

# Chapter 32

## PAROLE\*

### A. Introduction

Parole is a system of discretionary release for prisoners who have not yet served their maximum sentences. Parole also refers to the process of your supervised re-integration into the community while you serve the remainder of your sentence outside of prison.<sup>1</sup> In this Chapter, Part B provides an overview of the parole system of New York State. Parts C through I examine New York's parole system in detail. Part C explains the calculation of the minimum imprisonment period; Part D discusses the Shock Incarceration Program; Part E discusses the sentence of parole supervision; Part F explains parole release hearings; Part G reviews release on parole; Part H covers parole revocation; Part I discusses release from parole supervision; Part J looks at the parole system of California; Part K considers the Florida state system; Part L examines the Illinois state system; Part M explores the system in Texas; and Part N explains the Michigan parole system. Prisoners in other states must research their own states' laws on parole, as parole laws tend to be very different from state to state and parole has been eliminated altogether in many states. See Chapters 35 of the *JLM*, "Getting Out Early: Conditional and Early Release," for information on conditional and early release, and see Chapter 39 of the *JLM*, "Temporary Release Programs," for information on temporary release programs.

### B. New York

In New York, the Division of Parole and the Department of Correctional Services recently merged and became the Department of Corrections and Community Supervision (DOCCS).<sup>2</sup> The parole law is found in the N.Y. Executive Law § 259 and in Title 9 of New York State Compilation of Codes, Rules and Regulations, Part 8000.<sup>3</sup> The parole law requires the DOCCS to adopt written guidelines for use in making parole decisions.<sup>4</sup> The DOCCS also publishes pamphlets, handbooks, and other materials that explain the parole process.<sup>5</sup>

For further information, check with your institution's parole officer, pre-release center, or law library. They should have the New York State Parole Handbook, "Questions and Answers Concerning Parole Release and Supervision."<sup>6</sup> This pamphlet gives the DOCCS' answers to questions on issues regarding time served, institutional parole and parole board activities in state correctional facilities, parole supervision, the revocation process, the Sentencing Reform Act of 1995, interstate parole, juvenile offenders, restoration of rights, executive clemency, appeals, and access to parole files. If available, you should also review

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1. This supervised release can be as a result of a discretionary parole release or a mandatory supervised release ordered by the sentencing judge.

2. In New York, Parole, Conditional Release, Work Release and Temporary Release programs are run by the Department of Corrections and Community Supervision. N.Y. Correct. Law §§ 150, 151, 851, 852 (McKinney 2014); N.Y. Correct. Law § 10 (McKinney 2014); N.Y. Penal Law § 70.40 (McKinney 2014). Probation is handled by the Division of Probation and Correctional Alternatives. N.Y. Exec. Law § 240 (McKinney 2014). Because the combining of the departments is so recent, the state laws may still describe the Division of Parole and the Department of Correctional Services as separate departments.

3. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000. The New York Official Compilation of Codes, Rules, and Regulations is in a green three-ring binder, and it should be in your prison library.

4. N.Y. Exec. Law § 259-c(4) (McKinney 2014). See N.Y. State Dept. of Corr. & Cmty. Supervision, Release Decision-Making Guidelines Application Manual (1982). Though the Guidelines are written and codified, the Parole Board is not absolutely bound to follow them.

5. These materials can be located online at [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) or by contacting the N.Y. State Dept. of Corr. & Cmty. Supervision at (518) 473-9400.

6. N.Y. State Dept. of Corr. & Cmty. Supervision, New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision (2010), *available at* [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 24, 2017).

other DOCCS publications, especially the *Guidelines Applications Manual*, and look at the laws and regulations themselves.<sup>7</sup>

This Chapter describes the practices and procedures of the Parole Board. Parole has five basic phases:

- (1) Determination of your minimum sentence;
- (2) Parole release considerations, preparing for your parole hearing, and the hearing itself;
- (3) Release on parole and supervision by parole officers;
- (4) Constitutional due process protections required in the parole revocation process; and
- (5) Release from parole and the restoration of full rights.

You can appeal a Parole Board decision in two ways. The first appeal is an administrative procedure conducted through the Appeals Unit of the Parole Board.<sup>8</sup> You *must* first try the administrative process within the DOCCS. If that fails and you wish to continue, you may then appeal through an Article 78 proceeding in the New York courts.<sup>9</sup> You should know that the courts have adopted an extremely tough test for review of any Parole Board decision. In order for courts to intervene in Parole Board decisions, you must show “irrationality bordering on impropriety on the part of the parole board.”<sup>10</sup> In other words, you must show that the Parole Board’s decision did not make sense and was close to being improper in order for a court to step in. It is very unusual for a court to find that a Parole Board’s decision was wrong.

### C. Minimum Term of Incarceration Under an Indeterminate Sentence & Conditional Release Under a Determinate Sentence

There are two types of sentences the sentencing court can give: indeterminate and determinate. An “indeterminate” sentence is when the court assigns a range of minimum and maximum time a prisoner must serve, rather than a specific number of days or years. A determinate (“flat”) sentence is a fixed period of time you must spend in prison. If you are serving a determinate sentence, you are not eligible for parole but may qualify for conditional release.

If you were given an indeterminate sentence, the sentencing court should have set the minimum amount of time you must serve in a state correctional facility before you become eligible for release.<sup>11</sup> Since 1995, New York has been moving away from indeterminate sentencing and discretionary parole release to the system of determinate sentences. Determinate sentences are required for persons sentenced as second violent felony offenders after 1995, or first violent felony offenders after 1998.<sup>12</sup> Determinate sentences are also required for felony drug offenders sentenced after 2004.<sup>13</sup> Persons sentenced to a determinate sentence as violent or second violent felony offenders are eligible for conditional release when they have served six-sevenths of their sentence.<sup>14</sup> Persons serving determinate sentences for felony drug offenses are eligible for merit time/conditional release after serving five-sevenths of their sentence.<sup>15</sup>

7. A copy of the Division of Parole’s Release Decision-Making Guidelines Application Manual should be available at the law library for each state prison or by contacting your Facility Parole Officer.

8. The appeals procedure is the same for Parole Board decisions regarding a minimum period of imprisonment (MPI), parole release, parole rescission, and final revocation. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1(a).

9. For a discussion of Article 78 proceedings, see Chapter 22 and Part C(6) of Chapter 5 of the *JLM*.

10. In re Russo v. N.Y. State Bd. of Parole, 50 N.Y.2d 69, 77, 405 N.E.2d 225, 229, 427 N.Y.S.2d 982, 986 (1980) (holding that the Parole Board may impose an MPI for a longer period of time than the sentencing judge could have fixed). The *Russo* standard has been held to be a review of “whether the Board’s decision to deny parole was arbitrary or capricious.” *Silmon v. Travis*, 95 N.Y.2d 470, 477, 741 N.E.2d 501, 505, 718 N.Y.S.2d 704, 708 (2000) (holding it was not arbitrary or capricious for the Board to consider a lack of remorse and insight in denying parole). See *Jorge v. Hammock*, 84 A.D.2d 362, 364, 446 N.Y.S.2d 585, 587 (3d Dept. 1982) (holding complete disregard of a sentencing judge’s recommendation in setting a minimum incarceration period was inappropriate and entitled prisoner to a new hearing).

11. N.Y. Penal Law § 70.00(3) (McKinney 2014). If you were sentenced before September 1, 1980, the Parole Board—instead of the sentencing court—will fix your minimum term. See *Schwimmer v. Hammock*, 59 N.Y.2d 636, 637, 449 N.E.2d 1266, 1267, 463 N.Y.S.2d 188, 189 (1983) (holding the Parole Board had the authority to set prisoner’s minimum period of incarceration (MPI) because the law in existence at the time of sentencing did not give the sentencing court the power to set an MPI).

12. N.Y. Penal Law §§ 70.02, 70.04 (McKinney 2014) (effective until Sept. 1, 2015).

13. N.Y. Penal Law §§ 70.70, 70.71 (McKinney 2014).

14. N.Y. Correct. Law § 803(1)(c) (McKinney 2014).

15. N.Y. Correct. Law § 803(1)(d) (McKinney 2014).

But there are three exceptions. First, you may get early parole if you successfully complete a shock incarceration program<sup>16</sup> (described in Part D of this Chapter). Second, you may appear before the Parole Board prior to the expiration of your minimum sentence if you are eligible for “merit time.”<sup>17</sup> Most categories of non-violent felonies qualify for merit time.<sup>18</sup> If you are serving a sentence that qualifies and you have earned merit time, you will appear before the Parole Board for release consideration after you have served five-sixths of your minimum sentence for a determinate sentence.<sup>19</sup> If you are serving an indeterminate sentence for a felony drug offense committed before 2004, you may earn additional merit time and appear before the Parole Board for release consideration after serving two-thirds of your minimum sentence.<sup>20</sup> Third, certain categories of felony drug offenses are eligible for a sentence of parole supervision<sup>21</sup> (described in Part E of this Chapter).

#### D. Shock Incarceration Program

Shock Incarceration is a program under the power of the Department of Correctional Services in which selected eligible prisoners participate in a structured six-month program at a Shock Incarceration facility.<sup>22</sup> Shock Incarceration is a highly structured program that requires daily exercise, a full work day, daily meetings, and substance abuse counseling. Participants are also required to participate in high school equivalency classes through the educational programs offered.<sup>23</sup> Generally, participants who successfully complete the program are issued a Certificate of Earned Eligibility and become eligible for parole release consideration before completing the court-imposed minimum sentence.<sup>24</sup> See Part F(5) of this Chapter for additional information on Certificates of Earned Eligibility.

A prisoner may submit an application to the Shock Incarceration screening committee for permission to participate in the shock incarceration program.<sup>25</sup> Eligible prisoners are also screened to insure that their participation in the program is “consistent with the safety of the community, the welfare of the applicant, and the selection criteria for the program.”<sup>26</sup> Therefore, even if you meet the eligibility criteria for the program, you still may not ultimately be chosen to participate.

#### E. Sentence of Parole Supervision

If you have a history of drug or alcohol addiction, and abuse of that substance has led you to commit illegal acts, you may be given a sentence of parole supervision (also known as a “Willard Sentence” after the Willard Drug Treatment Center). You are eligible for a sentence of parole supervision only if you satisfy the following three requirements:

- (1) You have a history of drug or alcohol addiction that has significantly contributed to your illegal acts,
- (2) A sentence of parole supervision would likely help you become or stay drug-free, and
- (3) A sentence of parole supervision would not risk “public safety or public confidence in the integrity of the criminal justice system.”<sup>27</sup>

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16. N.Y. Correct. Law §§ 865-867 (McKinney 2014); N.Y. Exec. Law 259-i(2)(e) (McKinney 2014).

17. Merit time is time credit given for such actions as good behavior, efficient performance of duties, and success in a treatment program. N.Y. Correct. Law. § 803(1)(d)(ii) (McKinney 2014).

18. N.Y. Correct. Law § 803(1)(d)(ii) (McKinney 2014).

19. N.Y. Correct. Law § 803(1)(d)(iii) (McKinney 2014).

20. N.Y. Correct. Law § 803(1)(d)(iii) (McKinney 2014).

21. N.Y. Penal Law § 70.70(3)(d) (McKinney 2014).

22. If you complete a shock incarceration program, you are eligible to receive a Certificate of Earned Eligibility under Section 805 of N.Y. Corrections Law. N.Y. Correct. Law §§ 805, 867 (4) (McKinney 2014). See Part F(5) of this Chapter for additional information on Certificates of Earned Eligibility.

23. N.Y. Comp. Codes R. & Regs. tit. 7, §1800.6(b).

24. N.Y. Correct. Law § 805 (McKinney 2014).

25. N.Y. Correct. Law § 867(1) (McKinney 2014). To be eligible, you must be under the age of 40 and have been at least 16 years old when you committed the crime for which you are incarcerated. You must be eligible for parole within three years and not have been convicted of a felony with an indeterminate sentence. The commission of certain crimes will also make you ineligible, including but not limited to a violent felony offense, an A-1 felony offense, or rape in the second or third degree. N.Y. Comp. Codes R. & Regs. tit. 7, §1800.4.

26. N.Y. Comp. Codes R. & Regs. tit. 7, §1800.3(c).

27. N.Y. Crim. Proc. Law § 410.91(3) (McKinney 2014); *People v. Denué*, 275 A.D.2d 863, 864, 713 N.Y.S.2d 783, 784 (3d Dept. 2000) (denying petitioner a sentence of parole supervision because he did not show that he had a history of substance dependence that significantly contributed to his criminal conduct or that he was not subject to an undischarged term of imprisonment).

Furthermore, you can only be given a sentence of parole supervision for conviction of certain specified crimes.<sup>28</sup> When the court considers whether to give you a sentence of parole supervision, the prosecutor may either agree with or oppose the sentence, and the court is permitted, but not required, to consider the prosecutor's view.

If you receive a sentence of parole supervision, you will be placed under the supervision of the state DOCCS and will be sent immediately to a reception center for no more than ten days.<sup>29</sup> Once you arrive at the reception center, the law requires that you be given a copy of the conditions of your parole. You will need to acknowledge in writing that you have received a copy of these conditions.<sup>30</sup> Sometime after you leave the reception center, you will be placed in a drug treatment campus for ninety days.<sup>31</sup> While you are at the campus, the DOCCS will assess your needs and develop a personal drug treatment program. In most cases, this program will include help from local community organizations that work with the DOCCS.<sup>32</sup> After you have completed the drug treatment program at the campus, you will be given money, clothes, and transportation from the drug treatment campus to the county where your parole supervision and drug treatment plan will continue.<sup>33</sup>

## F. Parole Release Hearing and Appeals

### 1. Your Right to a Parole Release Hearing

The parole release hearing is an interview where the Parole Board determines whether you should be released from prison before you serve your maximum sentence. You are entitled to a parole release hearing at least one month before the end of your minimum period of incarceration.<sup>34</sup> There are some situations in which you may become eligible for parole before you complete your minimum sentence. You may get early parole if you complete a Shock Incarceration program, or if you are eligible for and earn merit time, or if you serve and successfully complete a sentence of parole supervision.<sup>35</sup> (See Parts D and E of this Chapter for a description of the Shock Incarceration Program and the Sentence of Parole Supervision.) You do not have to file for a parole release hearing; one will be scheduled for you automatically. If you believe your scheduled parole release hearing is past due, you can contact the pre-release center or parole officer at your institution.

### 2. Steps to Take Before the Hearing

The decision to release you on parole is strictly a matter for the Parole Board to decide; there is no statutory or constitutional right to parole release.<sup>36</sup> Nevertheless, there are ways you can improve your chances of being

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28. The specified crimes are listed in N.Y. Crim. Proc. Law § 410.91(5) (McKinney 2011) and include the following: criminal mischief in the third degree as defined in N.Y. Penal Law § 145.05 (McKinney 2010); criminal mischief in the second degree as defined in N.Y. Penal Law § 145.10 (McKinney 2010); grand larceny in the fourth degree as defined in N.Y. Penal Law §§ 155.30(1)–(10) (McKinney 2010); grand larceny in the third degree as defined in N.Y. Penal Law § 155.35 (McKinney 2010) (except where the property consists of one or more firearms, rifles, or shotguns); unauthorized use of a vehicle in the second degree as defined in N.Y. Penal Law § 165.06 (McKinney 2010); criminal possession of stolen property in the fourth degree as defined in N.Y. Penal Law §§ 165.45(1)–(3), (5)–(6) (McKinney 2010); criminal possession of stolen property in the third degree as defined in N.Y. Penal Law § 165.50 (McKinney 2010) (except where the property consists of one or more firearms, rifles, or shotguns); forgery in the second degree as defined in N.Y. Penal Law § 170.10 (McKinney 2010); criminal possession of a forged instrument in the second degree as defined in N.Y. Penal Law § 170.25 (McKinney 2010); unlawfully using slugs in the first degree as defined in N.Y. Penal Law § 170.60 (McKinney 2010); an attempt to commit any of the aforementioned offenses if such attempt constitutes a felony offense; or any class D or class E controlled substance or marijuana felony offense as defined in N.Y. Penal Law §§ 220.00–220.76, 221.00–221.55 (McKinney 2008). You are only eligible if (i) you are a second felony offender who stands convicted of no other felony offense; (ii) you have not previously been convicted of either a violent felony offense as defined in N.Y. Penal Law § 70.02 or a class A or class B felony offense (other than a class B felony offense defined in article 220 of the penal law, which contains a variety of drug offenses); and (iii) you are not subject to an undischarged term of imprisonment. N.Y. Crim. Proc. Law § 410.91(2) (McKinney 2014).

29. N.Y. Crim. Proc. Law § 410.91(1) (McKinney 2014).

30. N.Y. Crim. Proc. Law § 410.91(6) (McKinney 2014).

31. N.Y. Crim. Proc. Law § 410.91(1) (McKinney 2014).

32. N.Y. Crim. Proc. Law § 410.91(6) (McKinney 2014).

33. N.Y. Crim. Proc. Law § 410.91(7) (McKinney 2014).

34. N.Y. Exec. Law § 259-i(2)(a) (McKinney 2014) (effective until Sept. 1, 2015).

35. N.Y. Correct. Law § 805 (McKinney 2014).

36. See, e.g., *Barna v. Travis*, 239 F.3d 169, 171 (2d Cir. 2001) (holding that a prisoner does not have a justifiable expectation of release on parole, and that it is up to the Parole Board to determine prisoner eligibility for parole); *Boothe v. Hammock*, 605 F.2d 661, 664 (2d Cir. 1979) (holding that New York state's statutory scheme of parole did not

released on parole. While you are in prison, the more that you do to get ready for your re-entry into the community, the better your chances become of convincing the Board to release you on parole. However, in recent years, the Parole Board has placed a great deal of importance on the seriousness of the crime when making decisions about prisoners who are put in prison for violent felonies. In addition to the facts and circumstances of the underlying crime, the Parole Board is likely to consider five basic areas:

- (1) *Education*—Did you take any classes while in prison? Those classes might include a GED course, vocational training, or college;
- (2) *Employment*—Did you try to develop any job skills? These could range from making furniture to kitchen work, as long as it is a skill that relates to life and might help with employment outside of prison;
- (3) *Issues That Led to Incarceration*—Can you address the problems that led to your conviction? For example, if you are in on a drug use charge, did you participate in any treatment programs?;
- (4) *Likelihood of Community Reintegration*—Have you had any contact with your family or community? Even if you cannot show family ties like letters or visits, developing a contact with a halfway house or an ex-offender service group will help; and
- (5) *Future Plans and Goals*—You should be prepared to discuss your immediate plans and future goals for your life after release on parole.

In short, your activities while you are in prison affect your chances for parole.

As an eligible parole candidate, you must complete what is known as a parole or release plan before your parole release hearing. This plan will be part of your Inmate Status Report.<sup>37</sup> The Guidelines describe “release plans” as including the “community resources, employment, education and training and support services” that are available to you in prison.<sup>38</sup> One of the most important parts of your parole plan is your plan for employment or education after release. If you are granted parole but have not created a satisfactory plan, your release date will be pushed back until you have made one. If you wait longer than six months after the release hearing to develop a satisfactory plan, you will have to go before the Parole Board again for reconsideration of your status.<sup>39</sup> Therefore, if you are finding it difficult to develop a parole plan, you must get some help as soon as possible. Otherwise, you risk delaying or losing your parole release.

For help in preparing your parole plan, contact the pre-release center or parole officer at your institution. The parole regulations state that the DOCCS should “assist inmates eligible for . . . parole . . . to secure employment, educational or vocational training.”<sup>40</sup> In addition to contacting the pre-release center and/or institutional parole officers, you should use any other contacts you have (like former employers, family, or friends) to get a job while still in prison. For information on employment in New York City, you can contact the New York State Department of Corrections and Community Supervision at (518) 473-9400. The Fortune Society is another good source of support that may lead to possible employment. It offers one-on-one counseling and tutoring. You can write to the Fortune Society at 29-76 Northern Boulevard, Long Island City, NY 11101 or call (212) 691-7554.

Your institutional record is also an important part of your Inmate Status Report. It will list your program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy, and relationships with staff and other prisoners.<sup>41</sup> It is important that this information present a favorable image to the Parole Board. However, while it may be helpful to maintain a good-standing prison

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create a due process entitlement to parole). However, as discussed in Part F(5) of this Chapter, in 1987 New York adopted the Certificate of Earned Eligibility program, which created a presumption in favor of release on parole in certain situations.

37. N.Y. Exec. Law § 259-i(2)(c)(A)(iii) (McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3. New York defines the Inmate Status Report as follows: The Inmate Status Report is prepared by an Institutional Parole Officer and will include information such as: (1) court information on the present offense, the judge’s sentence, etc.; (2) your age, place of birth, occupation, marital status, and other personal characteristics; (3) your legal history (prior offenses); (4) your institutional record, including any disciplinary record, your medical history and involvement in educational and recreational programs; (5) your inmate statement, which includes comments regarding the offense that resulted in your conviction, as well as your comments about your prior record; and (6) your Parole Plan. N.Y. State Dept. of Corr. & Cmty. Supervision, New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision (2010), at 2.19, *available at* [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 24, 2017).

38. N.Y. Exec. Law § 259-i(2)(c)(A)(iii) (McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 9, § 800.3.

39. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3(f).

40. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.1.

41. N.Y. Exec. Law § 259-i(2)(c)(A)(i) (McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3 (a)(1), (b)(1).

record to make a good impression on the Parole Board, it is important to note that good conduct alone does not guarantee parole.<sup>42</sup>

To obtain parole, your record and conduct must show the Parole Board that:

- (1) You “will live and remain at liberty without violating the law,”
- (2) Your release will not harm society, and
- (3) You will not “deprecate” the seriousness of the crime you committed (make the crime seem less serious) and undermine respect for the law.<sup>43</sup>

If you have been issued a Certificate of Earned Eligibility, which is explained in Part F(5) of this Chapter, the Parole Board will apply a lesser standard of review in determining your parole.<sup>44</sup> Nevertheless, it is a good idea to build the strongest record of education, program participation, and work that you can since your activities while in prison directly affect this part of the Inmate Status Report.

If the Parole Board grants parole, some prisoners may be required to find acceptable housing before being released. The Parole Board’s requirements for approved housing may be very challenging (for example, prisoners may be banned from living near a school or a school bus stop, may not be allowed to live alone, or may not be allowed to live in a shelter).<sup>45</sup>

If you are serving a sentence for a non-violent felony, other than those involving manslaughter, homicide, or sexual misconduct, you may be eligible for presumptive release.<sup>46</sup> A presumptive release allows you to be released to parole supervision without appearing before the Parole Board as long you have no serious disciplinary violations and have not brought a frivolous court proceeding while in prison.<sup>47</sup> You must submit an application in order to be considered for presumptive release and should talk with your Correction Counselor for more information on the program application.<sup>48</sup>

### 3. The Parole Release Hearing

A two- or three-member panel of the Parole Board conducts the parole release hearing during visits to each facility.<sup>49</sup> Only one member of the panel will review your parole plan in detail. The other panel members will be present at the interview, but will generally defer to the judgment of the member who read the file. Instead of reading the full report, the other panel members will receive a summary of your parole report. The Parole Board members, the facility parole officer and staff, and a hearing reporter will be present at the release interview. You are not permitted to have an attorney with you at this interview.<sup>50</sup>

During the parole release interview, panel members will ask you questions about:

- (1) Your plans if you are released on parole;
- (2) Your conduct and activities while in prison;
- (3) Your criminal record, including past crimes and time served; and
- (4) The events surrounding the crime for which you are presently incarcerated.

It is important to note that the panel members will consider whether you understand why the crime happened, whether you feel any remorse for the crime, and what you would do differently in the future. You must answer all questions honestly, but be sure to present your side of the story in answering any difficult

42. N.Y. Exec. Law § 259-i(2)(c)(A) (McKinney 2010).

43. N.Y. Exec. Law § 259-i(2)(c)(A) (McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.1(a).

44. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3(c); *see also* N.Y. Correct. Law § 805 (McKinney 2014).

45. *See People ex rel. Travis v. Coombe*, 219 A.D.2d 881, 881–82, 632 N.Y.S.2d 340, 341–42 (4th Dept. 1995) (holding that parole grantee was not entitled to immediate release, since “[n]o residence was located that was acceptable to the Division of Parole”).

46. N.Y. Correct. Law § 806 (McKinney 2014).

47. N.Y. Correct. Law §§ 806(1)(i)–(iii) (McKinney 2014).

48. N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision* (2010), at 2.12, *available at* [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 24, 2017).

49. N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision* (2010), at 2.5, *available at* [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 24, 2017); New York State law also says that the Board of Parole “shall consist of not more than nineteen members appointed by the governor with the advice and consent of the senate.” N.Y. Exec. Law § 259-b(1) (McKinney 2010).

50. N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision* (2010), at 2.6, *available at* [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 24, 2017).

questions. Remember, if your parole is denied and you want to appeal, the basis for any appeal *must* appear in the hearing record. So, you must present all your information and reasons for parole at the interview.

Be sure to bring to your release hearing any documents that would make a good impression on the panel members, such as program certificates, diplomas, or letters of recommendation. These should already be in your parole file, but sometimes institutional authorities forget to file them properly.

The Parole Law *requires* the Parole Board to take into consideration *all* of the following factors in determining early release on parole:

- (1) Your institutional record;
- (2) Your academic achievements;
- (3) Your training or work assignments;
- (4) Any therapy you have had;
- (5) Interpersonal relationships with staff and other prisoners;
- (6) Your performance, if any, in a release program;
- (7) Any release plans involving community resources, education, and training support services;
- (8) Any deportation orders;
- (9) Any written or oral statement of the crime victim;<sup>51</sup>
- (10) The seriousness of the offense for which you are presently incarcerated;<sup>52</sup>
- (11) Recommendations of the sentencing court and district attorney;
- (12) The recommendation of your attorney at trial;
- (13) The pre-sentence probation report;
- (14) Any mitigating and aggravating factors;<sup>53</sup>
- (15) Activities following arrest and prior to conviction;<sup>54</sup> and
- (16) Any prior criminal record.<sup>55</sup>

If the Board fails to consider relevant statutory factors in determining your parole, you may have grounds for appealing the parole decision.<sup>56</sup> However, the Board does not have to give each factor equal weight.<sup>57</sup>

The Board decides whether or not to grant parole either on the day of the hearing or a few days later. Typically, the panel will make a decision immediately after you leave the room. The Parole Board has a large amount of decision-making power in deciding whether or not you are eligible for parole. Beyond the factors listed above, the Parole Board establishes its own guidelines to determine when a prisoner is eligible for parole,<sup>58</sup> and it currently sets a high standard. As the court stated in *Barna v. Travis*, “the New York parole scheme is not one that creates in any prisoner a legitimate expectancy of release.”<sup>59</sup> Even though the Parole

51. The Parole Board will also consider any statements made on the victim’s behalf by a representative.

52. The Parole Board will consider both the type of sentence and the length of the sentence.

53. Mitigating factors are circumstances in your crime that do not excuse the criminal conduct but might make the Board view your crime less harshly—for example, if you had no prior criminal record. Aggravating circumstances are those that might make the Board view your crime more harshly—for example, if your crime affected a large number of people.

54. It is important to effectively use your pre-conviction time (that is, the time following your arrest but before conviction and sentencing), especially if you are out on bail. Seeking employment—or, if you already have a job, keeping a good record at that job—can sometimes help justify a lower sentence and early release on parole.

55. N.Y. Exec. Law § 259-i(1)(a) (McKinney 2010); N.Y. Exec. Law § 259-i(2)(c)(A) (McKinney 2012).

56. *See, e.g., King v. N.Y. State Div. of Parole*, 190 A.D.2d 423, 431, 598 N.Y.S.2d 245, 250 (1st Dept. 1993), *aff’d*, 83 N.Y.2d 788, 632 N.E.2d 1277, 610 N.Y.S.2d 954 (1994) (holding that the Parole Board has a duty “to give fair consideration” to each person who comes before it, and where the record “convincingly demonstrates” that the Board did not fairly consider the proper standards in reaching its decision, courts must intervene); *but see, e.g., Valderrama v. Travis*, 19 A.D.3d 904, 905, 796 N.Y.S.2d 758, 759 (3rd Dept. 2005) (holding that a parole decision made in accordance with the requirements of the statutory guidelines is not subject to further judicial review unless it is affected by irrationality bordering on impropriety).

57. *See Geames v. Travis*, 284 A.D.2d 843, 843, 726 N.Y.S.2d 506, 506 (3d Dept. 2001) (holding the Parole Board does not have to weigh each factor equally; the heavy weight put on crime severity and criminal history was acceptable in this situation); *King v. N.Y. State Div. of Parole*, 190 A.D.2d 423, 431, 598 N.Y.S.2d 245, 250 (1st Dept. 1993), *aff’d*, 83 N.Y.2d 788, 632 N.E.2d 1277, 610 N.Y.S.2d 954 (1994) (holding that although it is not necessary for the Parole Board to refer to every factor or for the board to give each factor equal weight, the Board must consider each factor laid out in the law).

58. N.Y. Exec. Law § 259-c(4) (McKinney 2010).

59. *Barna v. Travis*, 239 F.3d 169, 170–71 (2d Cir. 2001) (holding that denial of parole did not violate the Due Process or *Ex Post Facto* clauses, since petitioners did not have “a legitimate expectancy of release that is grounded in the state’s statutory scheme”).

Board must consider the above factors, the list is only intended as a guide. In recent years the Board has given particular weight to the factors of the seriousness of the crime and past criminal history for individuals in prison for violent felonies.

#### 4. Victim Impact Statement

A victim impact statement is a written statement to the Parole Board by the crime victim or the victim's family, describing the effect of the crime on the victim's life or on his or her family.<sup>60</sup> The victim or the victim's family must submit the statement at least ten business days before your parole hearing.<sup>61</sup> You usually cannot see the victim's (or the victim's family's) statement unless the victim or court authorizes you to do so.<sup>62</sup>

Whether or not there is a victim impact statement in your file, you can ask as many people as possible from your family, your community, and your legal team to write letters to the Parole Board in support of your release. If the letters come to you directly, photocopy them (or ask someone to photocopy them for you) and ask the parole officer at your facility to add them to your file. You should also bring these letters to your pre-parole interview and to the parole hearing itself.

#### 5. Certificate of Earned Eligibility

The "Earned Eligibility Program"<sup>63</sup> was enacted to address the problem of overcrowding in state prisons. Under the program, once you are in custody, you should be assigned a work and treatment program "as soon as practicable."<sup>64</sup> Two months before your minimum term expires, the DOCCS will review your institutional record to determine whether you have complied with your program. If you have successfully participated in this program, DOCCS *may* issue you a "Certificate of Earned Eligibility."<sup>65</sup> Prisoners serving an indeterminate sentence with a minimum term of eight years are not able to receive a Certificate of Earned Eligibility. It is also important to note that even if you successfully complete the program, you may still be denied a Certificate of Earned Eligibility since the decision to issue a Certificate of Earned Eligibility is discretionary.<sup>66</sup> This means that it is entirely up to DOCCS to determine whether to grant you a Certificate of Earned Eligibility and DOCCS is not required to give you one even if you complete the program. A court of law cannot force DOCCS to issue you a Certificate of Earned Eligibility, even if you have completed your treatment program; however, DOCCS cannot arbitrarily (randomly or unreasonably) deny a Certificate of Earned Eligibility. In such instances, a court may review the denial, although it is important to remember that courts often defer to the opinion of DOCCS, except in unusual or extreme circumstances.

If you have a Certificate of Earned Eligibility and have served your minimum period of incarceration, the standard for parole release is easier to meet.<sup>67</sup> First, the Parole Board will not consider whether your release will "deprecate the seriousness of [the] crime," which is the standard the Board uses for prisoners who do not have a Certificate of Earned Eligibility.<sup>68</sup> Second, when you possess a Certificate of Earned Eligibility, the Board presumes you will probably live and remain at liberty without violating the law—which means unless the Board affirmatively finds otherwise, you should get parole.

One month prior to the expiration of your minimum period of incarceration (MPI), you will be interviewed by members of the Board for release consideration.<sup>69</sup> The Parole Board will review:

60. N.Y. Exec. Law § 259-i(2)(c)(A)(v) (McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.4.

61. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.4(b).

62. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.4(e).

63. N.Y. Correct. Law § 805 (McKinney 2014).

64. N.Y. Correct. Law § 805 (McKinney 2014).

65. N.Y. Correct. Law § 805 (McKinney 2014). *See* Klos v. Haskell, 835 F. Supp. 710, 723 (W.D.N.Y. 1993), *aff'd*, 48 F.3d 81 (2d Cir. 1995) (stating the Commissioner and Deputy Commissioner of the Department of Corrections and Community Supervision may exercise "their discretion, without restraint, to remove an inmate from participation in the Certificate of Earned Eligibility program").

66. *See* Frett v. Coughlin, 156 A.D.2d 779, 781, 550 N.Y.S.2d 61, 63 (3d Dept. 1989) ("Successful participation in the program is merely a threshold requirement which activates the Commissioner's discretionary power to issue a Certificate of Earned Eligibility. The statute simply does not create a liberty interest in receiving a Certificate of Earned Eligibility because, even upon successful participation in the program, the Commissioner may deny the certificate.").

67. N.Y. Correct. Law § 805 (McKinney 2014).

68. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.1(a).

69. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3(c).



- (1) The institutional record, including program goals and accomplishments, academic achievements, vocational education training or work assignments, therapy and interactions with staff and inmates;
- (2) Performance, if any, as a participant in a temporary release program;
- (3) Release plans, including community resources, employment, education and training, and support services available to the inmate;
- (4) Any deportation order issued by the federal government against the inmate while in the custody of the Department of Corrections and Community Supervision and any recommendation regarding deportation made by the Commissioner of the Department of Corrections and Community Supervision pursuant to section 147 of the Correction Law;<sup>70</sup>
- (5) Any statement made or submitted to the Board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;
- (6) The length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the Penal Law for a felony defined in article 220 or article 221 of the Penal Law;
- (7) The seriousness of the offense with due consideration to the type of sentence and length of sentence;
- (8) Recommendations of the sentencing court, the district attorney, and the attorney who represented the inmate in connection with the conviction for which the inmate is currently incarcerated;
- (9) The pre-sentence probation report, as well as consideration of any mitigating and aggravating factors and activities following arrest prior to the inmate's current confinement;
- (10) Prior criminal record, including the nature and pattern of the inmate's offenses, adjustment to any previous periods of probation, community supervision, and institutional confinement;
- (11) The most current risk and needs assessment that may have been prepared by the Department of Corrections and Community Supervision; and,
- (12) The most current case plan that may have been prepared by the Department of Corrections and Community Supervision pursuant to section 71-a of the Correction Law.<sup>71</sup>

It is important to note that having a Certificate of Earned Eligibility does not automatically allow you to receive parole.<sup>72</sup> Rather, it “create[s] merely an expectation of parole . . . that deserves due process protection.”<sup>73</sup> As in all cases, you have a right to be heard by the Parole Board, and if you are denied parole, you have a right to be told why you were denied.<sup>74</sup> If a court determines that the Parole Board did not comply with these requirements, you may be entitled to a new hearing.<sup>75</sup>

## 6. Denial of Parole Release

If you are denied parole, within two weeks of your first hearing, the Parole Board must provide you with a detailed written explanation stating the reasons you were denied parole.<sup>76</sup> Within two weeks of your first hearing, the Board will also set a date for reconsideration of your parole release, which must be scheduled within twenty-four months of your first hearing.<sup>77</sup> The twenty-four month notice period begins from the date

70. N.Y. Correction Law Art. 6 § 147 (McKinney 2016).

71. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3(a)(1)–(12). *See, e.g.*, Pike v. N.Y. State Div. of Parole, 188 A.D.2d 602, 603, 591 N.Y.S.2d 495, 496 (2d Dept. 1992) (holding that despite the Department of Correctional Services issuing petitioner a Certificate of Earned Eligibility, “petitioner’s release was incompatible with the welfare of society, and that the petitioner would not remain at liberty without violating the law”); Confoy v. N.Y. State Div. of Parole, 173 A.D.2d 1014, 1015, 569 N.Y.S.2d 846, 847 (3d Dept. 1991) (holding that Parole Board’s denial of parole based on the findings that the “[prisoner] would not remain at liberty without violating the law and that his release would be incompatible with the welfare of society” was supported by the law and evidence).

72. *See* Howard v. N.Y. State Bd. of Parole, 270 A.D.2d 539, 539–40, 704 N.Y.S.2d 326, 327 (3d Dept. 2000) (holding that the fact that the prisoner received a Certificate of Earned Eligibility did not stop parole board from being able to deny him parole release).

73. *People ex rel. Hunter v. Bara*, 144 Misc. 2d 750, 752, 545 N.Y.S.2d 65, 66 (Sup. Ct. Richmond County 1989) (holding that the prisoner only has a liberty interest in the possibility of release on parole which required due process).

74. N.Y. Exec. Law § 259-i(2)(a)(i) (McKinney 2010) (effective until Sept. 1, 2015).

75. *See People ex rel. Hunter v. Bara*, 144 Misc. 2d 750, 752, 545 N.Y.S.2d 65, 67 (Sup. Ct. Richmond County 1989) (“If the Parole Board fails to comply with the statutory due process protection, the parole candidate is entitled to a new hearing rather than a habeas corpus relief . . . . It does not give the petitioner a vested right to release.”).

76. N.Y. Exec. Law § 259-i(2)(a)(i) (McKinney 2012) (effective until Sept. 1, 2015).

77. N.Y. Exec. Law § 259-i(2)(a)(i) (McKinney 2012) (effective until Sept. 1, 2015); N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3(d). *See* N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1 (appeals procedure).

of your last parole hearing.<sup>78</sup> Before the new hearing, you should (1) prepare a new parole plan; and (2) try to strengthen the parts of your record that the Board identified as reasons for denying parole. If you are denied parole more than once, you must continue to follow this procedure. If your parole is *revoked* (taken away), there is no time limit for rescheduling a parole release hearing. So, if your parole is revoked and you are returned to prison, the Parole Board may order that you be held for a period longer than twenty-four months before being given another parole hearing.<sup>79</sup> See Part H of this Chapter for more information on parole revocation.

### 7. Appealing Denial of Parole Release to Appeals Unit

You can appeal a denial of parole. This appeal is an administrative procedure conducted through the Appeals Unit of the Parole Board.<sup>80</sup> You have the right to an attorney when you appeal to the Parole Board. If you cannot afford an attorney, one will be assigned to you.<sup>81</sup> You can appeal a release proceeding on one or more of the following grounds:

- (1) The proceeding and/or determination violated lawful procedure, was influenced by an error of law, or was “arbitrary, capricious or otherwise unlawful;”<sup>82</sup>
- (2) A Board member or members relied on mistaken or irrelevant information in making a decision, and this can be *shown in the record* of the hearing; or
- (3) The determination was excessive.<sup>83</sup>

If you believe you have grounds for an appeal, immediately file a “notice of appeal,” which should be included in the notification of denial. Then request an attorney if you do not already have one. You must file a notice of appeal within thirty days of receiving the notification of denial; otherwise, you will have waived your right to an appeal.<sup>84</sup>

You should begin to prepare for your appeal by obtaining the parole release hearing minutes from: New York State Division of Parole, 97 Central Avenue, Albany, NY 12206.<sup>85</sup>

You will have to pay for the parole release hearing minutes (the record of the proceeding). If you have an attorney and cannot afford to pay for the minutes, your attorney can get them for you. You may also make a written request for “[a]ll other nonconfidential, discoverable documents relating to the appeal.”<sup>86</sup> So, if you believe there is important information in your parole records to support your appeal, you may request permission to access it. However, you will not be given unrestricted access. Access to your parole records will be limited in the following ways:

- (1) You can only gain access to your case record at certain times—just before a scheduled appearance before the Board or a hearing officer, or prior to making an administrative appeal;<sup>87</sup>
- (2) You can only access parts of the case record that the Board or the hearing officer will consider;

78. N.Y. Exec. Law § 259-i(2)(a)(i) (McKinney 2012) (effective until Sept. 1, 2015).

79. *See People ex rel. Matthews v. New York State Div. of Parole*, 58 N.Y.2d 196, 205, 447 N.E.2d 689, 693, 460 N.Y.S.2d 746, 750 (1983) (holding that under this particular record, denial of adjournment (delay) of parole revocation hearing did not violate due process).

80. The appeals procedure is the same for Parole Board decisions regarding a minimum period of imprisonment (MPI), parole release, parole rescission, and final revocation. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1(a).

81. N.Y. Exec. Law § 259-i(4)(b) (McKinney 2012). You should write to the County Clerk for the county in which your prison is located and ask the Clerk to assign you a lawyer for the administrative appeal.

82. “Arbitrary, capricious or otherwise unlawful” means the Parole Board’s decision to deny parole was not reasonable and shows a clear error in judgment by the Board.

83. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.3(a). An excessive determination is a decision that is not extreme or unnecessary based on the information and evidence available to the Parole Board.

84. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1(b).

85. N.Y. Exec. Law § 259-i(6)(a) (McKinney 2012) states that “[t]he board shall provide for the making of a verbatim record of each parole release interview, except where a decision is made to release the inmate to parole supervision, and . . . except when the decision of the presiding officer after such hearings result in a dismissal of all charged violations of parole, conditional release or post release supervision.”

86. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1(e). Nonconfidential, discoverable documents are materials that you are not restricted from seeing.

87. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(1).

- (3) You will not be given access to diagnostic opinions that could seriously disrupt your institutional program,<sup>88</sup> information obtained from a confidential source, or information that might harm another person;<sup>89</sup> and
- (4) The DOCCS will not grant access to reports or materials from other agencies.<sup>90</sup> You will only be allowed to review the record at the prison or at the area parole office that serves the prison.<sup>91</sup>

### 8. If Your Administrative Appeal is Denied

If you make an administrative appeal and are denied relief and want to seek a court to review the decision, you can begin an Article 78 proceeding.<sup>92</sup> Remember, as discussed in Chapter 22 of the *JLM*, “How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules,” you must serve (properly deliver) your Article 78 petition to each respondent and the New York Attorney General within four months of the date when the Appeals Unit decision becomes final.<sup>93</sup> This four-month limit is called the “statute of limitations.”

If you pursue an Article 78 review, it is important to note that it is difficult to get a court to reverse the Parole Board’s decision. The Parole Board’s decisions are discretionary (left to the Parole Board’s choice) and are not subject to review by courts if the decision is made in accordance with what the law requires.<sup>94</sup> There are two ways for a prisoner to get a reversal of the Board’s decision. A prisoner must make a “convincing showing” that either (1) the Board did not consider the required factors or considered erroneous information,<sup>95</sup> or (2) acted “irrationally bordering on impropriety”<sup>96</sup> in reaching its decision.<sup>97</sup> The Parole Board may not consider the following factors in deciding whether to grant parole: “penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place.”<sup>98</sup> Thus, if you are denied parole on the basis of one of those factors, you may have a right to a new hearing.<sup>99</sup> In addition, the Parole Board may not consider

88. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(2)(i)(a)(1).

89. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(2)(i)(a).

90. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(2)(i)(b).

91. N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5(c)(6).

92. See Part C(6) of Chapter 5 of the *JLM* and Chapter 22 of the *JLM* for discussions of Article 78 proceedings.

93. N.Y. C.P.L.R. 217 (McKinney 2003).

94. N.Y. Exec. Law § 259-i(5) (McKinney 2012). See *Davis v. N.Y. State Div. of Parole*, 114 A.D.2d 412, 412, 494 N.Y.S.2d 136, 137 (2d Dept. 1985) (“[T]he division of parole’s release decisions are discretionary, and if made in accordance with the statutory requirements, such determinations are not subject to judicial review.”); *Ristau v. Hammock*, 103 A.D.2d 944, 945, 479 N.Y.S.2d 760, 761 (3d Dept. 1984) (requiring a showing of “irrationality bordering on impropriety to warrant intervention by the courts” in a Parole Board’s release decision, which is discretionary).

95. *E.g.*, *Rodriguez v. Greenfield*, No. 99-0058, 7 Fed. Appx. 42, 45, 2001 U.S. App. WEST 5093, at \*6 (2d Cir. Mar. 23, 2001) (*unpublished*) (reversing the Parole Commission’s decision to deny parole because the prisoner’s record was incomplete, due to missing information on program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy, and interpersonal relationships with staff and prisoners); *Plevy v. Travis*, 17 A.D.3d 879, 880, 793 N.Y.S.2d 262, 263 (3d Dept. 2005) (reversing denial of parole and ordering a new parole hearing because the Parole Board improperly considered the petitioner’s prior violation of parole, which had been dismissed at the time, when determining denial of parole); *Lewis v. Travis*, 9 A.D.3d 800, 801, 780 N.Y.S.2d 243, 245 (3d Dept. 2004) (reversing denial of parole and granting a new parole hearing due to the Parole Board’s reliance on incorrect information about the petitioner’s conviction when making its determination); *Edge v. Hammock*, 80 A.D.2d 953, 945, 438 N.Y.S.2d 38, 39 (3d Dept. 1981) (reversing Parole Board’s determination of minimum period of imprisonment and ordering a new hearing because the Parole Board based its determination on crimes the petitioner had not been convicted of).

96. “Irrationally bordering on impropriety” means the actions of the Board were not only unreasonable but in some circumstances may be considered improper and incorrect.

97. Parole Board Decision is Deemed Prejudicial to Murder Convict, N.Y.L.J., Feb. 17, 1994, at 25 (citing *Quartararo v. N.Y. State Div. of Parole*, 224 A.D.2d 266, N.Y.S.2d 721 (1st Dept. 1996)); see also *Monroe v. Thigpen*, 932 F.2d 1437, 1442 (11th Cir. 1991) (noting that “[a] parole board may not engage in ‘flagrant or unauthorized action’” by knowingly relying on false information); *Russo v. N.Y. State Bd. of Parole*, 50 N.Y.2d 69, 77, 405 N.E.2d 225, 229, 427 N.Y.S.2d 982, 986 (1980) (rejecting assertion that parole board acted arbitrarily in setting minimum period of imprisonment at maximum sentence).

98. *King v. N.Y. State Div. of Parole*, 83 N.Y.2d 788, 791, 632 N.E.2d 1277, 1278, 610 N.Y.S.2d 954, 955 (1994) (requiring a new hearing before a different panel after finding prisoner was not given a proper parole hearing because “one of the Commissioners considered factors outside the scope of the applicable statute”).

99. See *King v. N.Y. State Div. of Parole*, 83 N.Y.2d 788, 791, 632 N.E.2d 1277, 1278, 610 N.Y.S.2d 954, 955 (1994).

“illegally seized evidence which has already been suppressed in a criminal action,” or “public pressure” in determining whether or not to grant a prisoner parole.<sup>100</sup> The Parole Board may not deny parole on the grounds that the “best kind of treatment” for your emotional and physical problems would be to remain in prison.<sup>101</sup> Finally, the Parole Board is required to consider any recommendations made by the sentencing court, and a reviewing court may order reversal and reconsideration if the Board fails to do so.<sup>102</sup>

Again, despite these limited examples of court reversals, it is important to remember that courts generally defer to Parole Board decisions. Even in cases where the Parole Board based its decision to deny parole on factors other than those specified by the legislature, courts have upheld the decision, since the Parole Board may deny parole where “it is incompatible with the welfare of society.”<sup>103</sup> Thus, the Parole Board may consider additional factors (such as lack of remorse or insight and acceptance of responsibility) to determine whether your release is compatible with the welfare of society.

### 9. Rescission (Reconsideration of Grant of Parole)

Even if your parole release interview goes well and you receive a parole release date, the Parole Board may be able to reconsider and change its decision before your release date. The New York State Department of Corrections and Community Supervision has established procedures for reconsideration of parole.<sup>104</sup>

The senior parole officer, or the parole officer in charge of a facility, may temporarily suspend a release date if he realizes that there may be a basis for Board reconsideration.<sup>105</sup> There are two general categories of events that might cause temporary suspension. The first is the discovery of “significant information which existed” or “significant misbehavior which occurred” *before* the parole release decision that was not known by the Board.<sup>106</sup> The second is an event that occurred *after* the Board’s decision to grant release.<sup>107</sup> The basis for Board reconsideration may include, but is not limited to, one or more of the following circumstances:

- (1) Significant misbehavior or a major violation of facility rules,
- (2) An escape or removal from temporary release,
- (3) A prisoner’s commitment to a psychiatric treatment center,
- (4) Imposition of an additional definite sentence,
- (5) Imposition of an additional indeterminate sentence, and

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100. Parole Board Decision is Deemed Prejudicial to Murder Convict, N.Y.L.J., Feb. 17, 1994, at 25. In *Quartararo v. N.Y. State Div. of Parole*, 224 A.D.2d 266, 637 N.Y.S.2d 721 (1st Dept. 1996), the court held that the Parole Board “improperly considered factors outside the scope of Executive Law § 259-i and in violation of a prior court order” and ordered a new hearing in front of a different panel. The court held that it was improper for the Parole Board to consider press accounts of the petitioner’s crime, unchallenged *ex parte* allegations for removal from a work release program, and photographs of the victim in reviewing the petitioner’s application for parole. The court ultimately exercised its broad remedial powers and granted Quartararo’s release on parole: “On three separate occasions . . . [the Board could] not or [would] not follow its own regulations, statutory mandate, or the lawful order of this court . . . . The Board has failed to support any of its determinations by adequate evidence, has misconstrued its role, power and duty, prejudged each of petitioner’s parole applications, and applied the wrong legal standard.” *Matter of Quartararo* (N.Y. State Division of Parole), N.Y.L.J., Aug. 18, 1995, at 23.

101. *People ex rel. Smith v. N.Y. State Bd. of Parole*, 91 Misc. 2d 486, 487, 398 N.Y.S.2d 12, 12 (Sup. Ct. Dutchess County 1976) (holding that petitioner’s parole status be reinstated because the Parole Board does not have “the duty of determining what would be the best kind of treatment for petitioner’s emotional and physical problems”).

102. *E.g.*, *Standley v. N.Y. State Div. of Parole*, 34 A.D.3d 1169, 1170, 825 N.Y.S.2d 568, 569 (3d Dept. 2006) (reversing denial of parole because the Parole Board “repeatedly failed to consider sentencing minutes and recommendations of the sentencing court” and remanding for a reconsideration that includes these factors); *McLaurin v. N.Y. State Bd. of Parole*, 27 A.D.3d 565, 565, 812 N.Y.S.2d 122, 123 (2d Dept. 2006) (affirming decision ordering Division of Parole to obtain prisoner’s resentencing minutes and have a new hearing); *Edwards v. Travis*, 304 A.D.2d 576, 576, 758 N.Y.S.2d 121, 122 (2d Dept. 2003) (Parole Division’s failure to consider sentencing judge’s recommendation warranted judicial intervention). *But see* *Porter v. Alexander*, 63 A.D.3d 945, 947, 881 N.Y.S.2d 157, 159 (2d Dept. 2009) (holding that although the sentencing court’s minutes were missing from the court file, this did not require a new hearing because there was no indication that the sentencing court made a positive recommendation regarding parole).

103. *Silmon v. Travis*, 95 N.Y.2d 470, 477–78, 741 N.E.2d 501, 505–06, 718 N.Y.S.2d 704, 708–09 (2000) (holding that a decision by the Parole Board to deny parole for a prisoner who pleaded guilty to murdering his wife but denied culpability was not arbitrary or capricious).

104. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5.

105. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(1).

106. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(2)(i).

107. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(2)(ii).

(6) Any major changes to the sixteen factors listed in Part F(3) of this Chapter.<sup>108</sup>

This list is not exclusive. For example, in a 2005 case, *Pugh v. Parole*, parole was rescinded (taken back) because the victims' statements were not considered before granting parole. Once the victims complained, the Board considered their statements.<sup>109</sup> The parole officer should notify you in writing of the suspension "as soon as practicable," investigate the circumstances leading to the suspension, and prepare a "rescission report" for a Board member.<sup>110</sup> The Board member will then review the report and decide either to reinstate your release date or to hold a rescission hearing. A rescission hearing is a hearing held to determine if after being granted but before parole release officially occurs, parole will be taken back or not. If a rescission hearing is ordered, you will receive a copy of the rescission report and a notice of the rescission hearing at least seven days before the hearing.<sup>111</sup> The notice must state:

- (1) The date and place of the hearing;
- (2) The specific allegations that will be considered at the hearing; and
- (3) A description of your rights at the final hearing, like your right to counsel, to testify, to present witnesses and introduce evidence, and to cross-examine most of the government's witnesses.<sup>112</sup>

There is no specific time limit, but the rescission hearing must be scheduled to take place within a "reasonable time after the board orders a hearing."<sup>113</sup> You have the right to be represented by a lawyer at a rescission hearing, but there is no requirement that a lawyer be appointed to you.<sup>114</sup> You have the right "to appear and speak on [your] own behalf; to present witnesses and introduce documentary evidence; and to confront and cross-examine adverse witnesses."<sup>115</sup> But you cannot force witnesses to appear if the members of the Board of Parole conducting the hearing find good cause in the record for a witness not to appear.<sup>116</sup>

A majority of the Board members at the hearing (that is, at least two of the three members) must find there is substantial evidence presented at the hearing to support a decision to rescind parole.<sup>117</sup> In general, if there was enough evidence to find you guilty of a violation of facility rules at the Superintendent's Hearing, there is probably enough evidence to uphold parole rescission.<sup>118</sup> The Parole Board will then rescind the release date and either set a new date for release consideration for not more than twenty-four months from the date of the original release interview, or set a new release date.<sup>119</sup> If the majority of the Parole Board does not believe there is enough evidence to support taking back parole, it will cancel the temporary suspension and restore the original release date. If that date has passed, the Board will set a new one for as soon as practicable.<sup>120</sup> The appeal process for rescission is the same as the process for appealing parole denial.<sup>121</sup>

It is unclear whether rescission of parole involves a protected "liberty interest" that invokes due process protection.<sup>122</sup> The Supreme Court held in *Jago v. Van Curen* that a prisoner, who had been granted a parole date that was later revoked before his release without notice or a hearing, did *not* have a liberty interest requiring due process protection.<sup>123</sup> In *Lanier v. Fair*,<sup>124</sup> the First Circuit noted that *Van Curen* involved a

108. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(2)(ii)(a)–(7).

109. *Pugh v. N.Y. State Bd. of Parole*, 19 A.D.3d 991, 993, 798 N.Y.S.2d 182, 184 (3d Dept. 2005) (holding that victim impact statements, which had not been available before, were substantial enough evidence to justify rescinding petitioner's parole).

110. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(3).

111. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(5).

112. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(5)(i)–(iii).

113. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(c)(1).

114. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(5)(iii)(a).

115. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(5)(iii)(b)–(c).

116. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(b)(5)(iii)(c).

117. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(d)(1).

118. *Brooks v. Travis*, 19 A.D.3d 901, 901–02, 797 N.Y.S.2d 183, 184 (3d Dept. 2005) (holding that petitioner's guilty plea to an offense in a misbehavior report was enough evidence to show a significant misbehavior for the purpose of rescinding parole).

119. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(d)(1)(i)–(ii).

120. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.5(d)(2).

121. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1.

122. For a discussion of due process and "liberty interest," see Parts B and C of Chapter 18 of the *JLM*.

123. *Jago v. Van Curen*, 454 U.S. 14, 17, 102 S. Ct. 31, 34, 70 L. Ed. 2d 13, 17 (1981).

124. *Lanier v. Fair*, 876 F.2d 243, 251 (1st Cir. 1989).

state law that gave the Parole Board complete power in determining its parole policies. Thus, in that particular instance, the law did not create a liberty interest. But other courts have found that you have a liberty interest when your parole is rescinded, and that you deserve due process protection in those cases.<sup>125</sup> For example, when a state law uses language that makes parole consideration mandatory, some courts have found that this language creates an “expectation of parole” that constitutes a liberty interest protected by the U.S. Constitution.<sup>126</sup> Also, some courts have decided that when a parole board limits its rescission authority by its own regulations, it creates a liberty interest that requires due process protection.<sup>127</sup> Thus, it is possible that since the New York State DOCCS has established procedures for the reconsideration of parole, it has also created a liberty interest in parole that deserves due process protection. This issue has not yet been litigated.

## G. Release on Parole

### 1. Release Procedures

If you are granted parole release, the first step will be completion and approval of your parole plan. Upon completion and approval of your parole plan, you will be given a “Conditions of Release” form to sign, and will be assigned a parole officer.<sup>128</sup> If you are approved for parole release prior to having an approved employment and residence program, you will be placed on “open date” status. If you do not have an approved plan within six months of receiving an “open date” program, you must reappear before the Board.<sup>129</sup>

If you were sentenced to a determinate sentence for a felony sex offense, a violent felony or a felony drug offense, the law requires that you serve a period of post-release supervision.<sup>130</sup> The additional post-release supervision for a felony sex offense may be up to twenty-five years and for a violent felony or a felony drug offense may last up to five years, depending on the type of offense for which you were imprisoned.<sup>131</sup> The sentencing court retains the discretion to designate a lesser term depending on the nature of the crime that resulted in your conviction.<sup>132</sup> If your sentence requires post-release supervision, conduct further research at your facility’s library or online, as this Section provides only a general overview of the law and its effects.

### 2. Supervision of Parole

After you are placed on parole, you will remain under the supervision of the Department of Corrections and Community Supervision until the end of your maximum sentence, the end of your parole supervision (which may be granted early by the Parole Board), or your return to prison.<sup>133</sup> Be sure you completely understand your release conditions, including any special conditions imposed by the parole officer or the Parole Board. Failure to follow any parole release requirement could result in a violation, which might trigger parole

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125. *See, eg.*, *Watson v. DiSabato*, 933 F. Supp. 390, 392 (D.N.J. 1996) (holding that New Jersey’s parole statute creates a sufficient expectation of parole eligibility to give rise to a liberty interest); *Harper v. Young*, 64 F.3d 563, 564–65 (10th Cir. 1995) (“[P]rogram participation is sufficiently similar to parole or probation to merit protection by the Due Process Clause itself.”).

126. *See, e.g.*, *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1040 (S.D.N.Y. 1995) (holding that there is a state-created limited protected liberty interest in New York parole proceedings, extending as far as a prisoner’s rights to be heard and to know reasons for parole denial); *Wilson v. Kelkhoff*, 86 F.3d 1438, 1446 (7th Cir. 1996) (holding that Illinois’s parole statute provides for protectable liberty interest in release for most prisoners). *But see Allison v. Kyle*, 66 F.3d 71, 73–74 (5th Cir. 1995) (holding that Texas’ parole statute does not create a liberty interest in parole that is entitled to due process protection); *Hamm v. Latessa*, 72 F.3d 947, 955 (1st Cir. 1995) (finding no state-created liberty interest in parole for a parole proceeding governed by Massachusetts state law).

127. *See Green v. McCall*, 822 F.2d 284, 287 (2d Cir. 1987) (holding that “a parole grantee has a protectable liberty interest that entitles him to due process in . . . parole rescission hearings” when the parole commission had limited rescission authority); *Ellard v. Ala. Bd. of Pardons & Paroles*, 824 F.2d 937, 943–44 (11th Cir. 1987) (“In view of the statutory restrictions on the authority of the Parole Board to revoke a parole, we conclude that [parole grantee] had a constitutionally protected liberty interest.”).

128. N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.2.

129. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.3(f); N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision* (2010), at 14, *available at* [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 24, 2017).

130. N.Y. Penal Law § 70.45(2) (McKinney 2011).

131. N.Y. Penal Law §§ 70.45(2), 70.45(2-a) (McKinney 2011).

132. N.Y. Penal Law §§ 70.45(2), 70.45(2-a) (McKinney 2011).

133. N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.1(a); N.Y. Exec. Law § 259-j(1) (McKinney 2011).

revocation proceedings. If you have any questions about the terms of your release or what type of activity is prohibited, ask your parole officer to explain.<sup>134</sup>

It is very important to develop a good working relationship with your parole officer, since he will be primarily responsible for determining your ability to serve the remainder of your sentence outside of prison. In addition, your parole officer can serve as a crucial resource to assist you in many ways, such as directing you to social service programs or emergency hotlines. Cooperate with your parole officer, but you should know that your interactions are not confidential. *Statements that you make about your activities that might be considered parole violations could be deemed confessions or admissions, and these statements could be used against you in parole revocation proceedings.*<sup>135</sup> However, if evidence is improperly obtained by your parole officer, this evidence may not be used against you in a criminal prosecution even if the same evidence is admissible at your parole revocation hearing.<sup>136</sup>

There are several important conditions of release you must follow carefully. Failure to do so might result in a violation of your parole, which could trigger parole revocation proceedings. The conditions of release are:

- (1) Within twenty-four hours of your release, you must report directly to your designated area of release and file an *arrival report* with the office of the DOCCS;
- (2) You must keep any appointments with your parole officer and complete any required written reports;
- (3) You must not leave the state or any area defined in your “Conditions of Release” plan without permission;
- (4) You must let your parole officer visit your home and work and inspect your property. You must immediately tell your parole officer of any change of address or employment status;
- (5) You must reply “promptly, fully, and truthfully” to any communication from your parole officer or a representative of the DOCCS;
- (6) You must advise your parole officer of any new arrest immediately. Even if the charges in the new arrest are dropped, failure to report an arrest can be a violation of your parole;
- (7) You may not associate with people who have criminal records;
- (8) You may not violate a law that has prison time as a possible penalty, and you may not threaten the safety of yourself or others;
- (9) You may not own, possess, or purchase any kind of firearm or dangerous knife without written permission from your parole officer. Other prohibited items include razors, stilettos, or imitation pistols, or any instrument that could easily cause physical injury without a satisfactory explanation for having the item; and
- (10) You may not use or possess any controlled substance or drug paraphernalia without medical authorization.<sup>137</sup>

Other special conditions of parole may be imposed based on the nature of the underlying criminal conviction. Parole conditions may be imposed by a member of the Board of Parole, the DOCCS, or a parole officer.<sup>138</sup> Furthermore, the DOCCS has special guidelines for sex offenders, which may include residency restrictions and curfews.<sup>139</sup> In practice, this means it may be very difficult to qualify for the conditions of parole, as you may be required to live in a place not near a school or a school bus stop, and you may be

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134. *See generally* N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision* (2010), at 17–27, available at [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 24, 2017).

135. *See, e.g.,* *People ex rel. King v. N.Y. State Bd. of Parole*, 65 A.D.2d 465, 468–69, 412 N.Y.S.2d 138, 140–41 (1st Dept. 1979) (holding that admission to parole officer of possession of heroin was admissible in a parole revocation hearing, even though evidence of heroin was suppressed in court proceeding because it had been illegally seized).

136. *See, e.g.,* *People ex rel. King v. N.Y. State Bd. of Parole*, 65 A.D.2d 465, 468, 412 N.Y.S.2d 138 (1979) (1st Dept. 1979) (“We note at this juncture that a parole revocation hearing is not a stage of a criminal prosecution, and the standards applied to the former do not carry over to the latter.”).

137. The preceding release conditions are listed in N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.2(a)–(k).

138. *Dickman v. Trietley*, 268 A.D.2d 914, 916, 702 N.Y.S.2d 449, 451 (3d Dept. 2000) (holding that a parolee’s field parole officer was authorized to impose the parole condition prohibiting the parolee from residing with a woman the parolee had never met, since restriction was rational and violated no statutory requirement).

139. *See, e.g.,* *Monroe v. Travis*, 280 A.D.2d 675, 676, 721 N.Y.S.2d 377, 378 (2d Dept. 2001) (holding that Parole Division could require sex offender to secure approved housing before granting his request of conditional release); *Billups v. N.Y. State Div. of Parole*, 18 A.D.3d 1085, 1085, 795 N.Y.S.2d 408, 409 (3d Dept. 2005) (holding that Parole Board’s requirement that prisoner find suitable residence as a condition of prisoner’s parole release was rational, because prisoner had a history of violent conduct and sexual offenses).

prohibited from living with a minor. For a discussion of special conditions that are often imposed on parolees convicted of sex offenses, see Chapter 36 of the *JLM*, “Special Considerations for Sex Offenders.”

If you are having any trouble with your parole officer, contact the parole officer’s supervisor.

### 3. Your Rights While on Parole

Your parole officer has a fair amount of discretion in supervising you and evaluating possible parole violations. When you sign your “Conditions of Release” form, you give “advance consent” to certain parole officer conduct that might be unconstitutional in other contexts. For example, your parole officer may search you and seize property without a warrant and without probable cause. He or she may visit your home frequently to make sure you still live there.<sup>140</sup> Your parole officer may also visit your place of employment.<sup>141</sup>

Since you are still considered to be in the constructive custody of the state, you—unlike an ordinary citizen—are not entitled to full constitutional protection against infringement of your rights. There has been some litigation on the extent of privacy and other rights that you keep as a parolee. Any searches must be knowing and voluntary, reasonably related to the rehabilitation goal, and performed by a parole officer in his or her duty to monitor your rehabilitation.<sup>142</sup> Since you usually must consent to searches at the time of parole, the knowing and voluntary requirement is met.<sup>143</sup> Furthermore, it is unlikely that a court will find the other two requirements have not been met.<sup>144</sup> For example, courts have held that you may be required to give blood and have your DNA kept on file in a data bank as part of a legal search.<sup>145</sup>

### 4. Special Parole

Special parole is different from regular parole. Special parole was created especially for drug offenses. It was repealed in 1984 but still covers crimes committed before November 1, 1987.<sup>146</sup> Special parole follows a prison term and is imposed by the sentencing judge. Regular or traditional parole means release before the end of a prison term and is imposed by the Parole Board. If you violate the conditions of special parole you must serve the remainder of the special parole term in prison. After serving the remainder of your special parole term, the Parole Commission may impose a new term of imprisonment. Following your imprisonment, the Parole Commission has the right to impose a term of traditional parole.<sup>147</sup> The Parole Commission may also re-impose another term of special parole after revoking a term of special parole.<sup>148</sup>

140. See N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision* (2010), at 23, available at [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 24, 2017).

141. N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.2(d). If you are worried that your parole officer visiting your job might be a problem, advise your parole officer about this. N.Y. State Dept. of Corr. & Cmty. Supervision, *New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision* (2010), at 23, available at [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 24, 2017).

142. *People v. Hale*, 93 N.Y.2d 454, 457, 714 N.E.2d 861, 862, 692 N.Y.S.2d 649, 650 (N.Y. 1999) (holding that a parole officer’s search of the home of a parolee suspected of dealing drugs did not violate his constitutional rights when parolee had agreed to searches for illegal drugs as a condition of parole).

143. N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.2(d).

144. *But see People v. Tony*, 30 Misc. 3d 867, 874–75, 914 N.Y.S.2d 585, 592 (N.Y. Sup. Ct. 2010) (holding that where a parole officer had no reason to suspect petitioner of a parole violation and searched his residence, the firearm located at the residence during the search would not be admissible in evidence because the search was not “rationally and reasonably related” to the parole officer’s duties).

145. N.Y. Exec. Law § 995-c(3) (McKinney 2012); *Kellogg v. Travis*, 188 Misc. 2d 164, 167–68, 728 N.Y.S.2d 645, 647–48 (N.Y. Sup. Ct. 2001) (holding N.Y. Exec. Law § 995-c is constitutional and withdrawal of a parolee’s blood does not constitute an illegal search and seizure, even though less invasive means of getting a DNA sample exist).

146. 21 U.S.C. § 841(c) (repealed 1984). See also, *Strong v. U.S. Parole Comm’n*, 141 F.3d 429, 431 (2d Cir. 1998) (“Although [21 U.S.C. § 841(c)] was repealed by the Sentence Reform Act of 1984, it still governs convictions for offenses committed before November 1, 1987”), *abrogated on other grounds by Rich v. Maranville*, 369 F.3d 83 (2d Cir. 2004)).

147. *United States v. Caraballo*, No. 96 Civ. 6915 (KTD), 86 Cr. 336 (KTD), 2000 U.S. Dist. LEXIS 499, at \*8, 2000 WL 48878 at \*3 (S.D.N.Y. Jan. 20, 2000) (*unpublished*) (holding that the Parole Commission can re-impose a term of regular parole on a prisoner who violated special parole and was imprisoned for the remaining period of his special parole).

148. *Rich v. Maranville*, 369 F.3d 83, 89–90 (2d Cir. 2004) (holding that “when special parole is revoked that term is suspended and continues to exist. The Commission thus creates nothing when it re-imposes that court-created term of special parole after the revocation and incarceration”).



## H. Revocation of Your Parole (Taking Away Your Parole)

### 1. How and Why Parole Revocation Begins

If you do not follow the terms of your parole release, you may have to return to prison to serve the rest of your sentence. In order for the Parole Board to revoke your parole, you must have violated a condition of parole “in an important respect.”<sup>149</sup> This standard, however, is often readily satisfied by a direct violation of one of the explicit conditions of parole, such as not making curfew<sup>150</sup> or being in an explicitly prohibited area.<sup>151</sup> Decisions by the Parole Division to revoke parole may only be reviewed by a court to determine whether the Parole Board followed the proper procedural rules. The court cannot make its own determination about the truth of your reasons for violating parole.<sup>152</sup> Courts usually uphold the Parole Commission’s decisions. If your parole officer has “reasonable cause to believe that [you have] lapsed into criminal ways, company, or [have] violated one or more of the conditions of [your] release in an important respect,”<sup>153</sup> he or she may report such conduct to a member of the Parole Board or a designated officer, who may then secure a warrant for retaking and temporary detention.<sup>154</sup> A parole violation is called a “delinquency.” If it is later proven that you violated your parole, your parole will be revoked going back to the date of this delinquency.<sup>155</sup> So it is important to know exactly when you allegedly violated your parole since you will be responsible to serve the prison time dating back to the delinquency date if your parole is revoked. You will, however, be credited for time spent on parole prior to the delinquency date.<sup>156</sup> If your parole is being revoked, you may contact the Legal Aid Society’s Parole Revocation Defense Unit at 199 Water Street, 5th Floor, New York, NY 10038 (phone (212) 577-3300).

If you are being held on a parole warrant, you are not entitled to bail or release until the parole warrant is lifted.<sup>157</sup> If you are being detained on other charges (which may serve later as the basis for parole revocation), and bail is set on those charges, you still cannot be released while the parole warrant is pending.

In *Morrissey v. Brewer*, the U.S. Supreme Court ruled that a paroled convict has a liberty interest protected by due process. This means that the revocation of parole release and re-incarceration must be determined in accordance with due process.<sup>158</sup> New York State’s parole law provides for two due process hearings: preliminary and final. Within three days of the issuance of a warrant for your retaking, you must receive written notice of what conditions you have violated and the date and location of the preliminary parole revocation hearing.<sup>159</sup> The notice shall be given within three days after the execution of a warrant for retaking

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149. N.Y. Exec. Law § 259-i(3)(c)(iv) (McKinney 2009); *People ex rel. Korn v. N.Y. State Div. of Parole*, 274 A.D.2d 439, 440, 710 N.Y.S.2d 124, 125 (2d Dept. 2000) (stating that a violation of a “substantial condition” of parole is sufficient to have parole revoked).

150. *See People ex rel. Korn v. N.Y. State Div. of Parole*, 274 A.D.2d 439, 440, 710 N.Y.S.2d 124, 125 (2d Dept. 2000) (holding that a prisoner violated a “substantial condition” of his parole by missing his curfew without adequately explaining this violation, and this was a reasonable ground to support revoking prisoner’s parole).

151. *Bellamy v. N.Y. State Div. of Parole*, 274 A.D.2d 871, 872, 711 N.Y.S.2d 596, 597 (3d Dept. 2000) (holding that revocation of parole was justified where parolee was found on a street that he was twice told not to enter as a special condition of his parole).

152. *People ex rel. Bayham v. Meloni*, 182 Misc. 2d 831, 832, 700 N.Y.S.2d 649, 650 (County Ct. Monroe County 1999) (quoting *Zientek v. Herbert*, 606 N.Y.S.2d 479, 480, 199 A.D. 2d 1075, 1076 (4th Dept. 1993)) (“A court, when reviewing a determination by the Parole Board to revoke parole, may only ‘examine the record to determine if the required procedural rules were followed and if there is any evidence which, if believed, would support the Parole Board’s determination, but the court may not make its own determinations based on its assessment of the credibility of the witnesses.’”).

153. N.Y. Comp. Codes R. & Regs. tit. 9, § 8004.2(a).

154. N.Y. Comp. Codes R. & Regs. tit. 9, § 8004.2(c) (“Reasonable cause exists when evidence or information which appears reliable discloses facts or circumstances that would convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that a releasee has committed the acts in question or has lapsed into criminal activity or company. Such apparently reliable evidence may include hearsay.”).

155. N.Y. Penal Law § 70.40(3) (a)–(b) (McKinney 2009).

156. N.Y. Penal Law § 70.40(3) (McKinney 2009).

157. *See, e.g., People ex rel. Calloway v. Skinner*, 33 N.Y.2d 23, 34, 300 N.E.2d 716, 720, 347 N.Y.S.2d 178, 184 (1973) (holding right to bail is statutory, and without statutory direction, prisoners are not entitled to either bail or release pending hearing before the Parole Board).

158. *Morrissey v. Brewer*, 408 U.S. 471, 479–84, 92 S. Ct. 2593, 2599–2602, 33 L. Ed. 2d 484, 493–96 (1972) (discussing the nature of a parolee’s liberty interest and finding that due process is required).

159. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2012); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3.

and temporary detention, and not less than forty-eight hours prior to the preliminary hearing.<sup>160</sup> If you are out of state, you should be given written notice of the time, place, and purpose of the hearing within five days of the issuance of the warrant for your retaking.<sup>161</sup>

## 2. Preliminary Hearing

The purpose of the preliminary hearing is to determine whether there is “probable cause” that you violated, in an important respect, one or more of the conditions of your parole release.<sup>162</sup> The Parole Board has the burden to show evidence of your alleged violation.<sup>163</sup> The hearing must be held within fifteen days of the issuance of the warrant of retaking, and must be conducted by a hearing officer who has not had any prior supervisory involvement over you.<sup>164</sup>

At the preliminary hearing, you are entitled to the following rights:

- (1) To speak on your own behalf or to have a lawyer represent you;<sup>165</sup>
- (2) To introduce letters and documents;<sup>166</sup>
- (3) To present witnesses who may provide relevant information in support of your case;<sup>167</sup> and
- (4) To confront and cross-examine witnesses testifying against you, unless the hearing officer finds good cause for their non-attendance.<sup>168</sup>

The regulations state that you may be represented by counsel at your preliminary hearing, but it is important to note that you do *not* have an absolute right to be represented by counsel, *nor* do you have an absolute right to have an attorney appointed if you cannot afford to hire one.<sup>169</sup> If you believe that you need the assistance of counsel at the preliminary hearing, try to get an attorney through the county or supreme court in the district in which you are being held, or through the Legal Aid Society if you are in New York City. Unless you have a very complicated case, it may be difficult to get an attorney assigned at this stage. You do not have to testify at this hearing or at the final hearing. You also do not have to make a statement to your parole officer while he or she is preparing the Parole Violation Report. Any statement you do make may be used as evidence at the final hearing.<sup>170</sup>

An important difference between the preliminary hearing and the final hearing is that not all of the charges need to be heard at the preliminary hearing. If the hearing officer determines that probable cause exists after hearing one or more of the charges, the judge may determine that enough probable cause exists to end the preliminary hearing and move towards a final hearing.<sup>171</sup> Probable cause means that there are reasonable grounds for the judge to believe that a parole violation occurred. If there is proof of conviction of a crime committed after release on parole (for example, a certificate of conviction), the judge will consider that

160. N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(a).

161. N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(a).

162. “Probable cause” means reasonable cause.

163. This means the Parole Board must create a sufficient case of a violation, which you have to explain or prove wrong.

164. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2012); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.4.

165. The attorney must file a notice of appearance. N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(c)(1); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.5(a)–(b)(1).

166. N.Y. Exec. Law § i(3)(c)(iii) (McKinney 2012); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(c)(2).

167. N.Y. Exec. Law § i(3)(c)(iii) (McKinney 2012); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(c)(3).

168. N.Y. Exec. Law § i(3)(c)(iii) (McKinney 2012); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(c)(4). You may force witnesses against you to attend the hearing through subpoenas, unless you have been convicted of a new crime while under parole supervision, or the hearing officer finds good cause for the witnesses’ non-attendance. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2012); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.3(c)(4). If you are proceeding *pro se* (without an attorney) at this stage, you may apply to the hearing officer or Board member presiding at the hearing for the subpoenas. N.Y. C.P.L.R. 2302 (McKinney 2010). You may also apply to the local supreme court for subpoenas for necessary witnesses or documents. N.Y. C.P.L.R. 2302(b) (McKinney 2010).

169. *See, e.g.,* People *ex rel.* Calloway v. Skinner, 33 N.Y.2d 23, 32, 300 N.E.2d 716, 719, 347 N.Y.S.2d 178, 182–83 (1973) (noting that the New York State Constitution confers only a conditional or discretionary right to counsel at a preliminary parole revocation hearing).

170. N.Y. Comp. Codes R. & Regs. tit. 9, § 8004.3(c); *see, e.g.,* People *ex rel.* King v. N.Y. State Bd. of Parole, 65 A.D.2d 465, 468–69, 412 N.Y.S.2d 138, 140–41 (1st Dept. 1979) (holding that admission to parole officer of possession of heroin was admissible in a parole revocation hearing, even though evidence of heroin was suppressed in court proceeding because it had been illegally seized).

171. N.Y. Exec. Law § 259-i(3)(c)(viii) (McKinney 2012).

enough to show probable cause.<sup>172</sup> Unlike the final hearing, there is no opportunity at the preliminary hearing to present evidence of mitigating factors or suggestions for alternatives to incarceration.

### 3. Final Hearing

Although the preliminary hearing is like an arraignment (if you have not yet gone to trial) to determine whether there is probable cause to continue to hold you for a suspected parole violation, the final hearing is like a trial to determine whether you violated parole. Thus, if the hearing officer finds probable cause at the preliminary hearing (or if you have waived<sup>173</sup> the preliminary hearing), a member of the Parole Board will review your case and determine whether to declare you delinquent. Depending on the decision of the Board member, you will either be scheduled for a final hearing or restored to supervision. If you are declared delinquent, you will be scheduled for a final hearing not more than ninety days after the probable cause determination.<sup>174</sup> The final hearing date may only be at a later date if you request and are granted an adjournment (delay) or if you agree to a postponement of the hearing.<sup>175</sup>

Both you and your attorney are entitled to written notice of the date, time, and place of the hearing at least fourteen days prior to the date of the hearing.<sup>176</sup> But if the hearing is adjourned or delayed for some reason, there is no additional fourteen-day notice requirement.<sup>177</sup> If the Parole Board fails to observe the statutory time requirements, your parole violation warrant will be removed and your parole status will be restored.<sup>178</sup> Notice of final revocation proceedings will tell you the rights that you have at the hearing.

In a revocation hearing you are entitled to the following rights:

- (1) To have a lawyer represent you<sup>179</sup> (if you have pending criminal charges, you could have the attorney representing you in the criminal case also represent you at your revocation hearing, or a different attorney will be assigned to you);
- (2) To appear and speak on your own behalf;
- (3) To confront and cross-examine witnesses testifying against you, unless the presiding officer finds good cause for the witnesses not to attend;
- (4) To present witnesses and documents in defense of the charges against you;
- (5) To present witnesses and documents about the question of whether placing you back in prison is the appropriate action;<sup>180</sup> and
- (6) To present mitigating evidence relevant to the restoration of parole.<sup>181</sup> That is, you can present evidence that might justify or excuse the conduct that is alleged to be a parole violation.

Your rights at the revocation proceeding are essentially the same as those in the preliminary hearing, except for your right to an attorney and your right to present mitigating factors. The standard for revoking parole at the final hearing is a determination by a “preponderance of the evidence” (meaning that it is more likely than not) that you violated one or more conditions of release in an important respect.<sup>182</sup>

172. N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.2(c)–(d).

173. Waived means to voluntarily give up a claim or right. In this case, it would be to voluntarily give up your right to a preliminary hearing.

174. N.Y. Exec. Law § 259-i(3)(f)(i) (McKinney 2014); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.17(a).

175. N.Y. Exec. Law § 259-i(3)(f)(i) (McKinney 2014); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.17(c).

176. N.Y. Exec. Law § 259-i(3)(f)(iii) (McKinney 2014); N.Y. Comp. Codes R. & Regs. tit. 9 § 8005.17(b).

177. *See, e.g., People ex rel. Wentsley v. Hammock*, 89 A.D.2d 1058, 1058, 454 N.Y.S.2d 761, 762 (4th Dept. 1982) (holding that “[t]here is no requirement that an additional 14 days’ notice be given for a rescheduled or adjourned final parole revocation hearing.”).

178. *See, e.g., People ex rel. Levy v. Dalsheim*, 66 A.D.2d 827, 828, 411 N.Y.S.2d 343, 344 (2d Dept. 1978), *aff’d*, 48 N.Y.2d 1019, 402 N.E.2d 141, 425 N.Y.S.2d 802 (1980) (“[The] statute . . . makes clear that a delay beyond 90 days after the probable cause determination is unreasonable per se”).

179. N.Y. Exec. Law § 259-i(3)(f)(v) (McKinney 2010); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.16(a). *See Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S. Ct. 2593, 2601, 33 L. Ed. 2d 484, (1972) (holding a paroled convict has a liberty interest that falls under the 14th Amendment, and its termination requires some due process). *See Chapter 4 of the JLM for information on how to find a lawyer, and Appendix IV for information on how to contact the Legal Aid Society.*

180. N.Y. Exec. Law § 259-i(3)(f)(v) (McKinney 2014); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.18(b)(1)–(4).

181. N.Y. Exec. Law § 259-i(3)(f)(vi) (McKinney 2014); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.18(b)(5).

182. N.Y. Exec. Law § 259-i(3)(f)(viii) (McKinney 2014); N.Y. Comp. Codes R. & Regs. tit. 9, § 8005.19(e). “Preponderance of the evidence” is a legal standard meaning “more likely than not.” It is a lesser standard than “beyond a reasonable doubt,” the legal standard for conviction of a crime.

If you have pending criminal charges, the conduct giving rise to those charges can be considered by the Parole Board in determining whether you violated your parole. If the parole revocation hearing takes place after any criminal case against you has gone to trial, several rules may apply. For example, if you were convicted or acquitted of those charges by any defense other than an affirmative defense (that is, an explanation you presented, such as insanity or self-defense, that lessened or defeated the legal consequences of your trial), the Parole Board can consider the conduct underlying the charges.<sup>183</sup> However, if you were acquitted through an affirmative defense, then the Parole Board probably cannot consider those charges in its parole revocation determination.<sup>184</sup> Courts have held that there is no denial of due process if the Board refuses to delay the final revocation hearing until after the pending criminal case is handled, even though there is a lower standard of proof in parole revocation decisions.<sup>185</sup> Thus, the Parole Board can find that you violated your parole even if you are not later convicted of the criminal charges.

#### 4. Appeals

You may appeal the revocation of your parole by filing a “Notice of Appeal” within thirty days of the date of the written notice of the Parole Board’s decision.<sup>186</sup> It is important to file your appeal within thirty days of the Board’s decision because you waive (give up) your right to appeal the decision if you do not file within this time.<sup>187</sup> You may be represented by an attorney during your appeal.<sup>188</sup> Within four months of the date on which the notice of appeal was filed, you or your attorney must file the original and two copies of the appeal letter or brief with the Appeals Unit in Albany.<sup>189</sup> Your appeal letter or brief must state the rulings that you are challenging and explain the basis for your appeal.<sup>190</sup> The appeal must be based on the written record. You may

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183. See, e.g., *People ex rel. Froats v. Hammock*, 83 A.D.2d 745, 745, 443 N.Y.S.2d 500, 501 (4th Dept. 1981) (holding that acquittal of criminal charges does not bar subsequent parole revocation based on underlying charges). As noted, an affirmative defense is an explanation that you provide as evidence to support that mitigates (lessens) or defeats the legal consequences that result from your trial. Examples of affirmative defenses include insanity, self-defense, and statute of limitations (most criminal prosecutions must be brought within a certain number of years after the crime was committed, and, if the prosecutor charges you after that time period, you would have the statute of limitations as a defense).

184. The Parole Board is prevented from considering the criminal charges in affirmative defense cases because of the doctrine of *collateral estoppel*, which means that issues brought before a court and decided in one case cannot be re-litigated by the same parties in another case. Whether the Board can use evidence that has been suppressed in a criminal proceeding against you in a parole revocation hearing is unsettled (that is, not certain). In *People ex rel. Piccarillo v. N.Y. State Bd. of Parole*, the Court held that evidence that could not be used in a criminal trial because it resulted from an illegal search or seizure also could not be used in a parole revocation hearing. *People ex rel. Piccarillo v. N.Y. State Bd. of Parole*, 48 N.Y.2d 76, 83, 397 N.E.2d 354, 358, 421 N.Y.S.2d 842, 846 (1979) (stating that the exclusionary rule applies to parole revocation hearings). However, Pa. Bd. of Probation v. *Scott* reached the opposite conclusion, holding that the federal exclusionary rule does not apply to parole proceedings. Pa. Bd. of Probation v. *Scott*, 524 U.S. 357, 364, 118 S. Ct. 2014, 2020, 141 L. Ed. 2d 344, [pincite] (1998). Some New York courts have interpreted *Scott* as overruling *Piccarillo*, while others have refused to do so. See *People ex rel. Gordon v. O’Flynn*, 3 Misc. 3d 963, 965, 775 N.Y.S.2d 507, 509 (Sup. Ct. 2004) (holding that *Scott* overruled *Piccarillo* and that the federal exclusionary rule does not apply to parole proceedings); but see *State ex rel. Thompson v. Harder*, 8 Misc. 3d 764, 766 n.2, 799 N.Y.S.2d 353, 355 n.2 (Sup. Ct. 2005) (holding that the court will continue to apply the exclusionary rule to parole proceedings).

185. See, e.g., *People ex rel. Matthews v. N.Y. State Div. of Parole*, 58 N.Y.2d 196, 201, 447 N.E.2d 689, 460 N.Y.S.2d 746, (1983) (holding that refusal to adjourn a revocation hearing until criminal charges were tried did not constitute a violation of due process). The Board only needs to find it is more likely than not that you violated your parole; you can only be convicted of the crime if the court finds beyond a reasonable doubt that you committed the unlawful act.

186. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1(b).

187. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1(b).

188. N.Y. Exec. Law § 259-i(4)(b) (McKinney 2014); N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.2(d). If an attorney entered a notice of appearance, the Parole Board appeals unit will not act on any correspondence from a prisoner until receiving notice that the attorney is relieved. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.2(e). A notice of appearance is a document that tells the Parole Board that an attorney will appear on your behalf. Thus, this regulation means that if you have an attorney and the attorney enters a notice of appearance, the Parole Board will not answer mail, calls, or other communication from you unless you decide to not have that attorney represent you and you notify the Parole Board of your decision to relieve the attorney. The Parole Board will only answer contact from your attorney unless you notify them that you are no longer using that attorney.

189. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.2(a)–(b).

190. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.2(a)–(b).

get an extension “for good cause” if you request one in writing within the four months following the notice of appeal.<sup>191</sup>

Among the questions that may be raised on appeal are:

- (1) Whether the proceeding and/or determination was in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or was otherwise unlawful;
- (2) Whether the Board member or members making the determination relied on erroneous information as shown in the record of the proceeding, or relevant information was not available for consideration;
- (3) Whether the determination made was excessive;<sup>192</sup> and
- (4) Whether the decision was supported by a preponderance of the evidence.<sup>193</sup>

In a revocation appeal, you cannot raise an allegation of newly discovered evidence. Such an issue must be raised in an application to the Board for a rehearing.<sup>194</sup> You should begin to prepare for your appeal by obtaining the minutes of the parole release hearing from the New York State Division of Parole at 1220 Washington Avenue, Building 2, Albany, NY 12226-2050.<sup>195</sup> Because the minutes can be expensive to acquire, an attorney may obtain them for you. You also may make a written request for “[a]ll other non-confidential, discoverable documents relating to the appeal.”<sup>196</sup> So if you believe there is important information in your parole case record to support your appeal, you may request permission to access it. However, you will not receive unrestricted access.<sup>197</sup>

The appeal will be decided by three members of the Parole Board, none of whom participated in the decision that you are appealing.<sup>198</sup> The Board will send its written decision, including its findings of fact and law, to you or your attorney.<sup>199</sup>

If your appeal is unsuccessful, you have several other options. After you have pursued all possible administrative remedies with no success, you can file an Article 78 petition in New York state court.<sup>200</sup> You only have four months from the date the appeal decision is mailed to you to file a petition in state court.<sup>201</sup> If you fail to file the petition within this time, the court will not hear your case.<sup>202</sup> If you are being held only on parole violation charges, and you seek to challenge the legality of your detention, you may file a petition for habeas corpus in the state supreme court.<sup>203</sup> See Chapters 21 and 22 of the *JLM* for more information on New York State habeas corpus and Article 78 petitions.

## 5. Parole Violator Reappearances

If your parole is revoked and you have been returned to prison, you will be eligible for release on the date your *time assessment* expires.<sup>204</sup> A time assessment is a required period of re-imprisonment determined by the Parole Board following a final revocation hearing. The Parole Board may also determine that an interview is necessary before release. However, an interview is only necessary if a prisoner:

- (1) Has committed a violation of facility rules;
- (2) Has exhibited a significant change in his mental or emotional condition (such as being transferred to a psychiatric ward or placed on suicide watch);

191. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.2(a)–(b).

192. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.3(a)(1)–(3).

193. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.3(b)(1).

194. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.3(c).

195. See N.Y. Exec. Law § 259-i(6)(a) (McKinney 2014) (“The board shall provide for the making of a verbatim record of each parole release interview . . . and each preliminary and final revocation hearing . . .”).

196. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.1(e).

197. Restrictions to access parole records are set forth in this Chapter in Part F(7), “Appealing Denial of Parole Release.” See also N.Y. Comp. Codes R. & Regs. tit. 9, § 8000.5.

198. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.4(d).

199. N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.4(a)(2).

200. See Chapters 5 and 22 of the *JLM* for information on Article 78 proceedings.

201. N.Y. C.P.L.R. 217(1) (McKinney 2013).

202. See *Carter v. State*, 95 N.Y.2d 267, 272, 739 N.E.2d 730, 733, 716 N.Y.S. 2d 364, 367 (2000) (dismissing a claim by a prisoner who brought an Article 78 claim six months after the decision was mailed to him because the claim violated the statute of limitations).

203. N.Y. C.P.L.R. 7001–12 (2014). See Chapter 13 and Chapter 21 of the *JLM* for a more detailed discussion of federal and New York state habeas corpus.

204. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.6(a). The Parole Board makes the time assessment after the revocation hearing, and it begins running from the date the parole violation warrant was lodged.

- (3) Has been arrested or convicted of a new felony after the final parole revocation hearing; or
- (4) Is not suitable for release based on other information (such as information about self-destructive or threatening behavior).<sup>205</sup>

### I. Release From Parole Supervision

After the expiration of your original maximum sentence, and provided you have served your time on parole supervision without interruption, you will be released from parole. The parole statute also allows for discharge from parole after three consecutive years of unrevoked parole.<sup>206</sup> You should talk to your parole officer if you believe you might be eligible for a three-year discharge, and he or she may apply to the Parole Board for you. The Board will not accept requests for such early discharge from a parolee.<sup>207</sup>

If you have a felony conviction, you may have lost certain rights or privileges, such as the right to vote, the ability to obtain a driver's license, the opportunity to be employed in a bank or an establishment that serves liquor, the ability to get a job, as well as other rights important to your life.<sup>208</sup> You can regain those rights after you serve out your parole term. However, you may be able to gain back the rights you have lost by applying for a certificate. If you have only one felony conviction, apply for a "Certificate of Relief from Disabilities" either before or after your parole supervision ends.<sup>209</sup> If you have more than one felony conviction, but you have completed parole and have shown five years of good conduct in the community, you should apply for a "Certificate of Good Conduct."<sup>210</sup> If you have not yet completed your sentence, applications for Certificates of Relief are submitted by parole officers to the Board of Parole. If you have completed your sentence, apply directly to the Executive Clemency Bureau of the Department of Corrections and Community Supervision.

If you are harassed or discriminated against for being an ex-offender following your release from parole, contact the Fortune Society at 29-76 Northern Boulevard, Long Island City, NY 11101 (phone (212) 691-7554)<sup>211</sup> or the Legal Action Center at 225 Varick Street, New York, NY 10014 (phone (212) 243-1313 or toll free at (800) 223-4044).<sup>212</sup> These agencies assist ex-offenders with their reentry into society. The New York Public Library publishes a practical handbook for pre-release and recently released prisoners called *Corrections III*. It gives information and addresses on topics including jobs, education, housing, finances, health, counseling, addiction, women's issues, homosexuality, and disability issues. *Corrections III* is available free of charge for New York State residents and prisoners from Institutional Library Services, The New York Public Library, 455 Fifth Ave., New York, NY 10016, (212) 340-0863.

### J. Parole in California

If you are given a life sentence in California, you must serve at least seven years before you may be eligible for parole.<sup>213</sup> However, if you were sentenced under a part of the law that sets a minimum period of incarceration for a life sentence, then you will not be eligible for parole release until you have served that minimum period.<sup>214</sup>

One year prior to your minimum eligible parole release date, a panel of at least two Commissioners or Deputy Commissioners of the Board of Prison Terms will meet with you to set a parole release date. The Board considers aggravating and mitigating circumstances in its determination of your parole release date.

205. N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.6(c).

206. N.Y. Exec. Law § 259-j(3)(a) (McKinney 2014).

207. N.Y. Comp. Codes R. & Regs. tit. 9, § 8007.1.

208. N.Y. State Dept. of Corr. & Cmty. Supervision, New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision (2010), at 41–42, *available at* [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 24, 2017).

209. N.Y. State Dept. of Corr. & Cmty. Supervision, New York State Parole Handbook, Questions and Answers Concerning Parole Release and Supervision (2010), at 41–42, *available at* [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 24, 2017).

210. N.Y. State Dept. of Corr. & Cmty. Supervision, New York State Parole Handbook, Questions And Answers Concerning Parole Release and Supervision (2010), at 42–43, [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 24, 2017).

211. More information about Fortune Society can be located online, *available at* <http://fortunesociety.org/> (last visited Feb. 24, 2017).

212. More information about Legal Action Center can be located online, *available at* <http://www.lac.org/> (last visited Feb. 24, 2017).

213. Cal. Penal Code § 3046(a)(1) (2001).

214. Cal. Penal Code § 3046 (2001).

Aggravating circumstances are those that might make the Board view your crime more harshly—for example, if your crime affected a large number of people. Mitigating circumstances are those that might make the Board view your crime less harshly—for example, if you had no prior criminal record. The Board may choose not to set a parole release date if it finds that the seriousness of the offense or of any past offenses are such that the interests of public safety require you to remain in prison longer.<sup>215</sup>

At the parole hearing, you may present evidence and speak on your own behalf. Only prisoners serving life sentences may have a lawyer at parole hearings.<sup>216</sup> In addition, victims have the right to make statements at parole hearings, which can include “comments . . . to the effect of the enumerated crimes on the victim . . . and the suitability of the prisoner for parole.”<sup>217</sup>

If you are granted parole, you will be notified of the parole release date within ten days after the hearing, of the conditions you must meet to be released by that date, and the consequences of the failure to meet those conditions.<sup>218</sup> A decision that you are suitable for parole will become final within 120 days after the date of the hearing. During this time, the Parole Board may review the panel’s decision. The Parole Board may reject the panel’s decision and order a new hearing by majority vote based on an error of the law, an error of facts, or new information presented to the Board.<sup>219</sup>

If the Board decides not to establish a parole date, you will be notified within twenty days.<sup>220</sup> The Board will send you a written statement explaining why a parole date was not set. In addition, it will recommend activities in which you may participate to improve your chances of receiving a parole date at a future hearing.<sup>221</sup> The Board will ordinarily rehear cases every year when it has declined to set a parole date, but the Board has the power to delay the hearing longer if it so chooses.<sup>222</sup>

If you have been convicted of a violent felony in California, the state Department of Corrections will notify law enforcement agencies and the state attorney in the county to which you were convicted and the county in which you are scheduled to be released prior to your release on parole.<sup>223</sup> The victim may also be notified of your release.<sup>224</sup> If you have not been convicted of a violent felony, notice of your release on parole will be given only if the county of release requests it.<sup>225</sup>

You will usually be returned to the county of your last legal residence, but the Parole Board may send you to another county if found to be in the public interest. In making this decision, the Parole Board will consider:

- (1) The need to protect the life or safety of a victim, you (the parolee), a witness, or any other person;
- (2) Public concern that would reduce the chance that your parole would be successfully completed;
- (3) The verified existence of a work offer, or an educational or vocational training program;
- (4) The existence of family in another county with whom you have maintained strong ties and whose support would increase the chance of successful completion of your parole; and
- (5) The lack of necessary outpatient treatment programs for parolees receiving substance abuse treatment pursuant to Section 2960.<sup>226</sup>

If you were convicted of a violent felony, you may not return on parole to a location within thirty-five miles of the actual residence of the victim or a witness to the crime during your parole.<sup>227</sup>

If you violate your parole and there is a long delay between your parole revocation hearing and your placement back in prison, you may be entitled to restored parole status, unless the authorities can prove a good reason for the delay.<sup>228</sup> If the Board decides to revoke your parole, you must receive a written record of

215. Cal. Penal Code § 3041 (2010).

216. Cal. Penal Code § 3041.7 (2007).

217. Cal. Penal Code § 3043(b) (2011).

218. Cal. Penal Code § 3041.5(b)(1) (2010).

219. Cal. Penal Code § 3041(b) (2010).

220. Cal. Penal Code § 3041.5(b)(2) (2010).

221. Cal. Penal Code § 3041.5(b)(2) (2010).

222. Cal. Penal Code § 3041.5(b)(2) (2010).

223. Cal. Penal Code § 3058.6(a) (2012).

224. Cal. Penal Code § 3058.8(a) (2012).

225. Cal. Penal Code § 3058.8(a) (2012).

226. Cal. Penal Code § 3003(b) (2011).

227. Cal. Penal Code § 3003(f) (2011).

228. *See In re Shapiro*, 537 P.2d 888, 893, 14 Cal. 3d 711, 720, 122 Cal. Rptr. 768, 773 (Cal. 1975) (“[A] prompt revocation hearing is essential because delay may result in the loss of essential witnesses or . . . evidence and the

the Board's decision and the opportunity to pursue an administrative appeal.<sup>229</sup> If your parole is revoked but you do not have a new conviction for a crime committed while you were on parole release, the time you are sent back to prison should not exceed twelve months.<sup>230</sup> However, if you commit acts of misconduct during your time back in prison, you may be held for an additional twelve months.<sup>231</sup>

### K. Parole in Florida

Parole has been abolished in the state of Florida.<sup>232</sup> However, it is still available for certain prisoners who committed crimes that occurred prior to the dates provided in the list below. If you are currently in prison for one of the following crimes, you are still eligible for parole, and this Section applies to you:

- (1) First degree murder, a felony murder, or the crime of making, possessing, throwing, projecting, placing, or discharging a destructive device (or the attempt of) before May 25, 1994;
- (2) All other capital felonies before October 1, 1995;
- (3) A continuing criminal enterprise before June 17, 1993;
- (4) Murder of a law enforcement officer (and other specified officers) before January 1, 1990;
- (5) Murder of a judge before October 1, 1990;
- (6) Any felony before October 1, 1983.<sup>233</sup>

You will be given an initial interview with a hearing examiner to establish a presumptive parole release date between eight months and five years after you begin your prison term.<sup>234</sup> Within ninety days of your initial interview, the Parole Commission will notify you of the established presumptive parole release date.<sup>235</sup> If your presumptive parole release date is more than two years after the initial interview, a hearing examiner will schedule an interview for review of the presumptive parole release date. This review will normally occur within two years of the initial interview and every two years thereafter.<sup>236</sup> However, if you were convicted of a more serious offense, including murder, attempted murder, sexual battery, or attempted sexual battery, or if you were sentenced to a minimum twenty-five-year mandatory sentence, and your presumptive release date is more than seven years away, this review will only occur every seven years.<sup>237</sup> Within ninety days before the presumptive parole release date, a hearing examiner will conduct a final interview with you to establish an effective parole release date and a parole release plan.

If you want to file for judicial review of the Parole Commission's calculation of your presumptive parole release date, you should file a *writ of mandamus*<sup>238</sup> (a document commanding a public official to perform his or her duty) in circuit court, rather than in district court.<sup>239</sup> To file a petition for *mandamus*, go to your facility's law library and ask to see a sample petition. Once you have prepared the petition to reflect the information in your case, send it to the local circuit court.

If your conduct while in prison has been unsatisfactory, or if you do not have a verified parole release plan, the Parole Commission may extend the presumptive parole release date—but not for more than one year.<sup>240</sup> Otherwise, the presumptive parole release date will become the effective parole release date. But you will not be released on that date until a satisfactory plan for parole supervision has been completed.<sup>241</sup>

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continuation of unnecessary incarceration or other limitations on personal liberty”).

229. See *In re Ruzicka*, 230 Cal. App. 3d 595, 597, 281 Cal. Rptr. 435, 436 (Cal. Ct. App. 1991) (holding that parolee was entitled to a written record of the Board's parole revocation decision and to pursue an administrative appeal where the parolee filed petition for writ of habeas corpus to challenge parole revocation).

230. Cal. Penal Code § 3057(a) (2012).

231. Cal. Penal Code § 3057(c) (2012).

232. Fla. Stat. §§ 3.701(b)(5), (d)(12) (2007).

233. Florida Department of Corrections, Frequently Asked Questions Regarding Parole, *available at* <http://www.dc.state.fl.us/oth/inmates/parole.html>.

234. Fla. Stat. Ann. § 947.16 (2010).

235. Fla. Stat. Ann. § 947.172 (2001).

236. Fla. Stat. Ann. § 947.174(1)(a) (2010).

237. Fla. Stat. Ann. § 947.14(b) (2010).

238. See *Parole & Prob. Comm'n v. Fuller*, 491 So. 2d 275, 275 (Fla. 1986) (holding that judicial review of presumptive parole release dates is available only through writs of mandamus, not through writs of habeas corpus).

239. See *Johnson v. Fla. Parole & Prob. Comm'n*, 543 So. 2d 875, 876 (Fla. 1989) (holding that writ of mandamus to challenge suspension of prisoners' presumptive parole release dates should be filed in the circuit court, rather than the district court of appeal), *overruled on other grounds by* *Sheley v. Fla. Parole Comm'n*, 720 So. 2d 216 (Fla. 1998).

240. Fla. Stat. Ann. § 947.1745(2) (2010).

241. Fla. Stat. Ann. § 947.1745(2) (2010).



If you have been convicted of certain serious felonies, you may remain under the authority of the trial judge for up to one-third of the maximum sentence imposed. When you are otherwise eligible for parole, the parole decision will be reviewed by the judge. The judge's decision whether or not to approve the release is not something that you can appeal.<sup>242</sup> If the judge refuses to release you on parole, you will be re-interviewed by the Parole Commission at intervals of not longer than two years. However, if you were convicted of a more serious offense, including murder, attempted murder, sexual battery, or attempted sexual battery, or if you were sentenced to a minimum twenty-five-year mandatory sentence, this review will only occur every seven years if your presumptive release date is more than seven years away.<sup>243</sup>

You can be released on parole only if:

- (1) The Parole Commission finds with reasonable probability that if you are placed on parole, you will live and conduct yourself as a respectable and law-abiding person; and
- (2) Your release would be compatible with your welfare and the welfare of society.

You must also show the Parole Commission that if you are released on parole, you will be suitably employed, or at least that you will not become a public charge (collect public assistance of any kind).<sup>244</sup>

You may be eligible for conditional medical release if:

- (1) You are not sentenced to death and are permanently physically incapacitated by an illness, disease or injury, and are therefore no longer a danger to yourself or society; or
- (2) You are terminally ill and your death is imminent.<sup>245</sup>

If you are given conditional medical release, you will remain under supervision for the remainder of your sentence, without reducing your sentence, and your sentence will not be reduced by any credit for good behavior. During that period of supervision, you must undergo periodic physical examinations, and if it is found that your medical condition no longer incapacitates you, you will be returned to prison, but reductions for good-time credit will be applied.<sup>246</sup>

Ordinarily, a condition of parole will be restitution (reimbursement for damages) to the victim of your offense. Failure to make restitution is a violation of parole and may result in revocation of parole.<sup>247</sup> A violation of the terms of parole may cause you to be arrested and returned to prison to serve out the term of your sentence. However, if your parole is revoked, the Parole Commission has the option to give you credit for any portion of time served satisfactorily while you were on parole release.<sup>248</sup>

If you are arrested for a suspected parole violation, a preliminary hearing will be held within thirty days of your arrest. You may be represented by a lawyer. If the preliminary hearing results in a finding of reasonable grounds to believe that you have committed a parole violation, a final parole revocation hearing will be held. You may also be represented by a lawyer at the final hearing.<sup>249</sup>

The parole period of supervision may not exceed the maximum period of your sentence. If you are being paroled from a single or concurrent sentence, the Parole Commission must give reasons in writing for extending the period of supervision beyond two years.<sup>250</sup>

## L. Parole in Illinois

Parole has been abolished in the state of Illinois.<sup>251</sup> If you were sentenced after February 2, 1978, you will have received a determinate sentence, and this Chapter no longer applies to you. This Chapter only applies to you if you were sentenced prior to February 2, 1978.

The Prison Review Board (Board) sets a fixed release date for all prisoners sentenced after 1977. If you were sentenced prior to 1977, you have an indeterminate sentence.<sup>252</sup> In determining a fixed release date, the Board considers the sentencing court's intent, aggravating and mitigating factors, good conduct credit, and

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242. Fla. Stat. Ann. § 947.16(4)(g) (2010).

243. Fla. Stat. Ann. § 947.174(b) (2010).

244. Fla. Stat. Ann. § 947.18 (2008).

245. Fla. Stat. Ann. § 947.149(1) (2001).

246. Fla. Stat. Ann. § 947.149 (2001).

247. Fla. Stat. Ann. § 947.181 (2012).

248. Fla. Stat. Ann. § 947.21 (2001).

249. Fla. Stat. Ann. § 947.23 (2004).

250. Fla. Stat. Ann. § 947.24 (2001).

251. 730 Ill. Comp. Stat. Ann. 5/3-3-2 (2013).

252. 730 Ill. Comp. Stat. Ann. 5/3-3-2.1 (2010).

your behavior since incarceration.<sup>253</sup> If you accept a release date determined by the Board, you are no longer eligible for parole. If you do not accept a fixed release date from the Board, you will be eligible for parole when you have served one of the following:

- (1) The minimum term of an indeterminate sentence minus time credit for good behavior, or twenty years minus time credit for good behavior, whichever is less; or
- (2) Twenty years of a life sentence minus credit for good behavior; or
- (3) Twenty years or one-third of a determinate sentence, whichever is less, minus credit for good behavior.<sup>254</sup>

In making its determination of parole, the Board considers reports prepared by corrections staff, and materials submitted by you, the State's Attorney, and the victim.<sup>255</sup> Even if you are eligible for parole, the Board will not parole you if it determines that:

- (1) There is a substantial risk that you will not follow reasonable conditions of parole,
- (2) Your release would minimize the seriousness of the offense or promote disrespect for the law, or
- (3) Your release would have a negative effect on the institution's ability to discipline others.<sup>256</sup>

If parole is denied, ordinarily a re-hearing is set for one year later, but no later than five years after the denial (with an exception for certain sexual crimes).

The Board will specify whatever conditions of parole it thinks is necessary to assist you in leading a law-abiding life; however, parole will always put certain requirements on you. There are additional rules if you were convicted of a sex offense.

As conditions of parole, you may *not* do any of the following:

- (1) Violate a criminal statute in any jurisdiction;
- (2) Possess a firearm or other dangerous weapon;
- (3) Use or possess narcotics or any other controlled substance or instruments to use such substances;
- (4) Go to places where controlled substances are sold, used, or distributed;
- (5) Associate with other people you know are on parole or mandatory supervised release without permission from your parole agent, or with people who are in an organized gang.<sup>257</sup>

In addition, you *must* do all of the following:

- (1) Report to an agent of the Department of Corrections;
- (2) Allow the agent to visit you at your house, place of employment, or other places when necessary;
- (3) Attend or reside at a facility for the instruction or residence of people on parole;
- (4) Obtain permission before writing or visiting a person who is incarcerated in an Illinois prison;
- (5) Report arrests to an agent within twenty-four hours of release from custody;
- (6) Obtain permission from an agent before leaving Illinois;
- (7) Obtain permission from an agent before changing your address or job;
- (8) Consent to a search of your person, property, and residence;
- (9) Submit to drug testing when instructed by a parole agent; and
- (10) Provide truthful information to parole agents in response to their questions.<sup>258</sup>

If you are released on parole and then suspected of having violated a condition of parole, you will have a preliminary hearing before a hearing officer to determine whether there is cause to hold you for a revocation hearing. A preliminary hearing is not required when the possible revocation is based on new criminal charges.<sup>259</sup> You may appear at a revocation hearing before at least one member of the Board to answer the charge and bring witnesses on your behalf. If you are found to have violated a condition of your parole, the Board may recommit you for any portion of the imposed maximum term of imprisonment, or it may take lesser actions that do not involve putting you back in prison, such as allowing you to remain on parole with changed

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253. 730 Ill. Comp. Stat. Ann. 5/3-3-2.1(e) (2010).

254. 730 Ill. Comp. Stat. Ann. 5/3-3-3(a) (2010).

255. 730 Ill. Comp. Stat. Ann. 5/3-3-4(d) (2012).

256. 730 Ill. Comp. Stat. Ann. 5/3-3-5(c) (2012).

257. 730 Ill. Comp. Stat. Ann. 5/3-3-7 (2013).

258. 730 Ill. Comp. Stat. Ann. 5/3-3-7 (2013).

259. 730 Ill. Comp. Stat. Ann. 5/3-3-9(c) (2012).

conditions or releasing you to a halfway house.<sup>260</sup> Even if you are recommitted for a parole violation, you may still be eligible for future release on parole.<sup>261</sup>

Every felony sentence, except a life sentence, includes a mandatory supervised release period or “parole term” that ranges from one to four years (with the exception of certain sex crimes, which have longer release periods).<sup>262</sup> The Board may discharge you from parole when it determines that you are likely to remain at liberty without committing another offense.<sup>263</sup> If you have been released on parole, and you believe you are entitled to a final discharge (release) from your sentence, you may file a habeas corpus petition seeking to be released outright while you are on parole release.<sup>264</sup> For a discussion on habeas corpus, see Chapter 21 of the *JLM*, “State Habeas Corpus: Florida, New York, and Michigan.”

### M. Parole in Texas

If you are serving a life sentence for a capital felony in Texas, you will not be eligible for release on parole until the actual time that you have served is equal to forty calendar years, not including good conduct time.<sup>265</sup> Unless you have been convicted of certain serious felonies, including murder, indecency with a child, aggravated kidnapping, or sexual assault, you will be eligible for release on parole. You become eligible for release on parole when your time served, plus good conduct time, equals one-fourth of the maximum sentence imposed or fifteen years, whichever is less.<sup>266</sup> There are exceptions to this for those serving a life sentence, for prisoners considered repeat or habitual offenders, and prisoners convicted of more serious felonies listed in the statute.<sup>267</sup> You may be released on parole when a parole panel establishes that your release will not increase the likelihood of harm to the public. A lawyer may represent you at your parole hearing when you appear before the parole panel.

You may be placed on parole only when arrangements have been made for your employment or maintenance and care, and when the parole panel believes you are able and willing to fulfill the obligations of a law-abiding citizen. If you are released on parole, you may be subject to certain conditions, including attendance at substance abuse or sex offender treatment programs, electronic monitoring, residence requirements, and payment towards the cost of parole supervision. Parole may be granted early to elderly, disabled, mentally ill or retarded, or terminally ill prisoners.<sup>268</sup>

If you are released on parole and are then accused of or arrested for violating parole, you are ordinarily entitled to a hearing within forty days after the arrest or within a reasonable time if you are arrested in another state.<sup>269</sup> Proof that you were convicted and sentenced for another crime while out on parole is enough to justify parole revocation. However, you may request a hearing where you can present mitigating factors for the later conviction. If your parole is revoked, you may not get credit for the time that you were out on parole. If you want to challenge a revocation of parole, you should file a state habeas corpus petition with the court that convicted you of the original offense from which you were paroled.<sup>270</sup>

To complete the parole period, you must serve out the whole term for which you were sentenced, which may or may not include the time you served prior to release on parole.<sup>271</sup> Depending on your

260. 730 Ill. Comp. Stat. Ann. 5/3-3-9 (2012).

261. 730 Ill. Comp. Stat. Ann. 5/3-3-10 (2007).

262. 730 Ill. Comp. Stat. Ann. 5/5-8-1(d) (2013).

263. 730 Ill. Comp. Stat. Ann. 5/3-3-8(b) (2012).

264. *See Collins v. Sielaff*, 43 Ill. App. 3d 1022, 1023 357 N.E.2d 1213, 2 Ill. Dec. 770 (Ill. App. Ct. 1976) (allowing parolee to maintain a habeas corpus action claiming entitlement to final discharge).

265. Tex. Gov’t Code Ann. § 508.145(b) (2011).

266. Tex. Gov’t Code Ann. § 508.145(f) (2011).

267. Tex. Gov’t Code Ann. § 508.145 (2011). Tex. Code Crim. Proc. Ann. art. 42.12, §§ 3g(a)(1)(A), (C)–(E), 3g(2) (West 2011). Prisoners serving time for felony offenses listed in the portions of part 42.12 that are specified above will not be eligible for release on parole until “the inmate’s actual calendar time served, without consideration of good conduct time, equals one-half of the sentence or 30 calendar years, whichever is less, but in no event is the inmate eligible for release on parole in less than two calendar years.” Tex. Gov’t Code Ann. § 508.145(d) (2011).

268. Tex. Gov’t Code Ann. § 508.146 (2007).

269. Tex. Gov’t Code Ann. § 508.282 (2004).

270. *See Bd. of Pardons & Paroles ex rel. Keene v. Court of Appeals for the Eighth District*, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995) (noting that when parolee sought state habeas corpus relief following the revocation of his parole, such a claim should be brought before the original convicting court).

271. Tex. Gov’t Code Ann. § 508.155 (2007).

specific situation, the Paroles and Pardons Division may allow you to serve the remainder of your term without supervision.

### N. Parole in Michigan

If you are serving an indeterminate sentence in a Michigan state prison, and you have served your minimum sentence minus any allowances (such as good time or a disciplinary credit), the Michigan state Parole Board may grant you parole at its discretion.<sup>272</sup> You may be granted “special parole” before you finish serving your minimum term, if your sentencing judge gives written approval.<sup>273</sup>

If you are serving a sentence for a drug offense, you may be eligible for parole before your minimum term is over—after half your minimum sentence, after five years, after ten years, or after seventeen and a half years—depending on the severity of your offense.<sup>274</sup>

If you are serving a life sentence, you may still be eligible for parole, unless you were convicted of first degree murder, adulterating medicine/drugs or selling adulterated medicine/drugs, explosives-related offenses, or criminal sexual conduct.<sup>275</sup> You may become eligible for parole from a life sentence within as few as ten years, depending on the crime for which you were convicted.<sup>276</sup> See Section 791.234(8) of the Michigan Compiled Laws for additional conditions that will apply.

If you have been sentenced for consecutive terms, you become eligible for parole when you have served the total time of the added minimum terms, minus any good time and disciplinary credits, if you are not subject to added disciplinary time.<sup>277</sup> If you have remaining consecutive terms to serve and have not received added disciplinary time while in prison, the Parole Board is allowed to terminate the remainder of the sentence you are currently serving once you have served the minimum term of your present sentence.<sup>278</sup>

The Michigan Parole Board will not grant you parole until it is satisfied that you made arrangements for employment, education, and any necessary mental health or medical care.<sup>279</sup> You *must* have earned your high school diploma or GED if you were not employed when you committed the crime, unless you were sentenced before December 15, 1998, or your minimum sentence was less than two years.<sup>280</sup>

The Parole Board must interview you at least one month before your minimum sentence has expired, minus applicable good time and disciplinary credits and as long as you are not subject to disciplinary time.<sup>281</sup> However, the Parole Board does not have to interview a prisoner in order to grant parole if it “determines that the prisoner has a high probability of being paroled and the parole board therefore intends to parole the prisoner.”<sup>282</sup> You may also waive your right to an interview, but the waiver must be in writing and no later than thirty days after the notice of intent to conduct an interview is issued.<sup>283</sup>

If the Parole Board decides to conduct an interview, you should receive a notice of intent to conduct an interview from the Parole Board at least one month before the interview date.<sup>284</sup> The notice must state the specific issues and concerns that will be discussed at the interview and that may be a basis for a denial of parole. The board cannot deny your parole for a reason that is not stated in the notice, except for good cause as stated to you at or before your interview, and as listed in the required written explanation.<sup>285</sup> Read the

272. Mich. Comp. Laws Ann. § 791.234(1) (2010). Michigan does not require that every prisoner be eligible for parole. *See, e.g.,* People v. Merriweather, 527 N.W.2d 460, 464, 447 Mich. 799, 809 (Mich. 1994) (“We find no basis, however, to conclude . . . the Legislature intended . . . all defendants, or even simply this defendant, must be eligible for parole”).

273. Mich. Comp. Laws Ann. §§ 791.233(1)(b)–(d) (2008).

274. Mich. Comp. Laws Ann. § 791.234 (2010).

275. Mich. Comp. Laws Ann. §§ 791.234(6)(a)–(f) (2010).

276. Mich. Comp. Laws Ann. § 791.234(7) (2010).

277. Mich. Comp. Laws Ann. §§ 791.234(3)–(4) (2010).

278. Mich. Comp. Laws Ann. § 791.234(5) (2010).

279. Mich. Comp. Laws Ann. § 791.233(1)(e) (2008).

280. Mich. Comp. Laws Ann. § 791.233(1)(f) (2008). You are exempt from this requirement if you are over 65, have a learning disability, or some other reason outside your control.

281. Mich. Comp. Laws Ann. § 791.235(1) (2012).

282. Mich. Comp. Laws Ann. § 791.235(1) (2012).

283. Mich. Comp. Laws Ann. § 791.235(6) (2012).

284. Mich. Comp. Laws Ann. § 791.235(4) (2012).

285. Mich. Comp. Laws Ann. § 791.235(4) (2012).

notice carefully, and be prepared to challenge and present evidence on any inaccurate issues stated in the notice.

During the interview, you may be represented by an individual of your choice, but your representative cannot be a fellow prisoner or an attorney.<sup>286</sup> You or your representative can present relevant evidence to support your release and challenge any inaccurate information in the notice. When making a parole determination, the Parole Board cannot consider an expunged juvenile record or any information it determines is inaccurate.<sup>287</sup> The Parole Board can consider—but cannot base a parole denial *solely* on—your marital history, prior arrests not resulting in conviction, or adjudication of delinquency.<sup>288</sup> The Parole Board must consider any statements made by a victim.<sup>289</sup> In addition, the Parole Board member conducting your interview must review information relevant to the notice of intent to conduct an interview, such as the parole eligibility report institutional staff prepared. The parole eligibility report includes information such as all the major misconduct of which you have been found guilty, your work and education record during confinement, and the results of any physical, mental, or psychiatric examinations performed on you.<sup>290</sup>

If the Michigan Parole Board decides not to release you, you will receive a written explanation of the reason for the denial, which may include specific recommendations for corrective action that you may take to improve your future chances of release.<sup>291</sup> Only the prosecutor or crime victim can appeal a decision made by a Parole Board; your ability to appeal the Parole Board's decision has been eliminated.<sup>292</sup> The appropriate standard of review for the Parole Board's determination is an abuse of discretion standard.<sup>293</sup> Habeas corpus is available only under extreme circumstances, such as where parole has been denied based on your race, religion, or national origin.<sup>294</sup> The law does not require that you be re-interviewed within the next twelve months—the Court of Appeals of Michigan has held that there is “no statutory impediment” (restriction imposed by the law) to a Parole Board's decision not to reconsider a prisoner's eligibility for parole for two years.<sup>295</sup>

## O. Conclusion

This Chapter provides a detailed overview of New York State parole procedures, from the release hearing to the revocation process. It also includes a brief overview of parole procedures and practices in these states: California, Florida, Illinois, Texas, and Michigan. We hope as well that prisoners in states not specifically covered in this Chapter will acquire a better understanding of parole policies. In general, this Chapter may serve as a model for ideas on how to research and whom to contact when learning about the parole system in your own state. Note, however, many states have eliminated parole and now impose determinate (fixed) sentences. All prisoners, even where the information is detailed, should refer directly to the applicable statutes and regulations of their state to see if there have been changes made following the *JLM*'s publication.

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286. Mich. Comp. Laws Ann. § 791.235(6) (2012).

287. Mich. Comp. Laws Ann. §§ 791.235(1)(a)–(b) (2012).

288. Mich. Comp. Laws Ann. §§ 791.235(3)(a)–(b) (2012).

289. Mich. Comp. Laws Ann. § 791.235(1) (2012).

290. Mich. Comp. Laws Ann. §§ 791.235(5), (7)(a)–(e) (2012).

291. Mich. Comp. Laws Ann. § 791.235(12) (2012).

292. *Morales v. Mich. Parole Bd.*, 260 Mich. App. 29, 36, 676 N.W.2d 221, 227–28 (Mich. 2003) (noting that, “[b]y eliminating the phrase, ‘shall be appealable by the prisoner’ . . . the Legislature clearly intended” to eliminate the prisoner's right to appeal a parole board's decision).

293. *Wayne County Prosecutor v. Parole Board*, 210 Mich. App. 148, 153, 532 N.W.2d 899, 901 (1995) (holding that the appropriate standard of review when a court reviews a Parole Board's decision to grant parole is abuse of discretion). This discretion is restricted by Mich. Comp. Laws Ann. §§ 791.233(1), 791.235(1), (3), (4), (7)–(9) (West 2012). The abuse of discretion is a difficult standard to meet because in order for the Parole Board's decision to be overturned, you must show that the Board's decision was unsupported by the evidence, unlawful, or clearly incorrect.

294. *Morales v. Mich. Parole Bd.*, 260 Mich. App. 29, 40, 676 N.W.2d 221, 230 (Mich. 2003) (“[T]he writ of habeas corpus deals only with radical defects which render a judgment or proceeding absolutely void”). A radical defect would be if the Parole Board did something that was clearly against what is required by law.

295. *In re Parole of Roberts*, 232 Mich. App. 253, 255, 591 N.W.2d 259, 260 (1998).