to supervision following the conclusion of a determinate sentence.

away from certain people such as prior victims or co-defendants. Standard conditions from the Parole Board are written into the "Certificate of Release to Parole Supervision" which the releasee signs and acknowledges upon release from a DOCCS facility.[4] The releasee is provided a copy of the release form with any additional Parole Board imposed special conditions upon release from prison.

In the latest report issued from DOCCS, some 46,413 people in NYS were on community supervision and subject to parole conditions.[5] About 9,500 of these parolees are living in another state on supervision.[6] In New York State, 47% of all parolees on supervision are African American, and 23% are Hispanic.[7]

Pursuant to Executive Law §259-i, if a parole officer believes that a parolee has violated one or more conditions of release in an important respect, a warrant may issue authorizing the detention of the parolee in a local detention facility. This determination is often made subjectively by the parole officer and her or his senior parole officer. When someone on supervision violates a standard or special condition of supervision which does not involve the commission of a new crime, that violation is deemed to be a "technical violation." Despite a provision in the Executive Law mandating "implementation of a program of graduated sanctions" for technical violations,[8] there are no standard guidelines with respect to the filing of a violation and issuance of a warrant. Under Parole Board regulations, once there is a finding of probable cause that a violation has occurred, a declaration of delinquency is filed and the individual is remanded into custody.[9] The individual then may be held for up to 90 days or more for the completion of their final hearing, and if the violation is sustained, the violator, if not released back to the community on a "revoke and restore," is subject to further incarceration in State prison.[10] Additionally, persons held on violations who have new pending criminal felony charges may, with the accused's consent, be held beyond the 90 days on what is called a "K" or control calendar, which adjourns their final hearing until the new criminal case is resolved.[11]

The number of New York State residents incarcerated for a violation of their conditions of parole is substantial and has a disparate racial impact. An estimated 40% of all persons sent to state prison each year are incarcerated as a result of technical parole violations, and in 2018

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[4] New York State Department of Corrections and Community Supervision Directive #8710; https://doccs.ny.gov/system/files/documents/2019/07/8710%20%20Certificate%20of%20Release%20to%20Community%20Supervision.pdf.

[5] New York State Corrections and Community Supervision Legislative Report 2019, page 12; https://doccs.ny.gov/system/files/documents/2020/02/community-supervision-legislative-report-2019-final.pdf.

[6] *Id.*

[7] *Id.*

[8] NY Executive Law § 259-c (12).

[9] 9 N.Y.C.C.R. §8004.2.

[10] 9 N.Y.C.C.R. 8005.17, 9 N.Y.C.C.R. 8005.20.

[11] "Practicing Parole from Release to Revocation," NYSBA, June 1, 2018; page 10; https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=83148.

nearly 7,500 parolees were reincarcerated for violating a condition of parole.[12] By comparison, violations resulting from new crimes committed by those on parole made up only 2.6 % of the of the parole violators returned to prison.[13]

Current NYS Parole Supervision Conditions

The current standard conditions of parole supervision lay out 12 rules for a parolee to follow[14]:

- Rules No. 1 and No. 2 require that a released person go to the area to which he or she has been approved for release within 24 hours of release, and to make parole office reports as directed. The area of approved release is almost always the county of conviction, which is often not the county where they previously resided or in which they may have community supports, such as family or friends.

- Rule No. 3 forbids leaving the State of New York and "any area defined in writing by my parole officer" without permission.[15]

- Rule No. 4 orders a parolee to permit visits to her or his approved residence and inspection of the parolee's property, person and residence. Any changes the parolee wants to make to residence, employment or program status must be discussed with the parole officer in advance unless "circumstances make prior discussion impossible."[16]

- Rule No. 5 requires a parolee to reply promptly, fully and truthfully to any inquiry or communication from his or her parole officer.

- Rule No. 6 mandates that the parolee notify their parole officer anytime she or he is in contact with law enforcement.

- Rule No. 7 is a ban on fraternization, which is defined as being in the company of anyone the parolee knows to have a criminal record except for accidental encounters.

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[12] *Stopping Parole's Revolving Door: Opportunities for Reforming Community Supervision in New York*, Independent Commission on New York City Criminal Justice and Incarceration Reform, June 2019, at 4 (citing United States Department of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States*, 2016 (April 2018), Appendix Table 7, BJS, 2016). *Available at* https://www.bjs.gov/content/pub/pdf/ppus16.pdf. *See also* New York State Corrections and Community Supervision Legislative Report 2019, pgs. 19-22; https://doccs.ny.gov/system/files/documents/2020/02/community-supervision-legislative-report-2019-final.pdf

[13] New York State Corrections and Community Supervision Legislative Report 2019, pgs 19-22; https://doccs.ny.gov/system/files/documents/2020/02/community-supervision-legislative-report-2019-final.pdf.

[14] 9 N.Y.C.R.R. 8003.2.

[15] *Id.*

[16] *Id.*

- Rule No. 8 prohibits a parolee from behaving in any manner which violates the provisions of the Penal Law and provides for a penalty of imprisonment. It also bans behavior which threatens the safety or well-being of the person on parole or others.

- Rule No. 9 is a prohibition on possessing or purchasing any deadly weapon, dangerous knife, or other dangerous instruments, including an imitation pistol. There is an additional clause which provides that the parolee will not possess, own or purchase any instrument "readily capable of causing physical injury without a satisfactory explanation for ownership, possession or purchase." [17]

Finally, the last three current standard conditions provide for a waiver of extradition in the event the parolee leaves the State of New York while on supervision (Rule No. 10), prohibits the possession or use of drug paraphernalia or controlled substances without proper medical authorization (Rule No. 11), and provides that the parolee will fully comply with instructions of her or his parole officer and obey "such written special conditions" as that officer, as a representative of the Parole Board, may impose. (Rule No. 12 for Board imposed special conditions, and Rule No. 13 for parole officer imposed special conditions).[18]

Recent Changes Made to Parole Conditions

In 2019, the Parole Board announced changes to 9 N.Y.C.C.R. 8003.2 which will repeal and replace the standard conditions of release. The Parole Board also concurrently issued new guidelines for parole violation sanctions. The new standard parole conditions are meant to "serve as a baseline and minimum for the conduct that is deemed acceptable and consistent with the goals of public safety and successful integration into society" and are "finely calibrated to prevent criminogenic behavior without restricting behavior which may be consistent with or even facilitate a positive reintegration into society."[19] The new rules regarding conditions of release will take effect on July 8, 2020 and the new guidelines for parole violation sanctions will take effect on December 8, 2020. A chart comparing the current standard conditions and the new conditions is attached as Appendix C.

The new conditions maintain many of the same technical requirements of the current standard conditions of release but are modified in certain respects. For instance, current Rules Nos. 1 and 2, which provide for making an arrival report and making all office reports as directed, are now combined to create new Rule No. 1 which mandates the same reporting requirements. The new Rule No. 2 is now the current Rule No. 3 which forbids the parolee from leaving the State of New York or any defined area without permission. Notably, the Parole Board has created a new rule, to be numbered as Rule No. 3, specifically prohibiting absconding, which is defined as "intentionally avoiding supervision by failing to maintain

[17] *Id.*

[18] *Id.*

[19] NYS Register/October 16, 2019 page 13, DOCCS Revised Rule Making, Revised regulatory Impact Statement (3).

contact with … [a] parole officer and failing to reside at my approved address."[20] Under the new parole violation sanction rules, absconding is punishable by imprisonment of up to 15 months. Failing to make an arrival report or a missed office report is punishable by mandatory participation in an alternative DOCCS program of either 45 days or 90 days such as the 45-day Edgecombe program or 90 days at the Willard Drug Treatment Campus, and if the violator fails the program or does not participate, a time assessment of 4 months or 6 months in prison is mandated.

The new Rule No. 4 is more tailored and circumscribed then the current Rule No. 4 and eliminates the parole officer's authority to visit the supervised person's employment. In addition, it no longer imposes "an immediate and continuing duty" on a parolee to notify his or her parole officer regarding changes in residence, employment and program when circumstances make prior discussion impossible. Instead, a parolee is required simply to "discuss" such changes with the parole officer.[21]

Perhaps the most substantial change to the standard conditions of release made in the new regulations pertains to standard condition Rule No. 7, fraternization, a standard condition long criticized for unnecessarily criminalizing entire families and communities given the intense racial disparities in law enforcement policing, treatment and prosecution. The new Rule No. 7 eliminates the charge of fraternization (which forbid being in the presence of another individual known to the supervised person to have a criminal record), and simply forbids the supervised person from "acting in concert" with a person they know to be "engaged in illegal activity."[22]

The Parole Board made minor changes to other standard conditions as well. For instance, standard Rule No. 8 was modified to prohibit the commission of any new criminal offense punishable by a period of incarceration, as well as prohibit any non-criminal behavior which threatens the safety and health of the supervised persons or others. The vague and ambiguous term "well-being" present in the current language of Rule No. 8 is eliminated in the new rule. The current Rule No. 9 was revised as well. It previously permitted a supervised person to own a firearm with the written permission of the parole officer, prohibited a supervised person from owning any deadly weapon or any dangerous knife, dirk, razor, stiletto, or imitation pistol, and prohibited the supervised person from owning an "instrument readily capable of causing physical injury without a satisfactory explanation" for the ownership. The new Rule No. 9 prohibits the ownership of a firearm or deadly weapon, but permits the ownership of a dangerous knife or razor as long as the individual has the permission of his or her parole officer.

Another minor change was made to Rule No. 12 which currently provides that a supervised person has a duty to comply with written special conditions of the Parole Officer. The new Rule No. 12 eliminates this writing requirement, potentially allowing oral conditions to be imposed and incarceration to be imposed if the supervised person is found to have violated an oral condition. Finally, the Parole Board created a new Rule No. 13 which mandates compliance

[20] NYS DOCCS Revised Standard Conditions and Revocation Guidelines, 9 N.Y.C.C.R. §8003.2 (3); https://doccs.ny.gov/revised-standard-conditions-and-revocation-guidelines.

[21] *Id.*; 9 N.Y.C.C.R. 8003.2 (4).

[22] *Id.*; 9 N.Y.C.C.R. 8003.2 (7).

with special conditions like the old Rule No. 12, but now requires the supervised person to acknowledge that their special conditions are reasonably tailored to his or her "circumstances and aimed toward [their] rehabilitation," and that a violation of the conditions in an important respect may result in a revocation of their parole.

Notably, several rules were left substantially intact. Rule No. 3 which gives DOCCS and any individual parole officer authority to forbid travel outside New York State and any area they designate in writing is the same as the current rule. The new Rule No. 5 is the same as the current rule, and Rule No. 6 still requires a supervised person to notify his or her parole officer of any contact with law enforcement, not just an arrest by law enforcement. Rules No. 10 and No. 11 also remain substantially unchanged.

The new standard conditions are enforced by a new sanction system under 9 N.Y.C.C.R 8005.20, which provides for time assessment sanctions to be imposed for a violation in an important respect of any of the standard conditions of release. The minimum sanction is completion of an undefined "alternative program" in DOCCS custody lasting either 45 days or 90 days with time assessments of 4 to 6 months being imposed in the event that the supervised person fails to complete the program. Other sanctions include a 3 to 12 month time assessment for behavior that is equivalent to certain enumerated penal law offenses; 3 to 15 month time assessments for absconding; and time assessments of 12 months to the parolee's maximum pending sentence for behavior which involves use of deadly or dangerous weapons, infliction of physical injury, threats to DOCCS staff or police or peace officers, violation of an order of protection or special parole conditions prohibiting contact with an individual, any behavior unlawful under the penal law violent felony offense statute, and other behavior illegal under certain penal law provisions pertaining to offenses including homicide, sex offenses, prostitution.[23]

In addition, the new sanction system excludes some parole violators from the time assessments described above and permits the imposition of longer periods of reincarceration. Specifically, those on parole for sex offenses, kidnapping, coercion, prostitution, obscenity, a marital offense, hate crimes or terrorism are subject to sanctions of up to the remainder of their pending maximum sentence even for technical violations, as are those who have violated parole conditions more than twice.[24]

Recommendations

First, we recommend continued support for the recommendations made in the NYSBA Task Force on Parole System November 2019 Report, which would eliminate mandatory pre-adjudication detention for alleged technical parole violations, reduce incarceration for adjudicated technical violations by limiting sanction caps to no more than 30 days, allow for incarceration only when alternatives to incarceration have been exhausted, reinvest savings from incarceration to community based assessments and treatment, provide for earned time credits to incentivize compliance with conditions, and increase the number of Parole Commissioners.

[23] *Id.*; 9 N.Y.C.C.R 8005.20 (c)(1-4).

[24] *Id.*; 9 N.Y.C.C.R. 8005.20(d).

Implementing these recommendations would best ensure that violations of conditions that do not affect public safety would not result in unnecessary and destabilizing incarceration and would lessen the racial disparity that already exists for African-American men who are over represented in the parole population, and as such, are disproportionately subject to incarceration for technical violations of parole. Even if pre-adjudication detention for technical violations were eliminated, however, if there is an alleged and willful failure to appear in response to a notice of violation, the accused who has failed to appear on a parole violation summons still could be arrested and detained for not appearing and could be brought to a court within 24 hours for a recognizance hearing. A criminal court judge can then decide if release is appropriate pending adjudication on the parole violation. Accordingly, NYSBA's previous recommendations respect the law enforcement value of giving supervised people a list of conditions to which they must adhere while on supervision, but eliminate the risk of unnecessary incarceration for minor technical violations of parole and cap the amount of time to be served for technical violations so the violator can return to the community as soon as possible to continue the re-entry process.

Our second recommendation is that certain standard conditions of parole should be reconsidered and modified to provide broader rights and a presumption of approval to people on supervision to travel for work, and obtain safer, more supportive and improved living conditions. For instance, standard condition Rule No. 2, in broadly prohibiting all interstate travel without written permission of their parole officer, severely limits supervised people's ability to take advantage of good community stabilizers like employment and residential and educational opportunities in their regional area which go beyond New York State lines. There are many opportunities for employment, stable housing and good education in contiguous states like New Jersey, Connecticut, Pennsylvania, Vermont, New Hampshire and Massachusetts. In July 2019, DOCCS issued Directive 9240 to provide updated guidance regarding in-state and out-of-state travel for individuals on parole. The directive eased restrictions on in-state travel and provided that out of state travel generally should be authorized but only after a case conference with the individual on parole and the individual is required to obtain a written travel permit in advance.[25] DOCCS can improve upon this directive by streamlining the out-of-state written permission process and creating an explicit presumption of approval. Arbitrarily restricting persons on parole to New York State by requiring a detailed, written permission to work negatively impacts seeing family and friends or finding employment or housing and does not seem justified by any compelling public safety concerns. In addition, many of our communities that border other states have integrated with the neighboring states' community in ways that include basic jobs such as delivery services, truck driving or taxi services. Limiting movement between states in this manner by imposing an onerous approval process also limits employment opportunities and sets people up for violating this condition by forcing them to choose between gainful employment, living with loved ones or finding a safe and stable residence on the one hand, and compliance with technical parole conditions on the other. Even under Directive 9240, because it does not explicitly state that there is a presumption of approval for out-of-state travel, too often people on supervision are still arbitrarily denied travel requests for legitimate reentry goals of employment,

[25] *See* https://doccs.ny.gov/system/files/documents/2019/07/9240%20Request%20for%20Out%20of%20Area%20Travel%20by%20Parolees.pdf

support and housing. This, in turn, leaves the supervised person frustrated and feeling undermined by the lack of opportunity to pursue gainful employment, stable housing or be able to live with loved ones.

Our third recommendation addresses Rule No. 11, which ensures that persons on supervision are not engaging in illegal behavior by ingesting or purchasing illegal substances. The rule should be substantially modified to add language that recognizes the current understanding of substance disorder as a medical problem that requires therapeutic treatment rather than incarceration. Language should be added to require the parole officer to seek and exhaust any and all treatment options upon a finding of use or possession of any controlled substance, including evidence-based treatment options such as harm reduction and medication assisted treatment.

Our fourth recommendation involves minor changes that should be made to the rules permitting the issuance of violations for behavior that is considered verging on criminal but does not actually meet the adjudication elements for criminal prosecution. For instance, the language of Rule No. 8 should be changed to provide that the supervised person shall not violate any law to which they are subject and which provides for a penalty of imprisonment, and eliminate the vague and ambiguous language "nor will my behavior violate the health and safety of myself or others." The use of this clause to incarcerate supervised persons for non-criminal behavior is unfair and is a source of potential due process violations.

Also, minor changes to rule No. 9 should be made to include only those in possession of weapons or instruments that are proscribed by the Penal Law, and eliminate the generalized language strictly prohibiting possession of any "dangerous knife or razor" as these instruments can be possessed for legitimate purposes, such as X-Acto knives or box cutters used in various trades or employment. At the very least, the new rule should reinstate the previous condition's language that allowed a supervised person to offer a "satisfactory explanation" for ownership, purchase or possession of a dangerous knife or razor after the possession is discovered. Permitting a person on parole to provide a "satisfactory explanation" in this manner avoids a situation where someone who finds gainful employment in the construction trade, automobile repair or as a janitor or handyman is unable or fails to request prior permission from his or her parole officer to use certain types of instruments like box cutters or razors and receives a violation of parole and a lengthy detention. Changing the new rule to continue to allow the parolee to offer a "satisfactory explanation" for the possession of these items will allow those supervised persons who must use certain types of knives or box cutters for work or home repair an opportunity to explain any innocent possession.

Finally, our fifth recommendation would be to amend Rule No. 12, which requires a supervised person to fully comply with all instructions of his or her parole officer but is not limited to written instructions. Oral instructions, however, can be misunderstood or forgotten, particularly when provided to persons who may be suffering from mental health conditions or poor education. Any conditions that could result in a parole revocation proceeding if violated should be in writing and their purpose toward supervision should be stated.

II. Establish Statewide Minimum Standards and Training for Lawyers Providing Mandated Representation in Parole Proceedings

There Is a Right To Counsel in Certain Parole Proceedings

While incarcerated individuals do not have a right to be represented by counsel at their parole interviews before the Parole Board, they do have a right to counsel in connection with an administrative appeal of any decision of the Board's determination and, if they are unable to afford counsel, they have a right to have counsel assigned upon request.[26] Individuals released into parole supervision also have a right to be represented by counsel at a final hearing to determine if their parole should be revoked.[27]

Finally, an inmate who has received a parole release date which is rescinded has the right to be represented by counsel as well.[28]

New York Fails to Provide Appropriate Standards and Training for Attorneys Providing Mandated Representation in Parole Matters

A. *NYSBA Has Adopted General Standards for Indigent Defense*

On April 2, 2005, the House of Delegates adopted recommendations made by the then-Special Committee to Ensure Quality Mandated Representation for standards in mandated representation. Those standards apply to all forms of mandated representation, including representation of any person financially unable to obtain counsel who is entitled to representation under §259-i of the Executive Law.[29]

Subdivision E of the 2005 Standards discusses the qualifications of counsel and provides:

> E. Qualification of Counsel.
>
> E-1. Attorneys who provide mandated representation shall have sufficient qualifications and experience to enable them to render quality representation to a client in each particular case. Providers of mandated representation shall never allow an attorney to accept a case if that attorney lacks the experience or training to handle it competently, unless the attorney is associated with another attorney on the case who does possess the necessary experience or training.
>
> E-2. Institutional providers of mandated representation and assigned counsel plans shall have written minimum qualifications for attorneys who provide mandated representation, If mandated representation is to be provided in more than one category of cases, there shall be different minimum qualifications for each category

[26] Executive Law §259-i(4)(b).

[27] Executive Law §259-i(3)(f)(v).

[28] 9 N.Y.C.R.R. §8002.5(5)(a).

[29] 2005 Standards for Providing Mandated Representation at 3.

and, if appropriate, for different levels of cases within each category.[30]

The 2005 Standards also include a Subdivision F addressing training which provides:

F. Training.

F-1. All attorneys and staff who provide mandated representation shall be provided with continuing legal education and training sufficient to ensure that their skills and knowledge of the substantive and procedural law and ethical rules relevant to the area of law in which they are or will be practicing are sufficient to enable them to provide quality representation.

F-2. Continuing legal education and training programs shall be made available and affordable for attorneys and staff providing mandated representation, and public funds shall be provided to enable all attorneys and staff to attend such programs.

F-3. Attorneys who provide mandated representation shall allocate a significant portion or their annual mandatory continuing legal education credit requirement toward courses directly related to the subject matter of the mandated representation they provide.[31]

The NYSBA Standards for Providing Mandated Representation have been amended several times since 2005, but the provisions in subdivisions E and F addressing Qualification of Counsel and Training remained unchanged.

B. *The New York State Office of Indigent Legal Services Has Adopted Similar General Standards*

Pursuant to New York State Executive Law §832(3)(d), the New York State Office of Indigent Legal Services (ILS) is given the mandate to establish standards and criteria for the provision of indigent defense in cases involving conflicts of interest. On its website, ILS notes that:

> The standards and criteria hew closely to the established and widely admired New York State Bar Association Revised Standards for Providing Mandated Representation (revised 2010), which are indeed cross-referenced throughout; but they derive also from other state standards and nationally recognized criteria.

The ILS standards include provisions mandating that assigned counsel receive appropriate substantive, procedural, and practical training programs.

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[30] *Id.* at 9.

[31] *Id.* at 10.

C. *There Are No Statewide Standards and Very Little Available Training Specific to Parole Representation*

NYSBA, as noted above, has adopted minimum standards for the qualifications and training of assigned counsel but has not adopted standards specifically for parolee representation. The ILS standards have specific sections dealing with counsel in criminal cases and counsel for litigants in family law matters, but there are no standards specific to parole representation in the ILS standards either. Accordingly, there are no statewide guidelines or standards governing the provision of indigent legal representation in connection with parole proceedings despite the fact that assigned counsel in these proceedings is mandated by New York State law.

Nor is there sufficient training for assigned counsel in parole proceedings. On June 1, 2018, the Committee on Mandated Representation presented a public training program that included training on parole representation, and the Committee is scheduled to present another CLE program on representation in parole matters in June 2020. However, there have been few other training programs regarding representation in parole proceedings. For example, as established through a search of its upcoming CLE programs and a discussion with its Executive Director, it appears that the New York State Defenders' Association, which is one of the primary providers of CLE programs for criminal defense providers, does not offer any training programs designed for practitioners of mandated representation for parolees.

Recommendations

New York State Should Establish Regional Parole Resources and Training Centers

Given the unique nature of parole proceedings and their importance (because they can result in the reincarcertation or continued incarceration of the affected client), it is imperative that statewide standards specific to parole proceedings be developed and that adequate systematic training be provided. One way to accomplish this would be the creation and staffing of regional parole resource and training centers to provide much-needed legal resources and training to public defenders and assigned counsel focusing on parole proceedings, including release, revocation, and rescission hearings as well as appeals of those matters.

The regional training centers could be established and operated under the auspices of ILS. ILS does not provide legal assistance or lawyer referrals to individuals, but its mission includes assisting county governments and indigent legal service providers in the exercise of their responsibilities under County Law 18-b to provide effective assistance of counsel to those persons who are legally entitled to counsel but cannot afford to hire an attorney.[32]

There is precedent for the establishment of training centers like this. For example, ILS has recently developed expert immigration legal resource centers that assist the defender community in understanding the unique complexity of immigration consequences of criminal convictions. ILS's development of a network of regional parole resource and training centers accordingly fits squarely within its mission and legislative authority.

[32] *See* Mission, New York State Office of Indigent Legal Services, attached as Appendix D.

The establishment and operation of these regional centers will not only ensure that there are uniform standards and adequate training for lawyers providing mandated parole representation; they will also assist counsel in advocating for and identifying more productive, and less costly, alternatives to incarceration.

III. Supportive Housing is An Essential, But Missing Element of Reforming New York's Parole System

Safe and stable housing is a key foundation to successful reentry from prison. In New York State, Offender Rehabilitation Coordinators and parole officers employed by the New York State Department of Corrections and Community Supervision ("DOCCS") work with incarcerated people prior to release in order to find satisfactory housing options upon an individual's reentry into the community.

However, due to a statewide patchwork of laws governing formerly incarcerated individuals' access to public housing and social services, as well as varied levels of funding for those services, DOCCS is often forced to release people in prison either to homeless shelters rife with violence and drug use or to street homelessness. Either form of homelessness places them at risk of returning to incarceration both through technical violations of parole conditions and through conduct that leads to rearrest and reincarceration.

As of March 31, 2019, New York State prisons held 46,037 incarcerated people.[33] Across the state, many of the individuals recently released from state prison and local correctional facilities are homeless and wind up in local emergency shelters. As an example, during 2016 and 2017 alone, 50% of all people DOCCS released from state prison to NYC went into the NYC shelter system.[34]

DOCCS estimates that 80% of people incarcerated in state prisons are in need of alcohol or substance use treatment.[35] Nearly 21% percent of the almost 50,000 persons incarcerated in New York State's 54 correctional facilities in 2018 received mental health care.[36] The homelessness described above increases the risk of relapse into substance use disorder and episodes of mental health decompensation, and also decreases the likelihood of sustained engagement in behavioral health treatment.

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[33] New York State Office of Information Technology Services, "Inmates Under Custody: Beginning 2008," https://data.ny.gov/Public-Safety/Inmates-Under-Custody-Beginning-2008/55zc-sp6m. Accessed 2020-05-27.

[34] Mascali, Robert. "A way forward on homelessness: The population keeps growing, but it doesn't need to. Think outside the shelter." *New York Daily News*, 2019, www.nydailynews.com/opinion/ny-oped-a-way-forward-on-homelessness-20190324-7qrql3zd4jbhvjmdzftmbz4ysy-story.html. Accessed 2019-12-10.

[35] *See* Inmate Lookup, New York State Department of Corrections and Community Supervision, http://nysdoccslookup.doccs.ny.gov/. Accessed 2020-05-22 (the figure was obtained using a web "scraper" extension).

[36] Thompson, Christie and Taylor Elizabeth Eldridge. "No One to Talk You Down". *The Washington Post*, 2018, www.washingtonpost.com/news/national/wp/2018/11/21/feature/federal-prisons-were-told-to-improve-inmates-access-to-mental-health-care-theyve-failed-miserably/. Accessed 2019-12-10.

Addressing Homelessness Through Permanent Supportive Housing

Outside of the shelter system, there are two kinds of housing available for homeless people: permanent supportive housing ("PSH") and transitional housing.

PSH is one of the permanent housing pathways out of homelessness. It is limited to people with disabilities: individuals who face multiple barriers to housing stability such as substance use disorder, or chronic mental or physical illness among other factors. PSH provides low-cost (subsidized) housing along with case management and services such as counseling, substance use treatment, life skills training, and job readiness and retention, all with the goal of helping the individual/family maintain permanent housing. Just as the name indicates, people may reside in these units permanently (subject to lease requirements).

A limited supply of PSH is available for people with a range of special needs requiring such lifetime supports. Although laudable initiatives have been increasing the supply of PSH in the recognition that it is an effective – and cost-effective – way to stabilize some of the highest need homeless individuals, the supply does not begin to meet the demand.

Moreover, individuals on parole are almost totally excluded from PSH when eligibility requires being "chronically homeless" as defined by HUD. As a result of their federal funding, most PSH programs must prioritize those individuals who are defined as "chronically homeless." This definition, when calculating how long someone has been homeless, considers incarceration for longer than 90 days to be a break in the individual's period of homelessness, even if the individual was homeless at the time they were incarcerated. This federal requirement is being challenged by advocates to change the definition of chronically homeless so that the highest need people released from prison can access PSH. We agree with the advocates and urge a change in this definition.

The Need for Transitional Housing

In contrast to PSH, transitional housing, as defined by HUD, provides temporary housing and supportive services for up to 24 months. This is significantly longer than emergency housing/shelters which seek to limit stays to 30 to 45 days. Unlike PSH, transitional housing is not limited to people with disabilities.

For many homeless people on parole, transitional housing offers the support needed for stabilization after which they can return to their families or achieve independent housing via income earned through employment.

In New York State, there are successful models of transitional housing designed to meet the specific needs of homeless individuals with histories of incarceration. One such model is the Fortune Academy, located in West Harlem in a building called the Castle. The Castle provides both emergency and transitional housing leading to permanent housing in the community. Operated by the Fortune Society, the model includes close collaboration with a parole officer whose caseload is largely composed of those in the Academy. As a result of that collaboration

and the supportive services provided by the Fortune Society, technical parole violations are extremely rare.

At the request of New York State, the Fortune Society has been providing technical assistance to the Center for Community Alternatives (CCA) to replicate the Fortune model in Syracuse because there is also an urgent need in upstate New York for such housing. CCA has brought in the Syracuse Housing Authority as its partner. Their building, Freedom Commons, opened in the fall of 2019, provides emergency, transitional, and permanent supportive housing for formerly incarcerated homeless individuals as well as affordable housing for other members of the community.

There is an urgent need for additional specialized transitional housing designed to meet the needs of those trying to rebuild their lives after incarceration. However, it is challenging to replicate the models described above because funding for such housing has been shrinking. HUD funding for transitional housing programs has been scaled back significantly and is often now limited to certain specific populations such as homeless youth, veterans and victims of domestic violence.[37]

However, these funding restrictions do not take into account the needs of the many individuals who are homeless after incarceration. Particularly for people who have served long sentences, the adjustment to life outside can be extraordinarily difficult. Transitional housing is thus critical as many individuals returning from prison may need six months to a year of the kind of support provided by transitional housing before they are stable and housing ready.

All too often, however, people being released from state prison to homelessness are not eligible for the limited transitional housing that is available and find themselves perpetually at the lowest priority for PSH programs, thus languishing in emergency shelters, on the street, or cycling in and out of incarceration and homelessness.

Redefining Homelessness

HUD definitions are a barrier to progress for those leaving prison. As discussed above, people being released from state prison to homelessness find themselves perpetually at the lowest priority for housing. HUD's definition of homelessness excludes them, so they do not even have access to HUD-funded programs for homeless people until they have lived on the street or in a shelter for a period of time post-release. Moreover, because of their prison stay, they have not accrued the requisite shelter time or street homeless time to qualify for most permanent supportive housing programs.

[37] In 2013, HUD issued a brief explanation regarding its scale back of funding for transitional housing. See: Oliva, Ann Marie. "SNAPS Weekly Focus: What about Transitional Housing?". *HUD Exchange*, 2013, www.hudexchange.info/news/snaps-weekly-focus-what-about-transitional-housing/. Accessed 2019-12-10.

HUD defines "literally homeless" as individuals living in places not suitable for human habitation or those living in publicly/privately operated temporary housing (for example emergency shelters, transitional housing, etc.).[38]

According to the federal government, after a period of incarceration exceeding 90 days, people released directly from jail or prison to homelessness are not considered "literally homeless," and thus do not qualify for housing programs supported by HUD.[39]

The HUD definition of "chronically homeless" also excludes people returning from prison. HUD defines "chronically homeless" as a person with a "disabling condition" who has been continuously homeless for a year or more or who has had at least four episodes of homelessness in the past three years. While this definition includes people who have spent up to 90 days in jail, it excludes everyone who has served longer sentences in jail or prison.

In 2019, NYSBA adopted a Report of the Task Force on Incarceration Release Planning and Programs recommending that Congress "amend the definition of chronic homelessness in 42 USC § 11360(2) to state that people in jail and prison who have insufficient financial resources to pay for stable housing upon release are deemed to be 'chronically homeless.'"[40] The report concluded that:

> Unless and until Congress changes this definition of chronic homelessness, people being released from prison and jail will be at a disadvantage in accessing federally subsidized transitional, supportive, and permanent housing programs. It also means that programs that are committed to providing permanent and supportive housing

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[38] "Literally homeless" is defined as an "Individual or family who lacks a fixed, regular, and adequate nighttime residence, meaning:

> (i) Has a primary nighttime residence that is a public or private place not meant for human habitation;
>
> (ii) Is living in a publicly or privately operated shelter designated to provide temporary living arrangements (including congregate shelters, transitional housing, and hotels and motels paid for by charitable organizations or by federal, state and local government programs); or
>
> (iii) Is exiting an institution where (s)he has resided for 90 days or less and who resided in an emergency shelter or place not meant for human habitation immediately before entering that institution."

https://files.hudexchange.info/resources/documents/HomelessDefinition_RecordkeepingRequirementsandCriteria.pdf

[39] This is specific to individuals who are incarcerated for more than 90 days. There are other specific definitions of homeless for specific populations such as youth under 25 years old and survivors of domestic violence. *See* "Homeless Definition." *HUD Exchange*, files.hudexchange.info/resources/documents/HomelessDefinition_RecordkeepingRequirementsandCriteria.pdf. Accessed 2019-12-10.

[40] "The New York State Bar Association Report of the Task Force on Incarceration Release Planning and Programs 2019" at 60, http://www.nysba.org/irppreport/.

solutions to people being released from prison and jail may not be able to access this significant source of federal funding.[41]

Unfortunately, Congress has not yet amended the definition of chronic homelessness, and HUD remains *the* primary funder of homeless and housing programs nationwide. This creates the absurd situation whereby programs eager to offer quality housing services to people on parole must wait for them to first either live in the street or in a shelter to be certified as a homeless individual that meets the eligibility criteria required by HUD. At the same time as these barriers exist, HUD is cutting its funding for transitional housing so that the supply is diminishing rapidly, and little or no HUD funding for new transitional housing projects is available.

The non-HUD funding that is available tends to be the emergency shelter allowance which often permits only a very limited length of stay. Permitting only a short length of stay effectively prevents facilities from providing the supportive services that have been shown to be successful in stabilizing people on parole with multiple needs and allowing them to move successfully into the larger community.

In Syracuse, for example, there are typically two dozen or more people persistently cycling between prison or jail and shelter without any permanent solution because they fall outside the eligibility criteria for any housing program. Local Departments of Social Services often request that shelters limit lengths of stay to between 30 and 60 days; short stays are also encouraged by HUD. For example, when social service organizations apply for HUD funding for their region, shorter average lengths of stay in shelters are favored. However, the intensive programming and support that people exiting incarceration need to achieve stability and prevent recidivism require a stay that is longer than 30 days. The average length of stay at the Fortune Academy, for example, is approximately one year.

There is an urgent need for funding for emergency and transitional housing that meets the needs of formerly incarcerated individuals. Such housing will help individuals on parole meet their conditions of supervision and successfully transition to independent living in the community. Such housing has been proven to be a cost-effective and humane alternative to shelter placement or street homelessness, as well as an effective means of protecting community safety and averting unnecessary re-incarceration. Additional funding for PSH is also essential for formerly incarcerated individuals with multiple, ongoing needs.

Recommendations

1. ***Redefine homelessness*:** NYSBA reiterates its recommendation that Congress amend the definition of chronic homelessness in 42 USC §11360(2) to state that people in jail and prison who have insufficient financial resources to pay for stable housing upon release are deemed to be "chronically homeless."

[41] 2019 NYSBA Task Force on Incarceration Release Planning and Programs at 59.

2. ***Fund emergency and transitional housing for formerly incarcerated people*:** NYSBA recommends that the state create robust funding for emergency and transitional housing that addresses the special needs of homeless individuals who are formerly incarcerated.

New York State currently has an innovative way to fund services in PSH known as the Empire State Supportive Housing Initiative.[42] Rather than requiring applications to eight separate state agencies, it permits PSH programs to simultaneously draw on the resources of:

- Department of Health, including the AIDS Institute;
- New York State Homes and Community Renewal;
- Office of Alcoholism and Substance Abuse Services;
- Office of Children and Family Services;
- Office of Mental Health;
- Office for the Prevention of Domestic Violence;
- Office of Temporary and Disability Assistance ("OTDA"); and
- Office for People with Developmental Disabilities.

Recognizing that people in temporary transitional housing, like those in PSH, have complex needs best addressed by an individualized but holistic array of services, the State could utilize the same mechanism to create an Empire State Transitional Housing Initiative. Doing so would provide state budgetary savings by dramatically reducing parole violations and the costs of reincarceration.

Another approach, perhaps easier to administer, would be to combine resources from the eight agencies above, as well as DOCCS, to allow OTDA to support transitional housing services for people who are formerly incarcerated.

IV. Eliminate the Need to Seek an Administrative Appeal Before Filing an Article 78 Petition

Introduction

In 2017, the New York State Board of Parole conducted 12,242 parole interviews and granted release in 33% of those cases.[43] That translates to over 8,000 potential appeals with respect to the interviews where release into parole was denied.

The extant parole statutory and regulatory scheme provides that if parole is denied, the parole applicant must have a new parole appearance scheduled within 24 months,[44] and, in the meantime, has the right to appeal the denial of parole.[45]

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[42] "Empire State Supportive Housing Initiative (ESSHI)". *New York State Office of Mental Health*, omh.ny.gov/omhweb/rfp/2019/esshi-housing/. Accessed 2019-12-10.

[43] https://on.ny.gov/2oFVxsq.

[44] Exec. Law 259-i(2)(a).

[45] 9 NYCRR 8006 et seq.

Before an unsuccessful parole applicant can file an appeal in a court of law, the applicant must first exhaust potential administrative remedies.[46] In the case of parole, that means filing an administrative appeal with the very same Parole Board that denied parole.

The first required step in the administrative appeal process is filing a notice of intent to appeal with the Parole Board. A notice of appeal must be filed with the Board of Parole's Appeals Unit within thirty calendar days of the appellant's receipt of the decision denying parole.[47] Once the notice of appeal is received and acknowledged, the appellant must perfect the appeal by filing with the Appeals Unit an original and two copies of their brief within 120 calendar days.[48]

The appellant is entitled to a copy of the transcript of their parole interview prior to filing their administrative appeal brief.[49] Often, it takes as long as eight to ten weeks for the appellant to receive their copy of the transcript which substantially delays their ability to draft their brief. Further, the appellant is also entitled to a copy of the parole case record that was relied on by the Parole Board when it rendered its decision denying parole.[50] It is also often the case that it takes many weeks for the appellant to receive the full parole case record and that, too, limits the appellant's ability to quickly perfect their administrative appeal. Furthermore, the appellant must take great care to address all potential legal issues in their administrative appeal, as any issue not raised in the administrative appeal risks being dismissed as waived or unpreserved should the appellant subsequently seek review in court.[51] For all the above-mentioned reasons, appellants frequently need to request an extension of the 120 calendar days in which to perfect their appeal.[52]

After the administrative appeal is perfected, the Board of Parole's Appeals Unit undertakes review and provides a "Statement of Appeals Unit Findings and Recommendations" to three Board members who must affirm, modify, or reverse the denial of parole.[53] Notably, many of the Board members are not lawyers and yet are issuing the ultimate decision on a legal matter, as administrative appeals rely on statutory, regulatory and case law analysis.

There is no stated deadline for the Parole Board to render its administrative appeal decision. See 9 NYCRR 8006.4(b) (stating that appeals will be considered by three Board members "as soon as practicable"). If, as if often the case, the final decision is not made within

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[46] CPLR 7801(1); *People ex rel Gray v. New York State Board of Parole*, 174 A.D.2d 874 (Third Dep't. 1991).

[47] 9 NYCRR 8006.1(b)

[48] 9 NYCRR 8006.2(a)

[49] 9 NYCRR 8006.1(e)

[50] 9 NYCRR 8000.5(c)(iii)

[51] See, e.g., Matter of Rodriguez v. Coughlin, 219 A.D.2d 876 (Fourth Dep't. 1995) ("this Court has no discretionary power to reach" a due process claim not raised on administrative appeal).

[52] Requests for an extension of time to perfect an administrative appeal are authorized pursuant to 9 NYCRR 8006.2(a)

[53] 9 NYCRR 8006.4(b),(e)

four months after receipt of the perfected appeal, the appeal decision is "deemed adverse," the administrative remedy is considered "exhausted," and an applicant can then challenge the denial of parole in New York State Supreme Court via New York Civil Practice Law and Rules Article 78.[54]

The sole extant remedy for a successful Article 78 petition is a new, or "de novo," parole interview. Given that a denial of parole requires setting a date for another parole interview within 24 months, it is often the case that the parole applicant has had his or her next parole interview before the Article 78 petition has been decided. In most of those cases, judges presiding over the Article 78 proceeding dismiss the action as moot because the parole applicant has already received the only available remedy – a de novo parole interview.[55] As a result, myriad potential valid legal issues remain unadjudicated in a court of law and the Parole Board's determinations are effectively shielded from outside review.

Accordingly, the requirement that all parole applicants must exhaust their administrative remedies before filing an Article 78 petition is often an exercise in required futility given that administrative appeals are denied more than 90% of the time, and in most cases the parole applicant's ultimate goal is to be heard in court by a judge via an Article 78 petition.[56] An exception to the exhaustion requirement exists where it is demonstrated that "further pursuit of an administrative appeal would have been futile," but courts to date have summarily rejected this argument in the context of administrative appeals of parole denials.[57]

Recommendations

A solution to this problem would be to remove the requirement of exhausting administrative appeals and permit individuals denied parole to appeal directly to the New York State Supreme Court through an Article 78 proceeding without any further consideration by the Parole Board. This would be similar to the current appellate practice used by the Office of Temporary and Disability Assistance, which oversees applications for benefits such as public assistance, medical assistance, and supplemental nutrition assistance. If someone is denied benefits, they can request a fair hearing before an administrative law judge ("ALJ"). If they are

[54] 9 NYCRR 8006.4(c).

[55] *See, e.g., Gourdine v. New York State Bd. of Parole*, 150 A.D.3d 1491, 1492 (3d Dep't. 2017) ("Petitioner's reappearance before respondent in May 2015, at which his request for parole was denied, rendered moot his challenge to respondent's denial of his prior request for parole in May 2013).

The mootness problem has been exacerbated as of late. In years past, it was common for the Parole Board to schedule a person's next parole interview for twenty-four months in the future. Recently, the Board has increasingly been scheduling the next interview for somewhere between twelve to eighteen months. While the parole applicant benefits from a shorter date for their next parole interview, the quicker turnaround time makes it even more likely that any pending Article 78 proceeding will not be decided before their next parole appearance.

[56] There is also something inherently troubling about requiring a parole applicant to appeal to the very same Parole Board that denied parole, especially given that for the past several years there have been, at most, only sixteen members of the Parole Board such that Board members are regularly reviewing each other. It is not a surprise in that context that administrative appeals are rarely granted.

[57] *Toro v. Evans*, 95 A.D.3d 1573 (3rd Dep't 2012); *People ex rel. Martinez v. Beaver*, 8 A.D.3d 1095 (4th Dep't 2004).

denied benefits by the ALJ, it appears that they can directly file an Article 78 petition without having to file any kind of administrative appeal.

Therefore, we recommend a straightforward legislative solution to provide that decisions to deny parole are deemed "final" for purposes of §7801 and, accordingly, can be appealed via an Article 78 proceeding without any further review by the Parole Board. The following proposed language would accomplish this recommended change:

> AN ACT to amend the executive law in relation to appeals from parole board decisions denying release to parole supervision
>
> **The People of the State of New York, represented in Senate and Assembly, do enact as follows:**
>
> Section 1. Paragraph (a) of subdivision 4 of section 259-i of the Executive Law[58] is amended to read as follows:
>
> (a) Except for determinations made pursuant to paragraph (a) of subdivision two of this section denying release to parole supervision, which determinations shall be deemed final for purposes of section 7801 of the civil practice law and rules, and determinations made upon preliminary hearings upon allegations of violation of presumptive release, parole, conditional release or post-release supervision, all determinations made pursuant to this section may be appealed in accordance with rules promulgated by the board. Any board member who participated in the decision from which the appeal is taken may not participate in the resolution of that appeal. The rules of the board may specify a time within which any appeal shall be taken and resolved.
> §2. This act shall take effect immediately.

* * *

The work of the Task Force is ongoing and the Task Force intends to submit further reports with additional recommendations for reform as we continue our review and analysis.

[58] Exec. Law §259-i(4)(a) sets forth the parole appeals process and provides that, inter alia, rules of the Parole Board may specify timelines for appeals.

APPENDIX A

The following individuals serve on the Task Force on the Parole System:

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April 16, 2020

The Honorable Andrew M. Cuomo
Governor of the State of New York
New York State Capitol Building
Albany, New York 12224

Dear Governor Cuomo:

On behalf of the New York State Bar Association's Task Force on Parole System (the "Task Force"), we commend your administration's swift and decisive action in response to the COVID-19 pandemic, including your March 27, 2020 order directing the release of more than 1,100 individuals across the state who are incarcerated for low-level technical parole violations (the "Order"). Measures like your Order will save the lives of countless New Yorkers.

We urge your administration to take several additional parole-related actions that will further alleviate the deadly impact of this unprecedented health crisis. As you are aware, the very nature of the layout of jails and prisons does not allow for social distancing among the people incarcerated, corrections officers and other prison employees, with areas of those facilities frequently suffering from overcrowding and with large numbers of people together in one location – all of which dramatically increases the risk of exposure to the novel coronavirus. Jails and prisons are incubators for contagious disease as a result of close quarters, unsanitary conditions, limited healthcare resources, and lack of access to handwashing and hand sanitizer. Any reduction in the populations held at New York State jails and prisons will reduce the risk of, and improve the ability to contain, an outbreak in the jails and prisons and any reduction in the incarcerated population will also reduce the risk of infection for corrections staff, their families and the members of their communities with whom they interact when they leave work. Accordingly, the Task Force urges that your administration implement the following measures as soon as possible:

First, we ask that the Order be enforced to the fullest extent possible. It is our understanding that many individuals remain incarcerated in local jails for technical parole violations, notwithstanding your Order. Indeed, we are aware of many individuals in New York City and Westchester County who remain incarcerated on technical parole violations since March 27.

Second, we ask that you extend the Order to New York State prisons. Nearly 5,200 people are incarcerated in New York State prisons solely for technical parole violations and thousands of correction officers oversee these individuals. Whether individuals held for technical parole violations are housed in a prison or county jail should not matter; they should be immediately released to slow the spread of the COVID-19 pandemic.

Third, consistent with the Order, we ask that you promulgate orders immediately suspending the issuance of further warrants that require incarceration solely for technical parole violations. If individuals currently incarcerated for technical parole violations have been released, it does not make sense to fill their recently-vacated jail cells with new individuals who have committed similar technical violations.

Fourth, we ask that you conduct an expedited review and consider immediately releasing the following categories of incarcerated persons unless the parole case record demonstrates there is a current and unreasonable risk the person will violate the law if released and such risk cannot be mitigated by parole supervision:

- Individuals who have been granted parole but remain incarcerated awaiting a release date;
- Individuals who have less than one year remaining before their scheduled release date;
- Individuals serving a sentence of less than one year in a local jail who have served at least 60 days of their sentence;
- Individuals over the age of 50; and
- Individuals who have significant underlying health conditions that exacerbate the risks of COVID-19, including lung disease, moderate to severe asthma, heart conditions, diabetes, cancer or a weakened immune system.

These individuals comprise a subset of the incarcerated population that is simultaneously at low risk for recidivism and at high risk for developing serious complications from the novel coronavirus. We recognize that there will be work involved with release planning for each of these individuals, but this unprecedented health crisis requires immediate action.

The Task Force believes that the criminal justice system's overarching priority in these uncertain times is to safeguard the health of all those who must interact within the criminal justice system and those people incarcerated in the jails and prisons within our state. We believe that the recommendations above are commonsense measures that advance this goal.

We appreciate your attention to this matter and are available to discuss further at your convenience.

Sincerely,

Seymour W. James, Jr. Esq., Co-Chair

William T. Russell, Jr., Esq., Co-Chair

APPENDIX C

Current Rule-Existing Standard Conditions	New Rule- Standard Conditions Eff. 12/8/20
Current Rule #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**.**	**New Rule #1**- I will proceed directly to the area to which I have been released and, within 24 hours or by the next available business day after my release, make my arrival report to the Community Supervision Office indicated below. I will make office and or other reports thereafter as directed by my Parole Officer.
Current Rule #2- A releasee will make office and/or written reports as directed.	**Eliminated and Incorporated into New Rule #1 and New Rule #3 is added:** I will not abscond, which means intentionally avoiding supervision by failing to maintain contact with my Parole Officer and failing to reside at my approved residence.
Current Rule #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.	**New Rule #2**- I will not leave the State of New York or any other state to which I am released or transferred, or any area defined in writing by my Parole Officer without permission.
Current Rule #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.	**New Rule #4**- I will permit my Parole Officer to visit me at my residence, will permit the search and inspection of my persons, residence and property, and will discuss any proposed changes in my residence, employment or program status with my Parole Officer.
Current Rule #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.	**New Rule #5**-I will promptly, fully and truthfully to any inquiry of, or communication by, my Parole Officer or other representative of DOCCS.

Current Rule #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.	**New Rule #6-** I will notify my Parole Officer any time I am in contact with, or arrested by, law enforcement, I understand , like every member of the public, I have a right to seek the assistance of law enforcement at any time.
Current Rule #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.	**New Rule #7-** I will not act in concert with a person I know to be engaged in illegal activity.
Current Rule #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.	**New Rule #8-** I will not behave in such a manner as to violate the provisions of any law to which I am subject which provides for a penalty of imprisonment, nor will my behavior threaten the health and safety of myself or others.
Current Rule #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.	**New Rule #9-** I will not own, possess, or purchase a shotgun, rifle or firearm of any type including any imitation firearm. I will not own, possess or purchase any deadly weapon or use any dangerous instrument, as those terms are defined under Article 10 of the Penal Law. Further, I will not possess a dangerous knife or razor without the permission of my Parole Officer.
Current Rule # 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	**New Rule #10-** In the event that I leave the jurisdiction of the State of New York, I hereby waive my right to contest 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 I am discharged from community supervision. I fully understand that I have the right under the Constitution of the United States and under law to

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.	contest an effort to extradite me from another state and return me to New York, and I freely and knowingly waive this right as a condition of my community supervision.
Current Rule #11- A releasee will not use or possess any drug paraphernalia or use or possess any controlled substance without proper medical authorization.	**New Rule #11**- I will not use or possess any drug paraphernalia or use or possess any controlled substance without proper medical authorization.
Current Rule #12- 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.	**New Rule #12**- I will fully comply with the instructions of my Parole Officer.
	New Rule #13- I will fully comply with those special conditions set by my Parole Officer, a Member of the Board of Parole or an authorized representative of the Board or the Department of Corrections and Community Supervision. I understand that special conditions are additional conditions, set on an individualized basis, meant to be reasonably tailored to my circumstances and aimed toward my rehabilitation. I will fully comply with the following special conditions: The copy of the standard conditions shall also include the following clause: I fully understand that a violation of any condition of release in an important respect may result in the revocation of my period of Community Supervision. I hereby certify that I understand and have received my Certificate of Release to Community Supervision.

Mission

The purpose of the Office of Indigent Legal Services ("Office") is “to monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law.” Executive Law Article 30, Section 832(1). The Office does not provide legal assistance or lawyer referrals to individuals. Rather, it operates pursuant to policies established by the Board to assist county governments and indigent legal services providers in the exercise of their responsibility under County Law Article 18-B to provide the effective assistance of counsel to those persons who are legally entitled to counsel, but cannot afford to hire an attorney.

The Office and nine-member Indigent Legal Services Board ("Board") were created by Part E of Chapter 56 of the NY Laws of 2010, signed on June 22, 2010. This Chapter added Executive Law Article 30, Sections 832 and 833, and amended State Finance Law 98-b and County Law 18-B. The creation of the Office and Board was at least in part a response to the 2006 report issued by the Commission on the Future of Indigent Defense Services, created by then-Chief Judge Judith Kaye, which found glaring deficiencies in the quality of indigent legal services offered by counties. These deficiencies included excessive caseloads, inability to hire full-time defenders, lack of adequate support services, lack of adequate training, minimal client contact and, in some courts, outright denial of the constitutional right to counsel.

The Office and Board were also given responsibility for the distribution of State funds appropriated to the counties from the State’s Indigent Legal Services Fund (ILSF). The State established this dedicated Fund in 2003 to assist localities in meeting the duty to provide legal representation to persons unable to afford counsel. Using the discretion provided in the 2010 legislation, the Office and Board can establish criteria for distributing these funds to ensure that localities use the money to improve the quality of indigent legal services.

This new funding approach replaced the statutory ILSF distribution formula that included a “maintenance of effort” (MOE) requirement, whereby counties that failed to meet or exceed their level of expenditure on indigent legal services for the prior year were disqualified from obtaining any state funding. In adopting its Resolution in 2010 supporting legislation creating the Office and the Board, the New York State Association of Counties (NYSAC) specifically cited the elimination of the MOE as a significant reason for its support.

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COMMITTEE ON MANDATED REPRESENTATION

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To: **NYSBA Executive Committee**
From: **Robert S. Dean, Chair, Committee on Mandated Representation**
Date: **June 9, 2020**
Re: **Task Force on the Parole System Report**

The Committee on Mandated Representation supports the recommendations of the Task Force on the Parole System's May 27, 2020 Report. We emphasize the following:

Currently, there is a void in organizations or programs that provide continuous, consistent, and reliable parole training. Such training is plentiful throughout other areas of mandated representation (criminal and family law), yet remains sparse in the area of parole. Only well-established 18-B organizations that provide in-house training to their members currently provide such training (i.e., the Bar Association of Erie County), leaving a plethora of 18-B attorneys without readily available resources to be able to tackle the nuances of parole. Consistent with enhancing quality mandated representation, adequate systematic training of attorneys representing releasees must be provided.

This committee previously has supported and has developed standards for representation in mandated criminal and family law matters and looks forward to establishing similar standards in parole matters. Those standards will serve as an additional guide to training programs.

Currently, Executive Law 259-i provides safeguards for an inmate; it provides a statutory right to counsel for administrative parole appeals. It is imperative the right to counsel continue if the appeal process changes. If denials of release to parole supervision require direct review by a supreme court judge via an Article 78 proceeding in lieu of the administrative parole appeal process, then the inmate must be provided counsel at that Article 78 proceeding. Trained, experienced, and learned counsel can identify and argue law within the given statutory time frame that inmates simply cannot. Eliminating the right to counsel in a proceeding designed to permit review of a parole decision is an invitation to disaster. Pro se litigation for review of parole decisions which involve liberty interests goes against the very core and principles of the right to counsel and due process. Furthermore, we encourage the right to assigned counsel during the Article 78 appeal process of all administrative denials of parole (including matters involving parole revocation and parole rescission) rather than limiting that right to matters involving only the denial of release to parole supervision.

Very truly yours,

Robert Dean

Robert S. Dean
Chair, Committee on Mandated Representation

NORMAN P. EFFMAN
EXECUTIVE DIRECTOR

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WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC.

June 11, 2020

Kathleen Mulligan Baxter
General Counsel
NYSBA
1 Elk Street
Albany, New York 12207

Re: Agenda Item #13, Friday, June 26, 2020
Report and Recommendations of Task Force on Parole System

Dear Kathy:

I have discussed a request for a "friendly amendment" to the report with Co-chairs James and Russell who have both indicated that they would have no objection to the amendment.

PROPOSED AMENDMENT

I would move in place of the second paragraph on page twelve (under IIC) that the following paragraph be substituted and would read as follows:

> There is no consistent, ongoing training for assigned counsel in parole proceedings statewide. The small number of attorneys providing such representation in many areas and the dearth of state funding and standards and training support in counties with no, or minimal assigned counsel programs contributes to this problem. Only occasional training on parole representation has been available. On June 1, 2018, the Committee on Mandated Representation presented a public training program that included training on parole representation, and the Committee was scheduled to present another CLE program on representation on parole matters in June of 2020. As noted in discussion with the

Executive Director of the New York State Defenders Association (NYSDA), one of the primary providers of CLE programs for criminal defense providers, NYSDA has presented parole representation training in the past and is willing and able to do so in the future. But without specific, statewide requirements for training of all lawyers providing parole representation, CLE providers like NYSDA cannot reach a substantial portion of those lawyers.

Very truly yours,

NORMAN P. EFFMAN

NPE/su

xc: Seymour W. James, Jr.
William T. Russell, Jr.

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WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC.

June 16, 2020

Kathleen Mulligan Baxter
General Counsel
NYSBA
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Albany, New York 12207

Re: Agenda Item #13, Friday, June 26, 2020
Report and Recommendations of Task Force on Parole System

Dear Kathy:

By letter dated June 11, 2020, I advised you of the proposed "friendly amendment" that I intend to introduce regarding the above report at the Executive Committee meeting. Over the past two weeks, I have discussed with the Task Force co-chairs, as well as other members of the Task Force, an additional amendment which I again believe will be viewed as a "friendly amendment". The amendment would appear on what I believe is page 21 of the report, immediately following the proposed legislation and prior to the sentence indicating that the work of the Task Force is ongoing.

PROPOSED AMENDMENT

The following language will be added in a paragraph following the proposed legislation as follows:

> "In addition, as noted above, §259-I of the Executive Law provides for a right to have counsel assigned in connection with an administrative appeal from the denial, revocation, or rescission of parole release. Accordingly, in the event that the Legislature adopts this proposed amendment to the Executive Law eliminating administrative appeals, we urge the Legislature

to provide for a right to assigned counsel in connection with any Article 78 proceeding challenging the denial, revocation, or rescission of parole release."

Very truly yours,

Norman P. Effman
Executive Director

NPE/su

xc: Seymour W. James, Jr.
William T. Russell, Jr.