Pro Se

Special Edition 2006 Published by Prisoners' Legal Services of New York

Dismantling Parole: A Special Edition of "Pro Se"

It is no secret to New York prison inmates that the likelihood of parole has declined dramatically during the twelve years of the Pataki administration, particularly for violent felons. In 1991-92, the chances that a violent felon, not including an A-I felon, would be released by any given parole board were 51%. By 2005, that figure had fallen to 16%. Thus, whereas in the pre-Pataki years, good behavior, a willing performance of program requirements, and a demonstrable desire to avoid further criminality virtually guaranteed parole release at or reasonably close to a minimum term, such achievements today will almost surely result in frustration. Inmates generally, and violent felons in particular, are routinely "hit" and hit again by the Board, regardless of their prison accomplishments, based solely on the one thing they can never change: the "seriousness of the underlying offense."

The courts, with few exceptions, have been unsympathetic. The Appellate Divisions routinely affirm the decisions of the Parole Board, even those that deny parole to the most deserving candidates. They hold that the Board has wide discretion so long as a review of the record shows that it has given some consideration to the factors listed in Executive Law § 259-i. Even where the factors are in the inmate's favor, so long as the Board has at least considered them, its decision must be sustained unless it shows "irrationality bordering on impropriety."

Pro Se has received many letters from inmates asking us to write more about parole in the Pataki years. While we write regularly about relevant parole cases when they come up, we have not, to date, published a feature story

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This project is supported in part by grants from the New York State Division of Criminal Justice Services, the New York State Bar Foundation, and the Tompkins County Bar Association. Points of view in this document are those of the author and do not represent the official position or policies of the grantors.

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about the decline of parole in New York. January 31, 2006 The New York Law Journal beat us to the punch, publishing a lengthy review of the legal and human consequences of the Pataki administration's parole policies. We reprint that article in this special edition of ***Pro Se***, with permission from The New York Law Journal (c) 2006 ALM Properties, Inc. (All rights reserved.)

"*DISMANTLING PAROLE*"

by John Caher

Thousands of New York prison inmates sentenced at a time when parole release was a realistic prospect are now lingering behind bars as the Pataki Administration has dramatically restricted parole for violent felons, arguably going beyond anything authorized by the Legislature, a probe by the New York Law Journal reveals.

Through an administrative process subject to scant judicial review, Governor Pataki's appointees to the New York State Board of Parole have used their broad discretion to implement a gubernatorial policy to keep violent felons behind bars as long as possible, notwithstanding the recommendations of sentencing judges guided by a different and more lenient legal, political and legislative framework.

Parole release rates have declined radically since Mr. Pataki, a Republican elected initially on a tough-on-crime platform, became governor in 1995 and as the board members appointed by his predecessor, Democrat Mario M. Cuomo, have all been replaced.

The results are telling: In fiscal year 1992-93, the state released 23 percent of prisoners eligible for parole who had committed so-called A-1 felonies--murder, attempted murder, kidnapping, and arson. By 2004-2005, that had plummeted to 3 percent, just nine prisoners. At the same time, the release rate for other violent criminals who appeared for interviews before the parole board plummeted to 18 percent, or 337 inmates, from 51 percent.

Who Gets Parole

In a 2003 ruling, Acting Supreme Court Justice Edward A. Sheridan of Albany observed that since taking office, the governor has annually called for the elimination of parole. The judge, citing the sharp drop in parole releases since Mr. Pataki took office, found an "undeniable inference that the Board has 'gotten the message' and is implementing executive policy."

Critics of the administration's parole practices say inmates convicted under prior regimes--especially inmates who plea bargained and had reason to expect that they would be freed after serving the lower end of an indeterminate sentence – are getting a raw deal.

"It's fine, a legitimate political decision to do things prospectively," said Alfred A. O'Connor, an attorney with the New York State Defenders Association in Albany. "It's quite a different matter when you are victimizing people who are in [prison] under a completely different set of circumstances, a set of assumptions about what would happen."

The story of Brian E. Jacques, who plea-bargained for a term of 15 years to life, is typical. When Mr. Jacques pleaded guilty to an Albany County murder in 1983, he expected to be released after 15, maybe 17, years. At the time, that was a reasonable expectation. But Mr. Jacques had the misfortune of coming up for parole when

government attitudes about early release had changed.

Despite a good prison record and no prior history of violent behavior, Mr. Jacques has been denied parole four times since Mr. Pataki took office and has now spent 23 years behind bars. Mr. Jacques' fate is in the hands of the parole board. He could be released after his next parole hearing in August, or never, and the fact that the sentencing judge gave him the minimum is of no consequence.

"I wholeheartedly believe they are following Governor Pataki's agenda not to release violent felons," Mr. Jacques told the Law Journal. "I believe his message to the parole board is, "Do not let these people out,' and they are following that standard."

Several parole board members either declined to be interviewed or did not return repeated telephone calls. Scott E. Steinhardt, spokesman for the Division of Parole, said in a statement that each of the board's decisions "reflect a careful and independent level of consideration."

By law, parole is a possibility, not a guarantee or reward for good behavior, and an inmate has no legal expectation of securing parole release. See article, page 7. Moreover, the parole board has broad discretion in making its decisions. While the board is required to take into consideration a number of factors--such as the seriousness of the crime and the inmate's rehabilitative effort--it can place any weight on those factors and need not explain itself. Current commissioners often give more weight to the seriousness of inmates' crimes than to claims of rehabilitation.

Chauncey G. Parker, the governor's Director of Criminal Justice and Commissioner of the Division of Criminal Justice Services, which encompasses the Division of Parole, does not deny that the parole board shares the governor's philosophy and, to the extent permitted by law, follows his agenda. He said it is axiomatic that a panel appointed by a long-term governor would reflect the philosophy of the executive. But he sidestepped questions on whether it is fair to impose today's attitudes on inmates sentenced during another era.

"The governor's focus as a matter of public safety is to make sure…that people convicted of violent crimes serve the longest possible sentences," Mr. Parker said. "It is clear that the governor thinks as a matter of public policy and public safety that a more effective way to do this would be to have a determinate sentencing structure and have the judges make the decision, except for murder where it would be life without parole or something like that."

Mr. Steinhardt, the Parole Division spokesman, stressed that in the past decade, new crimes by parolees have decreased and the number of parolees returned on new felony convictions has dropped 48 percent.

Although exact numbers were not available, a large portion of New York's 63,000 inmates were sentenced to indeterminate, parole-eligible terms, the 2004 New York State Statistical Yearbook suggests. Mr. O'Connor said those convicts should be judged for parole purposes under the rules and protocols in effect when they were sentenced.

"It is one thing to have a determinate sentencing system. It is another to be retroactively imposing that," Mr. O'Connor said. "Now, there is no difference between a 15-year-to-life sentence and a 25-year-to life sentence."

Since taking office, Mr. Pataki has sought to redesign New York's sentencing structure to more closely mirror the federal system. The federal government abolished parole in 1984, substituting for the parole system one in which inmates serve a determinate sentence followed by a period of supervised release. Mr. Pataki would follow the federal government's lead.

"What the governor is proposing is a clear, transparent sentencing structure investing the discretion in the court and not in the parole board," Mr. Parker said. "Under current law, what the judge says is a factor, but ultimate discretion is vested in the parole board. If the governor's proposal went through, the judge's sentence would be the sentence."

But the Legislature has gone only half way, eliminating parole for some offenses, maintaining it

in others--and leaving the thousands of inmates convicted under older laws at the mercy of the current parole board.

The Sentencing Reform Act of 1995 abolished parole for second felony offenders and Jenna's Law in 1998 abolished parole for all violent offenders and added a post-release supervision component. As it now stands, only non-violent, non-drug offenders receive an indeterminate sentence. All other felons are sentenced, prospectively, to a determinate term.

As the result of changes in the law, the number of violent inmates eligible for parole has plummeted to 2,414 from 7,623 since 1992-93, a decline of 68.3 percent. But the number of eligible violent felons released each year has declined more rapidly--by 88.4 percent. Overall, the state released only 38 percent of the violent and nonviolent inmates before it last year, down from 62 percent in 1992-93.

"The parole board is acting as a second sentencing court, imposing its own sentence in place of the sentence imposed by the judge," said Robert N. Isseks, a criminal defense attorney in Middletown. "That is particularly clear in those cases where the judge imposed a sentence less than the maximum [such as 15-years-to-life rather than 25-to-life]. Then, the parole board steps in and imposes a sentence that is twice as much."

Mr. Isseks recently filed a federal class action in the Southern District accusing the Pataki Administration of side-stepping the parole law in order to advance its agenda. Nine named plaintiffs who were sentenced to less-than-the-maximum for second-degree murder, but have been repeatedly denied parole, allege that the parole boards relied on the seriousness of their offense while paying little attention to other statutory criteria.

A convict serving, say 5 to 15 years, has to be released eventually. But one serving a sentence where the upper limit is life is guaranteed only a parole hearing every other year after serving the minimum. Almost 20 percent of the people in New York prisons are serving a term where the top end is life — the highest percentage in the nation and nearly twice the national average.

Gerald T. Balone has served more than 30 years on a 25-years-to-life sentence for three murders. During his three decades in prison, Mr. Balone has completed rehabilitation and vocational programs. He says he does not know what more he can do to obtain the parole release he believes was presumed by his legislatively defined sentence.

"I am at a loss," Mr. Balone said. "I don't know what to do."

Alfred Mancuso, a 72-year-old career felon, received a 25-years-to-life sentence for murder in 1978. He has been denied parole eight times – every two years for the last 16 years – even though he claims to have a spotless prison record and continues to maintain his innocence.

"The bottom line is, they are afraid of Governor Pataki," contended Mr. Mancuso, a prisoner at the Collins Correctional Facility near Buffalo. "Every time they grant someone parole, [Mr. Pataki] comes out against it in the newspaper. I honestly believe they are hitting me because they are afraid of the repercussions."

Mr. Mancuso and other prisoners and advocates point repeatedly to the case of Kathy Boudin, a 1960s radical involved in the infamous 1982 Brinks armored truck heist. Three people were killed, and Ms. Boudin was convicted of felony murder.

After serving 22 years of a 20-years-to-life term, Ms. Boudin, who had numerous individuals and organizations lobbying for her release, was paroled in 2003. Mr. Pataki promptly denounced the decision and, within months, replaced longtime Parole Board Chairman Brion Travis. There have been no controversial parole releases since then.

"The lack of any established criteria and the unlimited discretion of the parole board begs for problems," said advocate Amy James-Oliveras of Wappinger's Falls, whose husband, George Oliveras, served 27 years of a 25-years-to-life term before he was paroled on a murder conviction. Ms. James-Oliveras is active in the Coalition for Parole Restoration, an organization comprised largely of wives of parole-eligible prisoners whose release has been blocked by the parole board.

"There is no accountability, and no real avenue of judicial review," she said.

Some trial judges have overturned or challenged parole board determinations on the grounds that the appointed panel is following executive policy rather than the law. The Appellate Divisions have consistently rejected those arguments, however, and even if a prisoner convinces a court to order a new hearing, his efforts may be for naught. By the time an inmate is denied parole, files and loses an administrative appeal, files and loses an Article 78 petition and appeals to an appellate panel, the whole court issue is frequently moot, since the courts can do nothing other than order a new parole hearing, and the inmate gets a hearing automatically every two years in any event.

Mr. Oliveras, for instance, was convicted of murder and robbery in the Bronx in 1975. His 25-years-to-life sentence made him eligible for parole in 2000. But at the time of his hearing, about a third of his record on his rehabilitation was missing. There was no record of his academic achievements or his participation in anger management courses.

He challenged his parole denial administratively, but lost. He went to Supreme Court and was denied again. He appealed to the Appellate Division. When the appeal finally got to court, Mr. Oliveras was four days from another parole hearing. So the court dismissed his claim for mootness.

At his next appearance--when Mr. Oliveras was prepared to go to court over the missing records--he was granted parole, so the issue of the lost records was never adjudicated. He was one of 10 A-1 violent felons paroled in 2002, out of 242 eligible--a release rate of about 4 percent.

"They [parole commissioners] are playing a role they are not supposed to play," Mr. Oliveras said. "They are re-sentencing in effect. They are playing a judicial role."

Critics say that, after a few adverse court rulings, the parole board now covers itself by stating, in its denial, that it took into account the statutory factors. But the critics suspect that the board makes determinations based on the instant offense alone.

"There are cases where it is obvious [that denial of parole] is based on the instant offense, and only lip service is being applied to the statutory criteria," Mr. Isseks said.

Joy Pujas of Ulster County is also active in the parole restoration movement. Her husband is doing time for a murder 24 years ago. He was sentenced to 20 years to life in New York City in 1982, came up for parole in 2002 and has been denied twice since then.

"If a judge can impose 25-to-life but instead imposes [20]-to-life, that indicates the judge thinks that under some circumstances [20] is sufficient," Ms. Pujas insisted. "But the parole board says it is not."

Ms. Pujas is urging legislation that would change the way commissioners are appointed. At least three lawmakers--Assemblyman Jeffrion L. Aubry, D-Queens, and Senators Velmanette Montgomery, D-Brooklyn, and Thomas K. Duane, D-Manhattan--are sympathetic and have proposed legislation or sponsored forums to discuss the issue. So far, there has been little movement in either house.

Political Considerations

"Clearly, there are political considerations in these appointments," said S. Earl Eichelberger, who served as a parole commissioner between 1985 and 1999 as a Cuomo appointee.

Mr. Eichelberger, whose term extended four years into the Pataki era, said there was a sense that commissioners were expected to carry out the general parole policies of both the Cuomo and Pataki administrations.

However, Mr. Eichelberger said he is unaware of a commissioner ever receiving direct orders from the executive chamber during either administration. Rather, he said, it was assumed that the board should respect the criminal justice philosophy of the sitting governor.

Retired Commissioner Henri C. Raffalli, who served on the parole board from 1987 to 1998, said the panel was influenced not by politics or

politicians, but by changing social values.

"I never felt any pressure, not from Cuomo and not from Pataki," said Mr. Raffalli. "The social pendulum kept swinging back and forth. The board is very sensitive to the expressions of society, as expressed in the newspapers. So we would try to run along those lines."

At one hearing shortly after Mr. Pataki came into office, Mr. Raffalli told a prisoner up for parole that "society says murder is a heinous crime" and the voters had elected a governor who "doesn't say we ought to put you in prison for 15 to life. He says we ought to get rid of you completely and kill you," according to a transcript of the proceeding.

Mr. Raffalli, in an interview, said his point was that prevailing attitudes had shifted fundamentally since the prisoner was sentenced to a 15-year-to-life term, and that those sentiments weighed heavily against his release. The prisoner was denied parole.

Inmates and their families say they are losing hope that parole decisions will be made based on the objective criteria of the law as written.

"You want to believe in a system, a system where there's righteousness, where people pay their dues and that it is all about correcting and rehabilitating and not only about punishment," said Ms. Pujas, who testified at Mr. Aubry's hearing. "We have come to the point where it is total punishment. Financially, it is devastating. Emotionally, it is crippling."

Release of Radical Kathy Boudin On Third Try Angered Governor

No parole board decision has received more attention in the past decade than its release of convicted murderer Kathy Boudin in 2003.

Ms. Boudin, a member of the radical Weather Underground, was sentenced to 20-years-to-life for her role in a 1981 armored-car holdup in Rockland County in which a security guard and two police officers were killed.

Ms. Boudin, a passenger in the getaway car, was unarmed and had no direct role in the shootings. A last minute addition to the scheme, she did not help plan the robbery, in which the stolen money was supposedly intended to further socialist causes.

In imposing the plea-bargained 20-years-to-life term, the sentencing judge, Justice David S. Ritter, said he could "see no reason in the world" why Ms. Boudin would not be released after 20 years "if the parole authorities are satisfied that's appropriate."

Over the course of 20 years spent primarily at the Bedford Hills Correctional Facility, Ms. Boudin was reportedly a model prisoner. She assisted AIDS patients and incarcerated mothers and earned a master's degree in education.

In 2001, the parole board denied Ms. Boudin's application.

In April 2003, Acting Supreme Court Justice Louis C. Benza ordered the board to consider the recommendations of the sentencing court. A second panel ostensibly considered Justice Ritter's recommendations, but again denied Ms. Boudin parole in May 2003.

Finally, a third panel granted Ms. Boudin parole in August 2003, sparking a debate that climaxed in Governor Pataki's reassigning the parole board's longtime chairman Brion Travis to the state Insurance Department. The transfer of Mr. Travis, an expert in criminal justice with no experience in insurance, was widely perceived as punishment.

"It is not a decision that should have been made," the governor said at the time regarding Ms. Boudin's parole. "It is not a decision that I would have made."

In a recent interview, the attorney who represented Ms. Boudin, criminal-law specialist Leonard Weinglass, called the decision to release Ms. Boudin an aberration from the norm.

"I think that case is very unusual in that the parole board did follow the standards that are supposed to apply in parole situations," Mr. Weinglass said. "Unfortunately, that is not always the practice."

Mr. Weinglass said that he has received numerous requests for representation from prisoners since Ms. Boudin's release.

"[They] have been repeatedly denied parole

despite their evident rehabilitation, always on the basis of the so-called 'seriousness of the offense,' which has become a parole-board mantra," Mr. Weinglass said.

Ms. Boudin, who declines press interviews, is making the most of her parole, according to Mr. Weinglass.

"She is pursuing her studies and doing full-time work and research connected to AIDS," he said. And in September, Mr. Travis, the former chairman of the parole board, was transferred to the Department of Corrections, an agency much more closely related to his expertise.

Court Decisions Give Parole Board Wide Discretion

A large body of case law establishes that the New York State Board of Parole has broad powers and wide discretion. According to the courts:

- Parole is a possibility, not a guarantee or reward for good behavior, and an inmate has no legitimate expectation of ever securing parole release (Barna v. Travis, 239 F.3d 169 [2001]).

- While the parole board is to take into consideration a number of factors--such as the seriousness of the crime and the inmate's rehabilitative efforts--it can place any weight it wants on those factors and need not explain itself. It is permitted to emphasize the seriousness of the offense (Matter of Little v. Travis, 15 AD3d 698 [2005]) so long as it takes into consideration the statutory factors articulated in Executive Law §259-i (Matter of Lue-Shing v. Pataki, 301 AD2d 827 [2003]).

- Judges should not undermine the parole board's broad discretion absent a showing of "irrationality bordering on impropriety" (Matter of Silmon v. Travis, 95 NY2d 470 [2000] quoting Matter of Russo v. New York State Board of Parole, 50 NY2d 69 [1980]).

Regardless, a growing number of courts are overturning parole determinations, often with harsh reviews of the actions of the Board of Parole. Here are some examples from the last two years.

> Noting an inmate's positive institutional adjustment or achievements in the written decision is not tantamount to considering them in a fair, reasoned and individualized manner. Indeed, such cursory treatment turns on its head the reformative or rehabilitative principle underlying an indeterminate sentence.
>
> Acting Supreme Court Justice Edward A. Sheridan of Albany in Chan v. Travis, (NYLJ, Feb. 27, 2003).

In Chan, Justice Sheridan implied that the parole board was more intent on carrying out executive policy than in following the law.

The case centered on a defendant who, as a 17-year-old member of a Chinese street gang, was involved in a 1992 homicide. Dennie Chan pleaded guilty to charges of first-degree manslaughter and related counts. In denying the convict parole after his initial appearance in 2001, the board took note of his positive achievements and rehabilitative efforts, but said the seriousness of his offense warranted denial of parole.

After an unsuccessful administrative appeal, Mr. Chan pursued an Article 78 petition that landed before Justice Sheridan in early 2003. The judge wrote an oft-cited decision in which he criticized the parole board's "apparent disregard of the rehabilitative component of the indeterminate sentencing and parole statutes" and "failure to address or to acknowledge, contrary to statute, the favorable comments of the sentencing Judge commending petitioner's sincere remorse, and expressing the Judge's expectation that petitioner would be released…at expiration of his minimum sentence, to assume a productive and repentant life."

Justice Sheridan said that since taking office in 1995, Governor George E. Pataki has annually called for an elimination of parole. Citing the sharp drop in parole releases since Mr. Pataki took office, the judge found an "undeniable inference that the Board has 'gotten the message' and is implementing executive policy."

"This State may be in transition to determinate sentencing and the abolition of traditional parole for all felons, but that may not be imposed by administrative fiat on this inmate and the class of inmates similarly situated," Justice Sheridan wrote. "The Board may not ignore that…policy and its obligation to this petitioner even if current law and Executive policy have taken a different direction."

The Division of Parole appealed, but by the time the case was before the Appellate Division, Third Department, Mr. Chan had been released at his next, statutorily-mandated parole hearing. The appeal was dismissed for mootness with no review of Justice Sheridan's findings (3 AD3d 820, [2004]) (*Prisoners' Legal Services* represented the inmate on appeal). Since then, the judge has overturned several parole determinations, but the Third Department has repeatedly reversed, stressing that the courts must tread cautiously to avoid intruding on the discretion of the Board of Parole.

Study the Record

> Apparently, it is [the parole board's] position that it is not responsible for reading and incorporating submissions as part of its deliberative process.
>
> Manhattan Supreme Court Justice William A. Wetzel in Cappiello v. New York State Board of Parole, 6 Misc.3d 1010A (2004).

Justice Wetzel found that the parole board had denied the convict, John Cappiello, parole solely because of the severity of his crimes, with no consideration of his rehabilitation. Mr. Cappiello had been convicted of felony murder in connection with the deaths of a couple apparently beaten to death with a hammer and an axe in the late 1970s. After Mr. Cappiello was denied parole seven times, Judge Wetzel ordered a new parole hearing and required the Board of Parole to state, on the record, that the members had actually read all of the submitted documents.

Justice Wetzel went a step further in also directing the convict, if the parole commissioners failed to respond to the query, to read the contents of his petition out loud to ensure that it was included in the record.

"The Parole Board's failure to qualitatively determine whether petitioner presented a current danger to society, based on all of the relevant statutory factors, was a clear abdication of its statutory duty," Justice Wetzel wrote. The role of the board, he said, "is not to resentence petitioner according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether as of this moment given all of the relevant statutory factors, he should be released."

Following the decision and the immediate *de novo* parole hearing it required, Mr. Cappiello was released on May 4, 2005.

Threat to Society?

> "Does the Board honestly believe that…a 74-year-old man, half blind from cancer, who has helped countless people, and learned and taught principles of law to many, truly is a continuing threat to society?"
>
> Manhattan Supreme Court Justice Alice Schlesinger in Phillips v. Travis, 800 NYS2d 397 (2005).

The matter involved a rogue police detective who, while shaking down a pimp in the late 1960s, killed the pimp and a 19-year-old prostitute and severely wounded a john. He was finally convicted

in 1974 and sentenced to 25 years to life. After a third parole denial, William R. Phillips persuaded Justice Schlesinger to overturn the parole board and order a new hearing. The judge said the commissioners who had decided Mr. Phillips' fate had apparently failed to take into consideration his institutional accomplishments. She ordered a new hearing in front of a different panel.

"If rehabilitation has meaning, if there is a belief that a man can change, if there is a faith that the goodness of a person can eventually resurface, then the law governing release on parole and the rationale for that law is being perverted by a Board that refuses to consider only what a man did 37 years ago and is paying for in almost 30 years of imprisonment," Justice Schlesinger wrote.

On Aug. 25, the Appellate Division, First Department, unanimously reversed Justice Schlesinger. It said that the parole board is free to consider the seriousness of the crime, among other enumerated factors, and it need not delineate each of the factors considered.

Aggravating Factors

> "[The] Board is required to do more than merely mouth the statutory criteria, particularly where as here each factor recited and brought forth in the parole interview, other than the crime itself, militated in favor of release."
>
> Manhattan Supreme Court Justice Shirley Werner Kornreich in Weinstein v. Dennison, NYLJ, April 19, 2005.

The case centered on a 79-year-old former advertising executive who in 1991 strangled his wife and threw her body from the 12th floor window of their apartment. Herbert Weinstein pleaded guilty to manslaughter and was sentenced to a 7-to-21-year term in December 1992. He was denied parole three times before his petition came before Justice Kornreich.

Justice Kornreich said the parole board must pay more than lip service to the elements it is supposed to consider along with the instant offense, such as the prisoner's institutional record. She said that while the seriousness of the crime is a valid consideration, the conviction per se should not preclude parole release and there must be some aggravating circumstance, beyond the seriousness of the crime, that warrants denial of parole.

Justice Kornreich's decision is under appeal at the First Department.

> A Parole Board's exclusive reliance on the severity of the offense to deny parole not only contravenes the discretionary scheme mandated by statute, but also effectively constitutes an unauthorized resentencing of the defendant.
>
> Appellate Division, First Department, in Wallman v. Travis, 18 AD3d 304 (2005).

Wallman is a rare case where a trial judge upheld the parole board only to be reversed on appeal. It involves a former Manhattan attorney, Jay Wallman, 64, who stole $4.7 million from his clients in the mid-1990s. The parole board, in denying Mr. Wallman's release, found a reasonable probability that the disbarred attorney would not remain at liberty without violating the law. Manhattan Supreme Court Justice Joan A. Madden upheld the determination, but the First Department unanimously reversed and ordered a new hearing.

Mr. Wallman was paroled July 6, 2005.

The Decision-Makers

The Board of Parole consists of up to 19 members, appointed by the governor and confirmed by the Senate for six-year, staggered terms. When a commissioner's term expires, he or she usually remains on the job until re-appointed or replaced. Each member is paid $101,600. The governor designates the chairman, who is paid $120,800.

Under Executive Law §259-b(2), members of the parole board must have at least a bachelor's degree and five years experience in one or more "fields of criminology, administration of criminal justice, law enforcement, sociology, law, social work, corrections, psychology, psychiatry or medicine."

Statutorily, the board's primary responsibilities are:

- Making release decisions: The board decides which convicts serving indeterminate terms should be released on parole. Under Executive Law §259, the board must personally interview all eligible inmates. Inmates do not have a right to counsel at the interview. Typically, two or three commissioners visit a prison and interview a number of inmates on any given day.

- Establishing release conditions: The board sets conditions of release for the prisoners it votes to free, as well as those who are "conditionally released."

- An inmate who is not released at his or her initial appearance, or a subsequent appearance, can be released on parole after serving two-thirds of the maximum if there has been no loss of good time credits. Prisoners serving a sentence where the maximum term is life (such as 15-years-to-life or 25-years-to-life) are not eligible for conditional release.

- Revoking parole: Under Executive Law §259, the board is authorized to revoke parole when it determines that a parolee has violated the conditions of release "in an important respect."The board can impose various sanctions and return the convict to prison.

There are currently 17 members of the Board of Parole, all appointed by Governor George E. Pataki. Twelve members are men and five are women. Five are black or Hispanic. Five are located in New York City and the remaining 12 are located in Albany, Buffalo and Rochester areas, according to the Division of Parole.

They are:

Chairman Robert J. Dennison.

Term expires Aug. 31, 2007. Education: B.A., Iona College, history and political science; M.A., counseling psychology, Manhattan College. Background: Probation and parole officer, parole revocation specialist, sixth grade teacher Politics: Conservative

Vanessa A. Clarke-McCarthy.

Term expires Feb. 7, 2011. Education: B.S., sociology, State University at Albany; J.D., Albany Law School . Background: Attorney, law intern with the state Department of Corrections, counsel to various Senate and Assembly committees. Politics: Republican

Marietta S. Gailor.

Term expires June 18, 2008. Education: B.A., psychology, Russell Sage College. Background: Probation officer. Politics: Republican

Walter William "Bill" Smith Jr.

Term expires July 6, 2011. Education: B.S., business administration. Background: Investigator with the state Crime Victims Board, social services investigator. Politics: Republican

Ileana Rodriguez.

Term expired June 18, 2005. Education: B.A., psychology, University of Miami; M.A., clinical psychology, Long Island University; Ph.D., clinical psychology, Long Island University. Background: Psychologist. Politics: Republican

Rosario Guy Vizzie Jr.

Term expires Feb. 6, 2007. Education: B.S., political science and psychology, State University at Brockport. Background: Probation director, probation officer Politics: Republican

Daizzee D. Bouey.

Term expired June 2, 2005. Education: B.A., social welfare, Hampton University (Virginia); M.S.W., administration, Stonybrook University; M.B.A., Long Island University Background: Probation officer and administrator, assistant corrections commissioner Politics: Independence

Vernon C. Manley.

Term expires June 18, 2006. Education: B.A., political science, Williams College; M.S., urban management and policy analysis, The New School for Social Research. Background: Executive Director of the Juvenile Community Service Division of the New York City Department of Probation Politics: Democrat

Debra J. Loomis.

Term expires June18, 2010. Education: B.A., sociology, Russell Sage College Background: Child protective services supervisor. Politics: Republican

George C. Johnson.

Term expired July 6, 2005. Education: B.S., criminal justice, Empire State College at Buffalo; M.S., multidisciplinary studies, State University College at Buffalo. Background: Corrections officer, chairman of the Erie County Conditional Release Commission and Public Safety Officer with the state Office of Mental Health. Politics: Republican

William R. Crowe.

Term expires Aug. 31, 2007. Education: B.A., Syracuse University, economics; J.D., State University at Buffalo School of Law. Background: Partner at the Buffalo law firm of Penney, Maier, Wallach & Crowe, assistant attorney general, assistant district attorney, acting village justice. Politics: Republican

Edward R. Mevec.

Term expired July 6, 2005. Education: B.A., social studies-political science, St. Thomas Aquinas College; J.D., University of Bridgeport School of Law. Background: Attorney, arbiter with the Small Claims Division of the New York City Civil Court, small claims hearing officer in Supreme Court, funeral director. Politics: Republican

Thomas P. Grant.

Term expires June 18, 2010. Education: B.A., political science, State University at Plattsburgh; M.S., educational administration, State University at Albany Background: Executive assistant to the chairman of the Division of Parole, former committee director for the state Senate Codes Committee and Judiciary Committee and legislative coordinator for the Finance Committee. Politics: Republican

Livio Lazzari.

Term expires May 4, 2007. Education: B.A., political science, City College of New York; M.A., political science, New School for Social Research; J.D., Brooklyn Law School Background: Parole officer, administrative law judge presiding over administrative parole revocation hearings. Politics: Republican

John G. Capacci.

Term expires June 18, 2009. Education: B.A., government, Notre Dame University; J.D., Albany Law School. Background: Partner in the Wayne County law firm of Zecher, Capacci, DeValk, Hendricks & Power, former member of the Wayne County Conditional Release Commission, former town justice. Politics: Republican

James B. Ferguson Jr.

Term expires Aug. 31, 2007. Education: B.A. political science, Marist College; J.D., Pace University School of Law. Background: Administrative law judge with the Division of Parole, former Bronx assistant district attorney. Politics: Unaffiliated

Patrick M. Gallivan.

Term expires July 6, 2011. Education: B.S., Canisius College; M.A., criminal justice, State University at Albany. Background: Erie County Sheriff, former state trooper. Politics: Republican

Degrees and Clergy Support Fail to Prove Rehabilitation

Can a triple murderer ever win redemption from the State of New York?

Gerald T. Balone, three-time killer, seven-time unsuccessful candidate for parole, and holder of a Master's degree in theology, has his doubts.

Despite earning five college degrees since his incarceration in 1973, completing three Department of Labor apprentice programs, garnering scores of awards for finishing countless counseling and self-help programs and securing the support of prominent politicians, three Roman Catholic bishops and several other clergy and advocates, Mr. Balone suspects nothing he has done and nothing he can do will lead to his parole release.

He may well be right.

When Governor George E. Pataki took office 11 years ago, a violent felon had roughly a one-in-four chance of getting parole. Now, the odds are approximately one-in-25. And while statistics are not available for multiple killers, it is a safe bet that their chances of making parole are almost non-existent, experts say.

Mr. Balone, 53, knows that he can never atone for his crime. Yet he also argues that the possibility of redemption was inherent in the sentence that was imposed. Knowing all the facts of the offense and the offender, the judge decided that Mr. Balone should serve a term of 25-years-to-life which, Mr. Balone contends, implies there is some possibility that despite the repugnance of his crime, release would be appropriate after a quarter century.

"If I had life with no parole, I could accept that," Mr. Balone said in a telephone interview from prison. "But I wasn't sentenced to life without parole, I wasn't sentenced to death. I was sentenced to 25-to-life. If they are going to recognize me for my worst deeds, they should also recognize me for my good deeds."

Mr. Balone's worst deeds were admittedly heinous.

In 1973, Mr. Balone was an angry thug, a 21-year-old man who had been abandoned as a child, had a fifth grade education and had recently been paroled from a robbery conviction. His rap sheet began at the age of 8 when, according to a presentence report, the "terribly neglected boy" ran away from a foster home, one in a series of orphanages, foster homes, detention centers and reform schools where he spent his formative years. He was arrested for shoplifting at 10, robbery at 15 and grand larceny at 18.

Mr. Balone had been on parole all of five weeks for a juvenile offender adjudication when, on April 24, 1973, he and a co-defendant broke into a home on the East Side of Buffalo. They bound and gagged the occupants, a 60-year-old man and his 58-year-old wife, and beat them with a hammer until they revealed the location of their coin

collection. Then Mr. Balone and his confederate executed their victims with gun shots to the head. As Mr. Balone and his partner fled, they shot and killed a third person, who had come to investigate.

Judge James Kane of Buffalo gave Mr. Balone the maximum sentence, 25-years-to-life. Under the sentencing laws in effect at the time, there was no available sentence of life-without-parole, although such a sentence has since been instituted for certain kinds of murder. To Mr. Balone, this means the Legislature had decided that there must be some circumstances that would justify the release of even a multiple killer.

But now, with a parole board appointed entirely by a governor who would eliminate parole and who has harshly criticized decisions that granted parole to violent felons, Mr. Balone said bureaucrats have decided that because of his crime there are no conditions that will justify his release, a conclusion he maintains is inconsistent with the laws under which he was sentenced.

"They are essentially re-sentencing us," Mr. Balone complains. "They spend all this money on educational and therapeutic programs for us and then basically tell us that it doesn't matter what we do, they'll never let us out."

Mr. Balone has an extensive dossier of support letters.

State Senators Velmanette Montgomery, D-Brooklyn, and Thomas K. Duane, D-Manhattan, have advocated for his release, as has Assemblyman Jeffrion L. Aubry, D-Queens. Senator Duane, ranking minority member of the Senate Crime Victims, Crime and Correction Committee, said in his letter that he knows of "no better candidate for parole." Catholic Bishops Howard J. Hubbard of Albany, James M. Moynihan of Syracuse and Henry J. Mansell, formerly of Buffalo and now Archbishop of Hartford, also sent letters on Mr. Balone's behalf. Officials at the New York Theological Seminary, from which Mr. Balone received a master's degree, indicated that over a 25-year period its graduates have a 96 percent success rate upon release, with only a 4 percent recidivism rate.

Yet, the parole board has been unmoved.

In its most recent denial in June, the board said that after giving consideration to Mr. Balone's educational and vocational achievements and satisfactory behavior, his release remains incompatible with the public welfare.

"There is a reasonable probability that you would not live and remain at liberty without violating the law," the parole board said. "Your release at this time would depreciate the seriousness of the offenses and undermine respect for the law. Your responses during the interview indicated limited insight into why you acted so violently."

Both the statute and case law make clear that parole is neither an entitlement nor a reward for good behavior. The statute specifically says that "[d]iscretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law." Under the statute, the parole board establishes its own guidelines for making parole determinations.

Erie County District Attorney Frank J. Clark, who was an assistant prosecutor when Mr. Balone was prosecuted back in the Nixon Administration, has not taken a stance on whether Mr. Balone should be released.

"I haven't been in a position to see the change in him over the period of time," Mr. Clark said. "All I know is that it was a horribly vicious crime and it probably would have been one, had it occurred when the death penalty was in effect, that would have been death-penalty eligible. Whether he remains someone who should be incarcerated is an issue the parole board is in a better position to judge."

Clearly, the parole board has always had extraordinary discretion. What has changed over the years, and particularly since Mr. Pataki re-made the parole board, is the way the panel exercises its discretion.

Twenty five years ago, shortly after Mr. Balone was sentenced to a parole-eligible term, more than 70 percent of the prisoners who appeared before the board were paroled. Now, about 30 percent are granted discretionary release. It is a new deal, especially for those who plea bargained at a time when parole release was a probable eventuality rather than a theoretical possibility.

Mr. Clark, president of the state District Attorneys Association, is sensitive to the concern of some judges and many inmates that the parole board seems to be usurping the judicial sentencing role.

"When a judge imposes a sentence of between 15 and 25 years [for murder], there is at least an implicit assumption that the judge felt that the minimum sentence is the appropriate one to serve," Mr. Clark said. "But if they impose the max [as was the case with Mr. Balone], it is hard to read anything into that."

Mr. Balone acknowledges that even he would be hesitant, as a member of a parole board, to take a chance on someone with his record. But he returns, time and again, the argument that the law under which he was sentenced presumed second chances.

After spending most of his life in a series of state prisons--Elmira, Coxsackie, Attica, Auburn, Clinton, Great Meadow, Eastern, Shawangunk, Sullivan, Woodborne, Sing Sing, Tappan, Downstate, Upstate, Orleans, Collins and now Fishkill Correctional Facility--Mr. Balone is reluctantly resigned to the fact that, barring a major shift in policy, he may well die in prison. Mr. Pataki's appointees to the parole board, nearly all of whom are Republicans, will likely continue to dominate the panel when Mr. Balone next comes up for a parole hearing in June 2007.

Those appointees have shown little inclination to release violent felons, and to some extent Mr. Balone is looking beyond the Pataki years, aware that the next governor could replace a majority of the commissioners by the end of his term.

"I have to honestly say that every time I go back to the parole board, I go back as a better person--with more accomplishments, more support, a better release plan," Mr. Balone said. "Sooner or later, maybe, it will be enough. But what do they want me to do? That is [the] question I can't get answered: 'What do you want me to do?'"

Given Minimum, Inmate 'Resentenced': Board Denies Release Citing a 'Propensity for Violence,' but Prison Records Show Otherwise

Although he died seven years ago, "Maximum John" Clyne remains the judge attorneys in Albany point to as the embodiment of a tough-sentencing judge. When Judge Clyne was on the Albany County bench, defense counsel say, there was only one likely sentence: the max.

But in the case of Brian E. Jacques, a then 20-year-old man who pleaded to second-degree murder in 1983, Judge Clyne imposed not the maximum sentence of 25 years or life, but the minimum--15 to life. Mr. Jacques, now 42, finished serving 15 years in 1998, just two weeks after Judge Clyne died. But four times since then, the parole board has said that, despite the sentence imposed by "Maximum John" Clyne, 15 years was not enough time in prison. Nor was 17, 19 or even 21 years.

The parole denials all stressed the crime Mr. Jacques committed, or the same crime that led Judge Clyne to impose a sentence that left open the possibility of release after 15 years.

In 1998, the parole board said "the gravity of the instant offense militates against release at this time. Such release would diminish the severity of the crime in the eyes of the community and would undermine respect for the law."

In 2000, it informed Mr. Jacques that the offense was "a serious escalation of your antisocial

behavior which includes convictions for criminal trespass second, unauthorized use of a motor vehicle and attempted burglary third-degree."

In 2002, it said the crime represented a "major escalation of your antisocial behavior and is indicative of a depraved indifference to human life."

In 2004, it cited Mr. Jacques' "propensity for violence" and again denying him release.

The record, however, shows no propensity for violence aside from the instant offense.

Mr. Jacques did indeed have a series of run-ins with police during the year prior to his arrest for murder. All of those incidents were directly or indirectly linked to alcohol abuse. For instance, he was arrested once for giving beer to a 14-year-old girl, twice for breaking into bars to steal liquor and once for getting drunk and stealing a car.

Even the murder was apparently linked to alcohol.

According to Mr. Jacques' confession--unrefuted in court and generally supported by a co-defendant's separate confession--on the night of Nov. 1, 1983, the defendant consumed 15 to 20 beers with two friends, who were also drinking heavily. An argument ensued over some chicken that one of the friends had apparently stolen from the refrigerator of the other. The victim was kicked and stomped, primarily by Mr. Jacques' co-defendant. But Mr. Jacques, who had a broken leg and was wearing a cast, also kicked the victim. The victim died and Mr. Jacques and his co-defendant were both indicted for second-degree murder. Both pleaded guilty. The co-defendant got 20-to-life, and remains incarcerated. Mr. Jacques got 15-to-life from Judge Clyne.

A pre-sentencing report submitted to Judge Clyne in 1983 described Mr. Jacques as polite and remorseful, and indicated that his criminal problems were rooted in alcoholism. The probation officer who conducted the investigation and wrote the report said that all of Mr. Jacques' arrests were the "direct results from the abuse of alcohol," noting that the defendant "exhibits a marked change in behavior while under the influence of alcohol." Still, the officer said, "such violent and overly aggressive behavior on the part of the defendant, even while under the influence of alcohol, is uncharacteristic of past patterns."

Relying on that report, Judge Clyne sentenced Mr. Jacques to the minimum term, with the understanding that release was possible after 15 years.

An inmate evaluation, completed by a supervisor at the Southport Correctional Facility, where Mr. Jacques is incarcerated, described the prisoner as friendly and cooperative and indicates that he has good insight and judgment and that there is no indication the prisoner harbors homicidal or suicidal thoughts or tendencies. Other records showed Mr. Jacques had successfully completed alcoholism treatment and anger management programs and obtained a high school and college degree. Although Mr. Jacques has been cited four times in the past 22 years for minor disciplinary infractions, he has never been accused of any violent act in prison, records reveal. And Mr. Jacques has not been issued a disciplinary ticket in nearly five years.

While parole is opposed by the family of the victim, Mr. Jacques has an unusual ally on his side: the police detective who arrested him.

Sgt. Richard Connolly, a now retired Cohoes police officer, said he has gone to bat for perhaps a total of three criminals he encountered during his 20 years in law enforcement.

"I am no crusader, but he is getting screwed here," Mr. Connolly said. "He should have been out after 15 years. I never thought he'd be in this long."

Mr. Connolly, who knew all three of the young men involved — the two perpetrators and the victim — said he had known Brian Jacques for years the way a cop on the beat knows a wayward kid in the neighborhood. In fact, Mr. Connolly said, it was his brother's bar that Mr. Jacques broke into to steal booze. The former detective disputes the parole board's conclusion that Mr. Jacques has a

"propensity" to violence and said that, until the night of Nov. 1, 1983, he had never known Mr. Jacques to exhibit any violence.

"He sure wasn't the heavy hitter," Mr. Connolly said. "The main actor was the other guy, but Brian did kick him and he was right there when [the co-defendant] did a job on the guy. I spoke to parole and wrote letters on [Mr. Jacques'] behalf, but it seemed to me the parole officer could care less. It was like I was taking up his time."

The Albany County district attorney, David P. Soares, did not respond to a request for comment.

In a telephone interview, Mr. Jacques said denial of parole seems a foregone conclusion whenever he appears before the parole board.

"I do everything they ask me to do and then I go back in front of them and all they want to talk about is the crime," Mr. Jacques said. "I tell them the same story every time, tell them of my remorse. I think they know I am never coming back when I get out, so maybe they want to get as much time out of me as they can to prove a point. It is heartbreaking."

Mr. Jacques said he has been clean--no alcohol or drugs--since 1986, three years after he was incarcerated.

"I will never commit another crime," Mr. Jacques said. "I've learned my lesson after doing 23 years in this environment. This is not the life for me."

Mr. Jacques' wife and prime advocate, Tracie Jacques of Elmira, has lobbied and battled legally on behalf of her husband. Ms. Jacques, an aspiring paralegal and criminal justice student at an upstate community college, has a pending Article 78 petition challenging the latest parole denial.

"Clyne, as stern as he was, gave Brian what was appropriate," Ms. Jacques, 42, said in an interview. "The board is re-sentencing Brian because they are not happy with what Clyne gave him on the offense."

The Division of Parole would not comment.

Ms. Jacques' legal arguments--that the parole board is systematically and illegally denying parole to prisoners convicted of violent crimes and that the board is carrying out the political agenda of the governor--have all been tried by other prisoners, to no avail. But Ms. Jacques said she will persist until her husband comes home.

"If people in the right places see what is going on, maybe this will change," said Ms. Jacques, a native of New England. "My husband laughs because I have so much faith. We go through bouts where we don't think he will ever come home. But I told him if the [Boston] Red Sox can win the World Series, we can win too."

Elderly, Sick, 'Model' Prisoners Met Barriers to Early Release

Former attorneys Frank Marino and Shirley Ehman made an unlikely pair of ex-cons.

Married in 1944 and admitted to the bar in 1947 and 1945, respectively, they were each sentenced in 1997 to 3-to-9 years for stealing $1.6 million from their clients' estates.

During their six years in prison--the maximum stay under their sentences for inmates, such as Mr. Marino and Ms. Ehman, who earn certificates of eligibility--the Long Island couple became a symbol of the ongoing conflict between the judiciary and the state parole board.

After the parole board first denied Mr. Marino parole, Queens Supreme Court Justice Herbert A. Posner made the unusual decision to order the board to release the 82-year-old Mr. Marino in March 2001.

Nonetheless, when the parole board next met in January 2002, it again denied Mr. Marino parole.

The board was reportedly unaware of Justice Posner's order.

Two months later, Queens Supreme Court Justice Allan R. Weiss once again ordered Mr. Marino released. He ruled that the parole board failed to follow a section of the Corrections Law that establishes a presumption in favor of parole when a prisoner has completed the minimum period

of incarceration and earned a certificate of eligibility.

The decision however resulted in Mr. Marino being released only days before his conditional-release date.

At issue in Mr. Marino's case, as in most appeals of parole board decisions, was whether the board properly applied the standards set forth in the New York Codes, Rules and Regulations.

Under the NYCRR, the board members must consider, among other things, the applicant's institutional record, his performance in a temporary release program (if any) and his release plans.

By those standards, both Mr. Marino and his wife appeared strong candidates for release. They were widely described as model prisoners who would be welcomed back by their community. Nonetheless, the two were both repeatedly denied parole until March 2003.

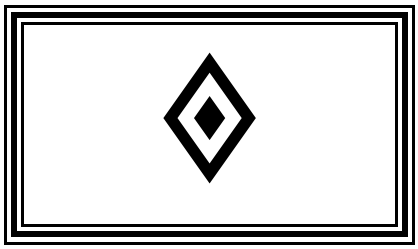
The delay in parole for Mr. Marino and his wife contributed to their not being reunited until days before her death.

Ms. Ehman was not paroled until she became too sick to be held any longer, according to the couple's daughter, attorney Christine Gartner.

"They kept her until the bitter end even though two doctors said she was going to die," Ms. Gartner said. "The day we picked her up she came out in a wheelchair and in diapers."

Ms. Ehman was unable to communicate. She died six weeks later.

Mr. Marino died in November at the age of 87.



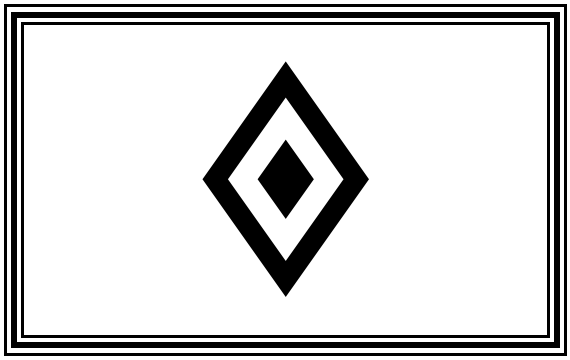
BOARD DECISIONS BY CATEGORY (Releases/Interviews)

Year	A-1		Violent Felonies*		Legislative Violent Felonies**		Drug Offenses	Total	
1992-93	47/202	(*23%*)	3,817/7,421	(*51%*)	6,548/8,710	(*75%*)	13,456/21,802	(*62%*)
1993-94	62/221	(*28%*)	3,974/7,690	(*52%*)	7,022/9,415	(*75%*)	14,232/23,035	(*62%*)
1994-95	42/167	(*25%*)	3,547/7,316	(*48%*)	6,566/8,756	(*75%*)	12,925/21,611	(*60%*)
1995-96	24/173	(*14%*)	3,516/7,851	(*45%*)	6,182/8,555	(*72%*)	12,178/21,541	(*57%*)
1996-97	15/160	(*9%*)	2,878/7,533	(*38%*)	6,162/8,295	(*74%*)	11,400/20,698	(*55%*)
1997-98	19/185	(*10%*)	2,129/6,442	(*33%*)	6,432/8,764	(*73%*)	10,930/20,470	(*53%*)
1998-99	14/203	(*7%*)	1,131/5,592	(*20%*)	5,987/10,050	(*60%*)	8,992/21,316	(*42%*)
1999-00	16/218	(*7%*)	1,049/4,896	(*21%*)	5,820/8,775	(*66%*)	8,734/19,251	(*45%*)
2000-01	8/258	(*3%*)	881/4,185	(*21%*)	5,632/8,063	(*70%*)	8,309/17,407	(*47%*)
2001-02	10/235	(*4%*)	682/3,328	(*20%*)	4,968/7,293	(*68%*)	7,415/16,142	(*46%*)
2002-03	10/242	(*4%*)	467/2,628	(*18%*)	4,482/6,796	(*66%*)	6,889/15,159	(*45%*)
2003-04	13/265	(*5%*)	441/2,371	(*19%*)	4,081/5,699	(*72%*)	6,413/13,617	(*47%*)
2004-05	9/263	(*3%*)	337/2,151	(*16%*)	2,588/4,244	(*61%*)	4,448/11,750	(*38%*)

* Murder 1st and 2nd, Attempted Murder 1st, Kidnapping, and Arson

** Other Violent Felonies, such as Attempted Murder, Rape, Robbery and Burglary

Source: Office of Policy Analysis



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COPY EDITING: FRANCES GOLDBERG
PRODUCTION: FRANCES GOLDBERG
DISTRIBUTION: BETH HARDESTY
EXECUTIVE DIRECTOR: SUSAN JOHNSON

Pro Se is printed and distributed free through grants from the New York State Bar Foundation and the Tompkins County Bar Association.