



**Testimony by Scott Paltrowitz, Prison Visiting Project  
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Before the Hearing of the NYS Assembly's Corrections Committee  
Board of Parole – December 4, 2013**

The Correctional Association of New York (CA) would like to thank the Corrections Committee of the Assembly for this opportunity to provide testimony about our observations and concerns about the decision-making of the Parole Board (hereinafter “BOP” or “Board”) and the procedures used by the Board and the Department of Corrections and Community Supervision (DOCCS) leading up to parole release decisions. The CA has had statutory authority since 1846 to visit New York’s prisons and to report to the legislature, other state policymakers, and the public about what is happening in our prison system. Our access has provided us with a unique opportunity to observe and document the actual practices inside NY’s prisons, including during the last two years since the merger of DOCS and Parole into DOCCS, and to learn from both incarcerated persons and staff their views on the processes and outcomes of parole decisions. In addition, the CA has held focused group discussions with formerly incarcerated persons regarding parole in the past and in preparation for this testimony.

**Part I** of this testimony will begin with an overall system-wide analysis of parole decisions, demonstrating the unacceptably low release rates by the BOP and the failure of 2011 Amendments to the Executive Law to result in any substantial change in such rates.

**Part II** will then provide a summary of those 2011 changes in the law and the implementation of those changes by DOCCS, in order to provide a context for the remaining portion of the testimony.

**Part III** will outline the CA’s major findings and concerns with Board decision-making and the processes used by the Board and DOCCS identified through prison monitoring visits to 14 DOCCS facilities across the state in 2012 and 2013, focused group discussions with formerly incarcerated persons, and participation in multiple fora that involved currently or formerly incarcerated persons. Specifically, the CA found that the BOP denies parole release, often repeatedly to far too many people, frequently based on the nature of applicants’ crimes of conviction or past criminal history while failing to consider people’s accomplishments, readiness for reentry, or objective risk. In addition, while the merger process has the potential of helping DOCCS better prepare people for reintegration to their communities and the BOP to evaluate and release people ready for return, the BOP has not implemented changes mandated by the 2011 amendments and does not provide guidance to applicants, while DOCCS does not provide sufficient program opportunities, particularly for long-termers denied parole. Compounding these challenges, medical parole has been vastly underutilized, and solitary confinement negatively impacts people’s ability to be released and return to their communities. Overall, the unnecessary denial of parole is inhumane, wastes taxpayer funds, denies communities valuable members, and perpetuates mass incarceration.

**Part IV** will offer recommendations to various stakeholders to fundamentally transform the operations of the Board and DOCCS to ensure that from the time a person is incarcerated, s/he begins a path toward returning to the community, that DOCCS provides meaningful opportunities to help the person prepare for successful return to the community, and that a Board, more representative of the communities to which applicants will return, both gives fair consideration as to whether a person is ready for return and releases all people who are ready.

## **I. OVERVIEW OF PAROLE BOARD INTERVIEWS AND DECISIONS**

The Board of Parole evaluates persons with indeterminate sentences for release and performs additional assessments and/or administrative functions in the processing of other individuals who are returning to their communities following incarceration in state prisons. A review of the BOP workload reveals that most individuals for whom the BOP is making a full assessment for suitability for parole are not approved for discharge. In these cases, often less than 30%, and in some categories less than 20%, of evaluated persons are approved for release. Indeed, for general, non-specialized (non-Shock and non-merit time) cases in which the BOP makes a full assessment, less than 20% of parole applicants are released during either initial appearances or reappearances. We find these rates unnecessarily low and contrary to the intent of the law governing parole release decisions, which contemplates that the BOP should release persons who pose limited risk to public safety and have demonstrated appropriate behavior while incarcerated.

The BOP interviews a significant number of persons each year for release and also performs paper reviews of the records for many other persons eligible for release. **Table 1: 2005 – 2013 Parole Board Interviews and Approval Rates** on page 3 contains a summary of the number of cases considered by the BOP each year from 2005 through October 2013. Data for 2005 through 2011 were compiled by the Board and provided to the CA in response to our FOIL request, whereas the data for 2012 and the 10-month period in 2013 (January through October 2013) were computed by the CA from the month summaries of Board interviews contained on the BOP website. It appears that the categories described on the BOP website for specific type of interviews may not entirely correspond to the categories contained in the 2005-11 summary provided by the Board. Consequently, we urge caution in drawing precise conclusions from the 2012-13 data about specific subcategories of decisions.

The total annual number of BOP cases during the last four years for which we have comprehensive data (2009 – 2011) was approximately 27,000 cases, of which 8,000 to 10,000 were only paper reviews that do not entail significant assessment of whether the person is an appropriate candidate for release. Most of these paper review cases involved individuals who had been approved for conditional release or had qualified for presumptive release. The vast majority of these persons were discharged from DOCCS, and the primary purpose of BOP review was to set the conditions under which the persons will be supervised when they are released.

In reviewing the remaining 17,000 to 19,000 cases coming before the Board, it is important to separately analyze the BOP decisions in five main categories: (1) graduates of a Shock program; (2) merit time reviews; (3) other initial appearances before the Board; (4) individuals who were incarcerated as technical parole violators and now eligible for release; and

**TABLE 1: 2005 - 2013 PAROLE BOARD INTERVIEWS AND APPROVAL RATES**

	2005	2006	2007	2008	2009	2010	2011	2012*	2013*
<b>Initials</b>	9,418	8,770	8,074	8,915	7,696	7,780	7,145	6,075	3,462
<b>Approvals</b>	2,908	2,277	2,237	1,691	1,390	1,321	1,095	968	817
<b>Approval Rate</b>	30.9%	26.0%	27.7%	19.0%	18.1%	17.0%	15.3%	15.9%	23.6%
<b>Merit</b>	2,308	2,129	1,949	2,171	1,773	1,744	1,629	1,049	1,393
<b>Approvals</b>	1,021	777	856	712	538	523	458	554	460
<b>Approval Rate</b>	44.2%	36.5%	43.9%	32.8%	30.3%	30.0%	28.1%	52.8%	33.0%
<b>Suppl Merit</b>	699	765	378	215	67	34	7	14	2
<b>Approvals</b>	438	430	218	122	40	21	3	8	1
<b>Approval Rate</b>	62.7%	56.2%	57.7%	56.7%	59.7%	61.8%	42.9%	57.1%	50.0%
<b>Final Deportation</b>	190	146	100	125	103	87	77	78	60
<b>Approvals</b>	158	125	70	97	81	61	60	60	37
<b>Approval Rate</b>	83.2%	85.6%	70.0%	77.6%	78.6%	70.1%	77.9%	76.9%	61.7%
<b>Total Initial w/o Shock</b>	12,615	11,810	10,501	11,426	9,639	9,645	8,858	7,216	4,917
<b>Approvals</b>	4,525	3,609	3,381	2,622	2,049	1,926	1,616	1,590	1,315
<b>Approval Rate</b>	35.9%	30.6%	32.2%	22.9%	21.3%	20.0%	18.2%	22.0%	26.7%
<b>Shock</b>	1,867	1,097	869	843	903	1,060	1,034		
<b>Approvals</b>	1,801	1,026	844	816	868	955	898		
<b>Approval Rate</b>	96.5%	93.5%	97.1%	96.8%	96.1%	90.1%	86.8%		
<b>Reappearance</b>	5,667	5,570	5,440	6,204	4,579	4,683	3,822	3,407	2,840
<b>Approvals</b>	820	815	1,032	824	711	796	658	694	531
<b>Approval Rate</b>	14.5%	14.6%	19.0%	13.3%	15.5%	17.0%	17.2%	20.4%	18.7%
<b>PV/CR Reappearance</b>	4,951	5,112	5,925	5,397	4163	3,664	3,455	175	99
<b>Approvals</b>	4,652	4,808	5,609	5062	3855	3,388	3,185	43	30
<b>Approval Rate</b>	94.0%	94.1%	94.7%	93.8%	92.6%	92.5%	92.2%	24.6%	30.3%
<b>Total Non-Admin</b>	25,100	23,589	22,735	23,870	19,284	19,052	17,169		
<b>Approvals</b>	11,798	10,258	10,866	9,324	7,483	7,065	6,357		
<b>Approval Rate</b>	47.0%	43.5%	47.8%	39.1%	38.8%	37.1%	37.0%		
<b>Other Administration</b>	233	173	278	218	215	219	178		
<b>CRC Reviews</b>	3,064	4,136	4,921	5,633	5,409	5,507	5,584		
<b>CRC-PV Reviews</b>	515	820	1,384	1,760	1,886	2,113	2,254		
<b>CRC-Shock Reviews</b>	64	600	853	812	696	669	752		
<b>CRC Merit Reviews</b>	3	394	1,084	1,590	1,474	1,394	1,160		
<b>Presumptive Reviews</b>	380	293	209	148	97	80	35		
<b>Merit PR Reviews</b>	1,156	749	678	577	357	224	92		
<b>Supp Merit PR Reviews</b>	699	765	378	215	67	34	7		
<b>Total Board Workload</b>	31,147	30,515	30,583	32,421	27,315	27,229	27,231		

\* 2012 and 2013 (through October 2013) data is based upon interview and decision information presented on the Board of Parole website. Some of the data in the 2012-2013 categories may not include all cases contained in the 2005 through 2011 data. In particular, the 2012-13 "Initials" are substantially reduced and may be excluding some decisions, and in 2012, there appears to be missing a number of "Merit Time" cases compared to other years.

(5) other persons reappearing before the Board having been already denied parole.<sup>1</sup> The first three groups are appearing for the first time before the Board, while the latter two groups are reappearances. The approval rates differ drastically for these categories. It is also of interest to look analyze BOP decisions (6) by age of parole applicants; and (7) by prison, including the security level of the prison and the gender of the people incarcerated in the prison.

### **1) Persons Enrolled in a Shock Incarceration Program**

Individuals who complete a Shock program are eligible for release and therefore, it is not surprising that throughout the period 2005 through 2011, 87% (2011) to 97% of these persons were released. There is no apparent assessment done by the BOP of the suitability of these persons for release as they have a statutory right to be discharged once they successfully complete the program. For the period 2006 through 2011, there were typically about 900 to 1,100 Shock cases reviewed each year. We do not have data for 2012 and 2013 because most Shock graduates are not interviewed by the Board, but only receive a paper review.

### **2) Merit Time Reviews**

Merit time is another statutory program in which persons who are incarcerated with primarily non-violent crimes and have completed selected DOCCS programs are eligible for parole prior to their minimum sentence if both granted merit time by DOCCS and then approved for release by the Board. Although the approval rates for persons appearing before the Board having been granted merit time by DOCCS is not as high as some of the other categories, during the period 2005 until 2011 the Board approved parole for these individuals in the range of 28% (2011) to 44% (2005 and 2007). The data we have for 2012 appears to be more limited and includes only 1,049 merit time interviews (compared to an average of 1,715 cases during 2009 through 2011), of which 53% were approved for parole, a significant increase from 2011 (28%). It appears the 2012 data is missing some merit cases, which may account for the higher approval rate. For the 10-month period in 2013, however, the number of merit time cases recorded on the BOP website (1,393) was comparable to the rate of cases during 2009-11, and the approval rate was 33%. Overall, we believe an approval rate of 30% to 40% for individuals who have been approved for merit time by DOCCS is unnecessarily low and is undermining the intent of the merit time law.

### **3) All Other Initial Appearances Before the BOP**

The remaining individuals appearing for the first time before the Board are persons not in a Shock program and who have not qualified for early release under merit time. The number of such cases dropped from 9,418 in 2005 to 7,145 in 2011. Unfortunately, the approval rate for these persons has also declined from 31% in 2005 to only 15% in 2011. Data we obtained from the BOP website for 2012 appears to be missing some cases, as the total number of interviews was only 6,075 compared to an average of 7,540 for the previous three years (2009-11). The

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<sup>1</sup> There are several other smaller categories of interviews conducted by the BOP: supplemental merit time, medical parole, special consideration, rescission of a parole approval decision, and parole interviews for final deportation. Annually, most of these categories comprise less than 100 cases per year, and consequently, we have not included an analysis of these cases in our testimony.

approval rate in 2012 was only 16%, signifying that less than one in every six persons coming before the Board for an initial interview was granted parole. We have a much smaller sample of cases for the 10-month period in 2013; only 3,462 initial interviews are listed on the website, whereas we would have expected more than 5,950 during this period based upon 2011 annual data. The approval rate for 2013 cases reported on the BOP website was 24%. It is unclear if this represents an improvement in the approval rate this year or is a function of how the initial cases are recorded in the monthly reports. Overall, we maintain the approval rates of less than 20% over a five-year period (2008-12) for initial parole hearings are unacceptably low and represent the Board essentially ignoring the judicial imposition of a minimum sentence for these individuals. It is unreasonable to assume that the courts have somehow misinterpreted the public welfare or respect for the rule of law to such an extent that 80% of their decisions were inappropriately lenient.

#### **4) Technical Parole Violators**

The two remaining categories are individuals who are reappearing before the Board. Technical parole violators (PV) are not generally interviewed by the Board and are released at a very high rate following a paper review. For the period 2005 through 2011, 92% to 95% of these persons were approved for release. Annually, there has been a decline in the number of technical parole violator cases reviewed by the Board from a high of 5,500 in 2007 to only 3,100 in 2011. The data presented in **Table 1** for 2012 and 2013 does not reflect the reviews of PV cases; rather, these numbers are only the few PV cases in which the person was interviewed by the Board because of some unusual circumstances in their case, and consequently, their approval rates were significantly lower. There is no indication that PV cases in 2012-13 are being released at lower rates than in the past. Given that the vast majority of PV cases do not generally represent a substantive review by the BOP of the person's likelihood for violating the law once released, they are not representative of how the Board is applying their discretionary authority for parole.

#### **5) General Reappearances Before the BOP**

The last remaining category is persons reappearing before the BOP who are not a PV or qualified for a conditional release. The group represents the second largest category of persons evaluated for parole during the period 2005-11, with annual numbers ranging from 6,204 in 2008 to the lowest number of cases, 3,822, in 2011. These individuals are approved for parole at rates generally lower than any other category. For the period 2005 – 2011, the approval rates ranged from 13% to 19%, with an average of 16.5% for 2009 through 2011. The reappearance cases for 2012 and 2013 listed in **Table 1** are significantly less than the average number for the prior three years, suggesting that we may be reporting only a subset of the reappearance cases reviewed by the BOP. Despite this limitation, the approval rates rose only slightly to 20.4% and 18.7%, respectively, in 2012 and the 10-month period in 2013. We find these figures most disturbing in that all of these individuals have been denied parole at least once prior to their reappearance and consequently, have generally spent an additional two years in prisons but the Board continues to deny their parole at rates comparable to or even lower than initial cases. There would be less justification in these cases to find that releasing these persons would undermine respect for the law or be incompatible with social welfare when they have served more than their minimum sentence. Similarly, it seems unlikely that five out of six of these persons had a poor institutional

record or would qualify as a significant security risk. Rather, it appears that in most cases, the Board is primarily deciding to impose their own sense of what is an appropriate sentence for these individuals and failing to appropriately assess their institutional record, the public safety risk, and the judicial sanction specifying the minimum term to be spent in prison.

**6) Analysis of Age and Approval Rates**

There is well established data that the older a person is, the less likely that individual will violate the law or pose a public safety risk. The COMPAS instrument significantly weighs a person's age in making an assessment of risk. It appears, however, that the Board is not adequately considering this factor in its decisions, as approval rates are essentially the same for each age bracket.

**Table 2: Analysis by Age of 2012 Parole Interviews**

AGE	RELEASED	%	DENIED/ DELAYED	%	TOTAL
No age	2	2.6%	74	97.4%	76
<20	18	8.8%	187	91.2%	205
20-29	524	20.0%	2092	80.0%	2616
30-39	606	21.4%	2227	78.6%	2833
40-49	642	18.9%	2757	81.1%	3399
50-59	472	21.5%	1722	78.5%	2194
60+	151	21.0%	569	79.0%	720
	2415	20.1%	9628	79.9%	12043

**Table 3: Analysis by Age of 2013 Parole Interviews**

AGE	RELEASED	%	DENIED/ DELAYED	%	TOTAL
No age	0	0.0%	35	100.0%	35
<20	29	15.6%	157	84.4%	186
20-29	409	18.1%	1848	81.9%	2257
30-39	499	21.0%	1875	79.0%	2374
40-49	523	18.9%	2242	81.1%	2765
50-59	369	19.3%	1542	80.7%	1911
60+	119	19.7%	486	80.3%	605
	1948	19.2%	8185	80.8%	10133

We analyzed the BOP interview data for 2012 and the 10-month period in 2013 to assess approval rates by 10-year age intervals. **Table 2: Analysis by Age of 2012 Parole Interviews** and **Table 3: Analysis by Age of 2013 Parole Interviews** reveal startling results showing that the percentage of persons released in each 10-year bracket from their 20s through their 60s were

approximately the same, all in the range of 18% to 21% for each category in both years. We question how an individualized assessment of risk and institutional behavior could result in such uniformity across such a wide spectrum of incarcerated individuals. Anecdotally, as discussed further below, we have found that many older persons in prison we have interviewed who have appeared before the Board recently have reported that their risk assessment using COMPAS was low, yet the Board denied them parole, often despite exemplary institutional records. The data contained in **Tables 2 and 3** would appear to support these assertions.

## **7) Analysis of Approval Rates by Prison, Security Level and Gender**

The BOP provided us with data for Fiscal Year 2011-12 detailing the approval rates for each prison for the various categories of Board decisions. This information is summarized in **Appendix A: Prison Parole Data for Fiscal Year 2011-12** attached to this testimony. An analysis of this data reveals several observations about the variability in approval rates among prisons, security categories, and gender differences.

Not surprisingly, the approval rates for maximum security male prisons were lower than for medium security facilities. Overall, only 8% of initial appearances at maximum security prisons were approved compared to a system-wide approval rate of 26%. It should be noted, however, that the system-wide average is significantly affected by the large number of releases from minimum security prisons, which account for only 3% of the entire prison population but yield 47% of the parole approvals. We question why less than one person in every ten maximum security individuals interviewed by the Board should be approved, especially since many of these persons have spent extended time in prison prior to their first appearance. There also was significant variability among these maximum security prisons. At Shawangunk, none of the 15 persons appearing for initial parole interviews were approved. At Great Meadow, only four persons of 99 individuals appearing before the Board for the first time were approved, a rate one-half the system-wide rate for all male maximum security prisons. It is unclear why this prison should have such a low rate, while Five Points, a facility with a similar population to Great Meadow, including many individuals with mental health needs, has an approval rate (11%) nearly three times greater, although still unacceptably low. The negative impact of having a disciplinary record, as will be discussed further below, is quite apparent from the situation at Upstate, an institution primarily housing persons confined to Special Housing Units; only two persons were released from the prison during the year, most likely from the prison work cadre.

The overall approval rate (22%) for all maximum security persons reviewed by the Board (including initials, merit time, reappearances and parole violators/conditional release cases) was also lower than the system-wide average of 37%. It must be emphasized that these figures include technical parole violators, who, as previously noted, are approved at a much higher rate (greater than 90%) than other cases and represent 19% of all reported Board cases. Again, we observed significant variability among the prisons with low approval rates of 11%-12% at Shawangunk, Southport and Upstate to a much higher rate of 34% at Five Points.<sup>2</sup> The low approval rates at these maximum security prisons are particularly disturbing in that many of the reappearances are for individuals who have been denied parole multiple times by the Board.

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<sup>2</sup> Downstate, a reception facility with a work cadre, has a higher approval rate, but this population is substantially dissimilar to other maximum facilities.

For medium security prisons, the overall approval rate for initial appearances is 18%, more than twice the rate for maximum security prisons, but still very low. Again, there is significant variability among the prisons with a low approval rates at several facilities (Otisville (6%), Franklin (11%), and Wallkill (12%)) compared to other prisons with much higher approval rates (Butler (26%), Watertown (25%), Cayuga (24%), Wyoming (23%), Altona (23%), and Ogdensburg (22%)). For most of these prisons, it is unclear why there should be such variability. Similarly, the approval rates for total appearances before the Board for persons in medium security prisons is low (34%) considering that a substantial portion are parole violators. Significant variability exists among the prisons in this category with low approval rates at several prisons (Wallkill (23%), Greene (25%), Mohawk (26%), Oneida (27%), and Woodbourne (27%)) compared to much higher rates at other facilities (Altona (42%), Groveland (42%), Mt. McGregor (41%), Ogdensburg (39%), Watertown (39%) and Cayuga (38%)). We believe this variability should be investigated to determine the reasons for such significant differences that do not appear to be a function of variability in the prison populations at these facilities.

We also noted that there are significant differences in the approval rates for men as compared to the female prison population. Overall, the approval rate for initial appearances for women is 65% higher than for the men and for all parole cases 43% higher for women. One would expect a difference in the approval rates, given the lower rate of women convicted of violent felonies (48%) compared to men (65%). But even with these relatively higher approval rates, we question why so few women are granted parole when half of the female prison population has not been convicted of a violent crime.

## II. SUMMARY OF THE 2011 CHANGES TO THE LAW AND DOCCS IMPLEMENTATION

In part due to the Board's low rates of release described in the previous part, as well as a broader effort to reduce recidivism, New York State made substantial changes in the laws governing DOCCS and the Parole Board in an attempt to infuse more evidence-based practices into the state's correctional policy. Specifically, on March 31, 2011, the legislature passed, and the governor signed, an Executive Budget Bill that made several amendments to Executive Laws and Correction Laws that have an impact on parole. Most relevant here, amendments were made to Executive Law § 259-c, which governs the functions, powers, and duties of the state Board of Parole. Amended Executive Law § 259-c(4) mandates that the BOP establish "**written procedures** for its use in making parole decisions" and "[s]uch written procedures **shall** incorporate **risk and needs principles** to measure the **rehabilitation** of persons appearing before the board, the **likelihood of success of such persons upon release**, and assist members of the state board of parole in determining which inmate may be released to parole supervision." (*emphasis added*). Two requirements of the Board created by this amendment must be noted. First, it requires the BOP to create written procedures about how it will make decisions. Second, it requires those new procedures to use risk and needs principles to assess the rehabilitation of parole applicants and their likelihood of success if released.

In addition, new Correction Law § 71-A requires DOCCS to develop a transitional accountability plan (TAP) when an individual is committed to custody. The TAP is to be a "comprehensive, dynamic and individualized case management plan based on the programming

and treatment needs of the inmate.” The TAP’s purpose is to “promote the rehabilitation of the inmate and their successful and productive reentry and reintegration into society upon release” and shall be used to “prioritize programming and treatment services . . . during incarceration and any period of community supervision.” BOP Chair Andrea Evans sent a memorandum to Board members in October 2011, stating that the TAP provides a “meaningful measurement of an inmate’s rehabilitation” and should replace the “inmate status report” in the Board’s decision-making in those cases where a TAP has been prepared. In a related manner, Correction Law § 112(4) requires the DOCCS Commissioner and the BOP Chair to “develop and implement . . . a risk and needs assessment instrument or instruments.” This instrument is required to be administered at reception and throughout incarceration and release to community supervision, and is intended to facilitate both appropriate programming during incarceration and community supervision, and successful integration into the community.

The 2011 Executive Budget Law also included the creation of the Department of Corrections and Community Supervision (DOCCS) by merging the Department of Corrections (DOCS) with the Division of Parole. The Law states that this single agency was created in order to “provide for a seamless network for the care, custody, treatment and supervision of a person, from the day a sentence of state imprisonment commences, until the day such person is discharged from supervision in the community.” Related to parole hearings, under amendments to Executive Law § 259-d, although hearing officers will be governed by the DOCCS in general administrative matters, hearing officers are to “function independently of the Department [DOCCS] regarding all of their decision-making functions” and “report directly to the Board.” Under amendments to § 259-l, the DOCCS Commissioner has the duty to ensure all employees help facilitate the Board in making its independent decision-making functions, and ensure that the functions of the Board are not hampered such as through restrictions of resources, limited access to information, or presentation of applicant information in a manner that could inappropriately influence the Board in its decision-making.

These changes in the law in New York are consistent with research conducted during the past two decades, which demonstrates that the criminal justice system can reduce recidivism by 10% to potentially 30% through the use of mechanisms to assess the risk and needs of incarcerated persons and interventions designed to address those factors that lead to future criminal activity.<sup>3</sup> National authorities, such as the National Institute of Corrections, recognize “that structured assessment tools can predict risk of reoffense more effectively than professional judgment alone.”<sup>4</sup> Specifically, experts recommend the use of empirically based actuarial tools combined with clinical judgment to assess risk of recidivism and identify needs that should be addressed to reduce the likelihood of re-incarceration. Moreover, these assessments should be based upon both changeable (dynamic) and unchangeable (static) factors related to criminal behavior.<sup>5</sup> At least 15 states, including California, have implemented computerized risk assessment procedures to evaluate people involved in their criminal justice systems. But assessment alone will not reduce recidivism. Interventions, both while persons are incarcerated

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<sup>3</sup> National Institute of Corrections, *Evidence-Based Policy, Practice, and Decisionmaking, Implications for Paroling Authorities*, Washington DC, US Department of Justice at 5 (2011).

<sup>4</sup> *Id.*

<sup>5</sup> PEW Center pm the States, *Risk/Need Assessment 101: Science Reveals New Tools to Manage Offenders*, Public Safety Performance Project, Issue Brief at 3 (2011).

and when they return home, must be implemented to address needs that have been identified by the assessment process. Consequently, programs, such as the national Transitional Accountability Plan (TAP), have been proposed to evaluate and monitor incarcerated persons' needs and progress in addressing those needs while in prison.

As a result of these changes in the law and in line with this recognized research, the newly created DOCCS adopted COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) as the risk assessment tool it would utilize. COMPAS is reported to be one of the two major general risk assessment instruments used by corrections systems and is recognized to be an effective assessment of risk and needs.<sup>6</sup> According to the developer of COMPAS, Northpointe, the tool was "empirically developed"; "focuses on predictors known to affect recidivism"; and "provides information on a variety of well validated risk and needs factors designed to aid in correctional intervention."<sup>7</sup> Most particularly relevant to the present testimony, COMPAS was "specifically developed to assess many of the key risk and needs factors in adult correctional populations and to provide decision-support information regarding placement of [incarcerated persons] in the community."<sup>8</sup> As used by DOCCS, COMPAS measures three types of overall risk: risk of felony violence, risk of arrest, and risk of absconding. In addition and interconnected with the levels of risk, COMPAS compiles what are termed criminogenic need scales, looking at the following factors: criminal involvement, history of violence, prison misconduct, re-entry substance abuse, negative social cognitions, low self-efficacy/optimism, low family support, re-entry financial, and re-entry employment expectations.<sup>9</sup> Through an 84-question assessment, COMPAS translates both static and dynamic factors into overall risk potentials and criminogenic needs scales. COMPAS results are intended to be used in conjunction with professional judgment to make classification decisions and guide activities. Some prisons in New York had initially begun using a *reentry* COMPAS as early as 2010, and most prisons fully implementing the use of COMPAS in 2012 after the 2011 amendments went into effect, though at least one CA-visited facility reported that it had not fully been using COMPAS until 2013. Staff at Ulster C.F. during a CA visit in May 2013 indicated that they had also begun implementing a *reception* COMPAS to assess people's needs upon initial entry into DOCCS.

In addition to COMPAS, DOCCS began implementing a case management plan that is considered by facility staff as a substitute for a Transition Accountability Plan, in April 2013. The TAP and COMPAS were intended to be used in coordination with each other as part of a larger process preparing people for successful return to their communities from the time of their initial incarceration through their release, community supervision, and ultimate discharge. More specifically, the coordinated system should involve moving through each of the following steps: 1) assessing individuals' risks at the time of incarceration; 2) assessing individuals' needs and responsibilities; 3) developing a case plan to delineate particular goals and actions to achieve those goals; 4) delivering programs for a person to make progress in their case plan; 5) measuring progress; 6) reviewing reentry risk; 7) assessing reentry needs and responsibilities; 8)

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<sup>6</sup> Tammy Meredith, John C. Speir, Sharon Johnson, *Developing and Implementing Automated Risk Assessments in Parole*, Applied Research Services, Justice Research and Policy, Vol. 9, No. 1, p. 3, 7, 2007.

<sup>7</sup> *Pratitioners Guide to COMPAS*, Northpointe, p. 1, Feb. 9, 2012.

<sup>8</sup> Id.

<sup>9</sup> COMPAS Assessments/Case Plan, DOCCS Directive #8500, Aug. 21, 2013.

release on parole; 9) finalization of a reentry case supervision plan; 10) release to the community and implementation and monitoring of progress with conditions in the case plan; 11) discharge from supervision; and 12) measuring outcomes.

During all of the CA's visits to prisons through February 2013, staff indicated that they had not yet begun implementing TAP and were not able to provide the CA with any information about TAP or its planned implementation. During the CA's visit to Collins in April 2013, staff indicated that DOCCS was no longer going to be using TAP, but instead they were going to be using what they referred to as a "case management plan" or "case plan." The purpose of the case plan, as articulated by DOCCS staff, is akin to the TAP – namely to create a more individualized, goal oriented program planning process that involves incarcerated persons in the process – though staff were not clear if in practice the case plan is different than the TAP and in what ways or to what degree it is different. According to prison staff, at an incarcerated person's first permanent facility, the ORCs will develop the case plan in conjunction with the incarcerated person. As of the time of this testimony, at least at some DOCCS prisons almost all of the people incarcerated at those facilities now have a case plan. For example, staff at Collins reported they began implementing the case plan in April 2013, and Watertown reported implementation starting June 1, 2013. In addition, the Fishkill administration reported they had begun implementing the new case plan, and as of August 2013, approximately 95% of the people incarcerated at Fishkill had a case plan. Similarly, staff at Sullivan indicated that they began initiating the case plan in June 2013, and at the time of our visit in November 2013, everyone at the facility should have had a case plan.

Finally with respect to changes made following the 2011 amendments, DOCCS underwent a process between the beginning of 2012 and mid-2013 whereby all former correction counselors and former facility parole officers in DOCCS prisons were merged into "Offender Rehabilitation Coordinators" (ORCs) who were all to be responsible for the same functions that included both counseling and parole work. According to information gathered from staff during CA visits to prisons across the state, including Woodbourne, Cape Vincent, Fishkill, Groveland, Greene, Collins, Ulster, Watertown, and Cayuga, the process of the merger – while slightly different in terms of timing at different facilities – followed a similar pattern. Specifically, after the merger went into effect, over a period of several months former correction counselors underwent upwards of three official training sessions regarding their new parole responsibilities, focused in large part on the new computer system for inputting and managing information relevant to parole for individual incarcerated persons. After the training was completed, typically around the fall of 2012, former correction counselors were given small caseloads, something on the order of one or two cases, to begin doing the parole work in what was sometimes referred to as "on-the-job training." At the same time, after the training of former correction counselors had been completed, in those facilities where former facility parole officers remained at the prison, they received some training typically sometime between the winter of 2012 and the spring of 2013, closer to the order of one afternoon of training, on the counseling responsibilities. At some prisons, the training on counseling responsibilities never took place because the former facility parole officers left the prison to go work in the field, a seemingly fairly common occurrence as discussed further below. Then, once the merger went into full effect at the facility, typically sometime in the first half of 2013, all former correction counselors and former facility parole

officers had fully merged responsibilities, meaning that they had equivalent full caseloads of both counseling and parole work.

### **III. CHALLENGES IDENTIFIED DURING PRISON VISITS**

The Prison Visiting Project (PVP) of the CA has received letters and surveys from individuals incarcerated in New York State, held meetings and interviews with incarcerated persons and staff during 14 prison visits to NYS correctional facilities in 2012 and 2013, received mail-in survey responses from people incarcerated at those facilities ("survey respondents"), collected data and other information from DOCCS and individual prisons, held meetings with formerly incarcerated persons, and participated in fora with currently and formerly incarcerated persons. Through all of this information collected over the last two years, the CA has received innumerable complaints about the failures of the Board. Additionally the CA has had an opportunity to track changes over time at DOCCS facilities and make assessments about Board decisions, Board hearing procedures, and DOCCS processes. Our review of system-wide data along with our collection of information during prison visits and from formerly incarcerated persons indicates first and foremost that the Board has long been abdicating its responsibility to make fair parole release decisions and to release individuals who have demonstrated their readiness to return to our communities. The 2011 changes to the law, while in theory, could have made positive improvements, in practice, the implemented changes have yet to result in any substantial change in outcomes of parole decisions, the processes of the Board itself, or the opportunities available in DOCCS. Specifically, we have found that:

- A) The BOP denies parole release, often repeatedly, to far too many people.
- B) The BOP fails to provide due consideration to all statutory factors and too often focuses primarily on the nature of applicants' crimes of conviction or criminal history.
- C) The BOP has failed to implement changes mandated by the 2011 amendments to the Executive Law and has not issued meaningful written procedures as required.
- D) The BOP processes fail to provide a meaningful opportunity for applicants to demonstrate their appropriateness for release.
- E) The merger and the processes in DOCCS facilities prior to applicants' Board appearances show progress, potential benefits, and some concerns in implementation.
- F) The BOP fails to provide guidance to applicants on what they can do to prepare themselves for release, and DOCCS does not provide sufficient program opportunities.
- G) The overuse of discipline and solitary confinement negatively infringes on people's ability to be released on parole and return to their communities
- H) Medical parole has been vastly underutilized, leaving many ill people languishing or dying in prison.

- I) The unnecessary denial of parole is inhumane, wastes taxpayer funds, denies communities valuable members, and perpetuates mass incarceration.

**A) The BOP Denies Parole Release, Often Repeatedly, to Far Too Many People**

Consistent with the system-wide and facility-specific data described above, incarcerated persons in facilities across the state have raised substantial concerns about parole denials. At some facilities the CA has visited, particularly those with large numbers of long-termers convicted of more serious crimes, parole has been one of the main concerns raised by people incarcerated at those facilities. Over and over again, the CA has heard that many people have been denied parole on numerous occasions over many years, with each denial generally meaning an additional two years incarcerated before appearing before the BOP again. People have reported being denied parole upwards of eight to ten times, and having had to remain in prison for decades longer than their minimum sentence.

For example, at Fishkill, where a significant portion of the population have been convicted of violent felonies, numerous interviewed persons and people who responded to a mail-in survey complained about being denied parole on multiple occasions over a period of many years. In fact, almost half of all survey respondents reported that they had previously been denied parole. Moreover, nearly half of those who had been denied parole had already been denied three or more times when they completed the survey, over a third had been denied four or more times, more than a quarter had been denied five or more times, and 10% had been denied seven or more times. A few survey respondents reported even being denied by the Board more than 10 times.

As another disturbing example, according to data received from Livingston C.F., a medium security prison where people incarcerated there are not necessarily serving long sentences for violent crimes, between 83%-85% of all parole applicants appearing before the Board were denied from 2010-2012, and only 15%-17% were granted. Moreover, a relatively large portion of the people incarcerated at Livingston had been denied parole at least once, with 37% of survey respondents reporting they had been denied parole during their current incarceration. Nearly two-thirds of those survey respondents who were denied parole had been denied multiple times, and almost a quarter had been denied five or more times, with some respondents reporting being denied upwards of eight and nine times. At Five Points, more than 90% of all people who went to the Board each year in 2010-2012 were denied parole, and only eight to nine percent were granted release. Moreover, of the 17% of survey respondents who had reported being denied by the Board at least once at the time of our visit, 70% had been denied multiple times, a quarter at least three times, and one person had been denied 10 times.

Similarly at an August 2013 Parole Summit sponsored by the Otisville Lifers and Long-Termers Organization, it was reported that 60 members of the organization who were at the event had already collectively spent 1,307 years in DOCCS custody, at an average of nearly 22 years per person, with four people reporting having spent 35 or more years in prison already, five having spent 30 or more years; an additional 13 having spent 25 or more years; 20 having spent 18 or more years; eight having spent 15 or more years; and seven having spent 10 or more years. When asked how many of the participants had been denied at least twice by the BOP, almost all

of the participants responded affirmatively; about half responded that they had been hit at least three times; about a third had been hit four or five times; and several had been denied release more than five times.

Although these prisons are but a few examples, many other CA-visited prisons had high levels of multiple denials. Additionally the challenges are widespread across the system even at places where parole did not affect a majority of the population. At Groveland, more than half of those who had been denied parole had been denied at least twice at the time they completed our survey, almost a quarter had been denied at least three times, and some had been denied as many as seven, eight, or nine times. At Clinton, although a relatively small percentage of survey respondents reported denials by the Board, several people indicated that they had been denied parole four, six, seven, and even 10 times. At Greene, while only 25% of survey respondents had been denied parole, 37% of those who had been denied parole were denied multiple times, with two people reporting being denied as many as eight times. At Sullivan, according to data provided by the facility, only 12%-17% of parole applicants were granted between 2011 and the first 10 months of 2013. Furthermore, there were very low release rates even at Ulster, where people going before the Board are members of the facility work cadre – meaning that they are typically classified as minimum security, have satisfied all of their program requirements, and are intended to go home from Ulster. Specifically, according to data received from Ulster, only 13%-18% were granted parole between 2011 and the first four months of 2013.

Overall, as seen in the system-wide data of Part I and the information provided by individual facilities and incarcerated persons, the BOP has been denying the vast majority of people who come before it, and often deny people repeatedly over many years.

**B) The BOP Fails to Provide Due Consideration to All Statutory Factors and Too Often Focuses Primarily on the Nature of Applicants' Crimes of Convictions or Criminal History**

Of particular concern, in conjunction with the many complaints about repeated parole denials, incarcerated persons across the system complain that the Board repeatedly denies parole based on the nature of applicants' crimes and their past criminal history, and fails to adequately consider or give sufficient weight to what people have accomplished while incarcerated, their current readiness for reentry, or their objective risk to the community. Under the longstanding executive law, the BOP must consider *all* of the following statutory factors: i) Institutional record (programs, training, work, therapy, staff/inmate relations); ii) Performance in temporary release program; iii) Release plans (community resources, employment, education, training, support); iv) Any deportation order; v) Victim statement; vi) Length of determinate sentence if person had received determinate sentence; vii) Seriousness of the offense (*including based on the type and length of sentence, recommendation of court/prosecutor/defense attorney, mitigating/aggravating factors, pre-confinement activity*); and viii) Prior criminal record.<sup>10</sup> In looking at all of the factors, under existing law, the Board is instructed that “discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not

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<sup>10</sup> N.Y. Exec. Law § 259-i (2)(c).

incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law.”<sup>11</sup> As discussed below, the current law has inappropriately led the Board to take on a role other than evaluating a person's readiness for reentry. Still, under the current law, although the Board is not required to give equal weight to each factor, it is required to give due consideration to all factors.

Despite the requirement that it give due consideration to all factors, many incarcerated persons across the state have complained that the Board relies almost exclusively on the nature of their crime of conviction or past criminal record. For example, many interviewed and surveyed persons who are incarcerated at Woodbourne reported that most of the many parole denials at the facility are based almost entirely on the nature of the candidate's original crime, rather than his institutional record, demonstrated personal growth, accomplishments while in prison, or readiness for reentry. In the same manner, numerous survey respondents at Fishkill complained about how the BOP continues to deny people based entirely on the nature of their original crime of conviction, regardless of their program completion, accomplishments while incarcerated, disciplinary record, amount of growth and change, or readiness for reentry back to their communities. In fact, more than 90% of survey respondents who had been denied parole reported the nature of their crime as a reason for their denial. Similarly at Clinton, nearly 90% of survey respondents in the Main facility indicated that they had been denied parole based on the seriousness of their offense, the highest reported reason for denials. As one survey respondent at Fishkill reported:

*“These parole commissioners are not seriously taking consideration of who we are today and how much our frame of mind changed for the better. They still judge us on our past instant offense whether it's 15, 18 or 20 years ago. That seems to be to them the only thing they see to give us 2 extra years every time. Many of [us] with a life bid have conducted ourselves for years in prison without a violent incident in prison and that alone shows a difference in that individual. Not only that we participate in programs to change our mind frame and have empathy for the people we made suffer because our choices were made back then. I definitely understand what I done to get me here by taking my victim's life was very wrong to the point of being an insane act. I even tried to put myself in my victim's family and friends shoes and the pain they're going through I could only imagine. I just wish parole commissioners ... [were] releasing ... violent offenders with 15, 18, 20 years in prison who want a fair chance.”*

Even at prisons where the people incarcerated have been convicted of less serious crimes, it is reported that the seriousness of their crime of conviction and past criminal history are major reasons for denials. For example, at Groveland more than two-thirds of survey respondents reported that the seriousness of the offense for which they were convicted was a reason for their denial and over 80% reported that their prior criminal record was a reason, while less than 20% reported that their failure to complete a program or their disciplinary record in prison was a reason for their denial. Nearly 80% of survey respondents at Five Points who had been denied parole reported that their prior criminal history was a reason for their denial and 38% reported that seriousness of their crime of conviction was a reason, while less than 30% reported that a

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<sup>11</sup> N.Y. Exec. Law § 259-i(2)(c).

poor disciplinary record in prison and failure to complete a program were reasons for denial, and only 13% cited lack of a release plan as a basis. CA survey respondents at Livingston who had been denied parole, reported that their parole was denied for the following reasons: seriousness of offense (62%), prior criminal record (56%), poor disciplinary record in prison (29%), failure to complete program (18%) and other (12%). No survey respondent at the facility reported the victim statement or the lack of a release plan as reasons for denial. At Greene, survey respondents reported three main reasons for parole denial: 'prior criminal record' (48%), 'seriousness of offense' (45%), and 'failure to complete program' (31%). As one person incarcerated at Greene suggested: "Parole needs to release [incarcerated persons] who are not a threat to society . . . and to stop discriminating [against a person] based on an individual's past history."

In a parallel manner to the overreliance on the nature of crimes of conviction and past criminal history, many currently and formerly incarcerated persons report being denied parole even though they have clean disciplinary records and have done everything they can to prepare for release. For example, numerous people incarcerated at Woodbourne reported that even though they had completed everything possible to rehabilitate themselves while in prison, they had done very little to increase their chances of obtaining parole. Some people at Greene raised similar complaints. As one person stated, for example, "the day I saw the Board about 50 people went too. No one made it. No disciplinary record, no refused programs." Similarly at Otisville, an incarcerated person lamented that "no matter what you do, they do whatever they want; if they don't like how you look or what you did or what you say, then they can deny you." The same pattern of complaints was seen at Fishkill, where for example, one person stated: "I am frustrated and confused about my parole denied release based on discretion and seriousness of the offense. I've completed all programs and volunteer to take other advance programs to help me get back on my feet. My pattern of behavior in the past 10 years is clean still I was denied parole."

*You go without any discipline record, complete everything, and they still hit you at the Board. If a person has changed and it shows, how can you ever get out from under your past record?*  
- Person incarcerated at Groveland

Similarly, many incarcerated persons at various prisons have reported parole denials despite the fact that they had very positive relations with DOCCS staff, and even had DOCCS Superintendents writing letters in support of their release. As one survey respondent at Woodbourne reported:

*I am an example that despite doing everything required and going above and beyond what is asked of me, I'm still denied parole. Despite recommendations of DOCS staff that deal personally with me on a daily basis, I am denied release on parole due to my instant offense and criminal history. I've been referred to as a model candidate for parole release by DOCS staff but parole does not care. Because of this reality, men are discouraged feeling that no matter what improvements they've made in their lives, parole will never recognize it above the things they cannot change (such as their past) enough to warrant release back to society.*

This overreliance on the nature of the crime and criminal history, and the failure to give due consideration to accomplishments, rehabilitation, readiness for reentry, and actual risk were viewed by many currently and formerly incarcerated persons as being in direct contradiction to the very purpose of parole, a BOP usurpation of the functions of sentencing judges, and a manifestation of a philosophy that focuses

*There is a futility of punishment.  
We are like a dead man walking.  
We should be preparing for  
going home, but we are being  
held up by the Parole Board.  
- Person incarcerated at Otisville*

on persistent punishment rather than rehabilitation. According to one person incarcerated at Fishkill, "the constant use of 'seriousness of the offense' negates any possibility of rehabilitation or consideration of it," and as another questioned, "please don't think that I am not taking full responsibility for my crime and I am aware of the seriousness of my offense. But how much time is enough: 25, 30, 50 years? Should not the Parole Board be concerned with rehabilitation?" Another person asked, "is 10 years a minor number?"

As raised by currently and formerly incarcerated persons, the role of the BOP should be to evaluate a person who comes before it in terms of their rehabilitation and readiness to return to their community. One of the main purposes of having indeterminate sentences and parole hearings is to create positive incentives and rewards for people to improve themselves while incarcerated. A person's minimum sentence is what the legislature and the courts have set as the sentence a person is required to serve for her/his crime of conviction. Allowing for a sentence range and the possibility of parole is intended to allow those with that crime of conviction who have demonstrated their suitability for release to in fact be released. A person's crime of conviction and past criminal history are two static factors that can never change. Denying people based predominantly on these factors raises substantial concerns about whether the BOP is evaluating the person before them, their degree of rehabilitation and growth, their risk to the community, and their readiness for reentry or is simply taking on the judicial role of sentencing for the purpose of punishment. Many incarcerated persons even characterize parole denials as new sentences; as one person incarcerated at Otisville described, "these are not denials of parole; these are new sentences: 24 months because of the nature of the crime." Similarly, as one person incarcerated at Fishkill lamented:

*"Parole is just a joke. My sentence is 25-life which means if I do 25 years and take all of the programs the DOCCS says to and I stay out of trouble then I'm supposed to be released after 25 years. The nature of my crime will never change. My risk assessment for the streets will always be high unless I get out and prove that I'm not a risk to society. The Parole Board has way too much power and discretion to the point where the commissioners are trying to play God. They are actually becoming judges and re-sentencing people by hitting people at their boards. That's not their job; that was the job of the sentencing judge. 25 to life means good behavior and completing all programs then after 25 you are to be released, not hit for 2 years again and again."*

Overall, the BOP has been failing to carry out its appropriate role of evaluation of parole applicants' preparedness to return to their communities, and instead has been playing a re-sentencing role by relying heavily on applicants' crimes of conviction and

past criminal history rather than applicants' accomplishments, readiness for reentry, and objective risk.

**C) The BOP has Failed to Implement Changes Mandated by the 2011 Amendments to the Executive Law and has not Issued Meaningful Written Procedures as Required**

Although the legislature mandated changes in the ways in which the BOP makes its decisions so as to encourage the Board to focus on more future-oriented factors and re-orient its role to one of evaluation or readiness for reentry, the Board has continued to deny people primarily based on the nature of their crime of conviction. As outlined above, the changes specifically require the BOP to utilize risk and needs principles in order to measure applicants' rehabilitation and likelihood of success upon release, and DOCCS to implement risk and needs instruments. Some of the legislators supporting the amendments have indicated that they intended the changes to cause the BOP to shift its focus from the nature of applicants' crime or criminal history to objective measures of applicants' achievements in prison, readiness for reentry, and risk.<sup>12</sup> Despite these intentions and the specific language of the law, the Board does not appear to have followed these amendments or changed the outcomes of its decisions.

Specifically, at least as of the time of this writing, the CA is not aware that the BOP has even issued the written procedures specifically mandated by the law, which is now more than two and a half years after the law's passage. The Board has claimed in legal proceedings that the Andrea Evans memo serves as the written procedures required under the law.<sup>13</sup> As others have argued and found, including some lower court judges, the Evans memo can not constitute the required written procedures because the memo does not provide any guidance about the interplay between the COMPAS, the case management plan, and the existing statutory factors; how the Board should be utilizing COMPAS, or what weight should be given to these various components. Moreover, although the Evans memo was written in October 2011, Andrea Evans herself stated in November 2011 that the mandated procedures had not yet been developed and stated in April 2012 that the procedures were at that time "currently being developed," indicating that she in no way could have believed that the memo she wrote was intended to be the procedures.<sup>14</sup>

In addition to the failure to issue the mandated written procedures, it does not appear that the Board has made the required shift away from a past-focused analysis to a forward looking analysis based on a risk and needs assessment, the rehabilitation of the applicant, and the likelihood of success upon reentry of the person before the Board. As will be discussed below, DOCCS has begun using COMPAS and a case plan, but the BOP continues to ignore the risk score levels and issues denials to people who have the lowest scores. For example, during our visit to Ulster in May 2013, a year and four months after COMPAS was fully implemented in DOCCS prisons, incarcerated persons complained that the Board was still denying parole release to people who received low risk assessment scores. Similarly, a person who went before the BOP

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<sup>12</sup> See John Caher, "Effect of Risk Assessment Rule on Parole Decisions is Unclear," *New York Law Journal*, April 30, 2012.

<sup>13</sup> See *Matter of Morris*, 40 Misc.3d 226, 231-32 (Sup. Ct. Columbia Co. 2013); Rosenthal, Alan and Warth, Patricia, "Parole Release Decisions and the Rule of Law," *Atticus*, p. 11, Summer 2013, Vol. 25, No. 2.

<sup>14</sup> See *Matter of Morris*, 40 Misc.3d at 231.

at Fishkill in the summer of 2013 still reported that the BOP never discussed the issue of the risk assessment during his hearing. Even as of August 2013, people incarcerated at Otisville reported that COMPAS was not being used by the BOP and that people with low risk assessment scores were being denied release based on the nature of their crime of conviction. Moreover, whatever changes the Board has made in terms of its decision-making in response to the 2011 amendments, there has not yet been any significant change in release rates by the Board. As discussed above in Part I, the combined release rates in 2012 and 2013 for general appearances before the Board for both initial hearings and reappearances were still less than 20%, rates that were in fact lower than initial appearance release rates in the mid-2000s.

Overall, the BOP has failed to issue meaningful written procedures or substantially change the bases or outcomes of its decisions, as it was required to do under the 2011 amendments to the Executive Law.

**D) The BOP Processes Fail to Provide a Meaningful Opportunity for Applicants to Demonstrate Their Appropriateness for Release**

Apart from the substantive outcomes of parole decisions, numerous incarcerated persons have complained about the BOP processes and the various failures to provide a meaningful opportunity to seek parole release. One concern raised is the make-up of the Board, and in particular the lack of representation on the Board of communities from which people going before the Board are from. For example, numerous long-termers at Otisville called for a restructuring of BOP membership. For example, one person incarcerated at Otisville pleaded that the state “needs to widen the selection pool of Parole Commissioners,” and another lamented that “very few if any of the Parole Board members have a background in rehabilitation.”

Looking at the make-up of the Board, nearly all of the Parole Commissioners come from law enforcement backgrounds, namely police, probation, or prosecution backgrounds.<sup>15</sup> Specifically, currently four of the Parole Commissioners previously worked in district attorneys' offices (two of whom also worked in Attorney Generals' offices), two additional Commissioners worked in Attorney Generals' offices (one of whom also worked for corrections in another state), one was a police detective and another was an agent for the Drug Enforcement Administration, two worked for probation, two additional worked for the crime victims board – one as Commissioner and one as an investigator, one was a former city councilmember and state senator, and one was a general lawyer. By contrast, the Board lacks representation of formerly incarcerated persons, family or community members of people who are incarcerated, people working for community-based reentry or rehabilitation organizations, or advocates or others who have worked on behalf of incarcerated persons. In addition, there have been concerns raised that the racial make-up of the Board is not representative of the people appearing before the Board or the communities from which they come, particularly given that approximately 75% of people incarcerated in NYS are black or Latino. Prior to the most recent appointments in 2013, there were no black men and only one black woman on the Board. Moreover, geographically, over 70% of the current Parole Commissioners come from urban upstate New York counties and over 40% come from the areas surrounding Buffalo, even though incarcerated persons from all upstate

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<sup>15</sup> The Parole Board is a political entity, with each commissioner appointed by the Governor and confirmed by the Senate.

urban communities represent only 24% of the total prison population in the state.<sup>16</sup> If the BOP's role is to evaluate whether an applicant is ready to return to the community, then it would only make sense that the BOP be comprised of a representative sample of the communities to which the applicants would return.

Related concerns raised that are elevated when considering the unrepresentative make-up of the Board, are that the BOP has generally unbridled discretion, parole decisions are often arbitrary, and whether someone is granted parole is at least perceived to be dependent on which Parole Commissioners review a particular case. If a parole applicant appears before a generally more sympathetic panel of Parole Commissioners, incarcerated persons believe that it is more likely the applicant will be granted parole and vice versa, that if an applicant appears before a panel of Commissioners who almost always deny release then it is more likely the applicant will be denied. As one person incarcerated at Otisville lamented, "when counselors or others talk to you after you get hit by the Board, it is not 'you're not ready' but 'it was a bad Board.'" Another similarly commented that "it is like a lottery; it just depends on the Board." Because Parole Commissioners have such vast discretion to make decisions as they choose, and neither the courts nor the political branches of government will interfere with such decisions in the vast majority of cases, incarcerated persons at least perceive parole decisions as arbitrary and based on personal philosophy rather than the merits of an individual case.

*For many of us earning parole release is by the luck of the draw; a lottery game of chance which largely depends upon the sentiments of the individual Commissioners, what programs we were able to take, and what supplemental educational programs were available in the facility.*  
- Person incarcerated at Shawangunk

One example of the potential impact of different parole commissioners on the outcome of parole release decisions comes from the work of the BOP at Collins during the first four months of 2013 prior to our visit to that facility. During the first four months of 2013, well after the merger and use of COMPAS had gone into effect, 94% of people appearing before the Board for the first time were denied (in contrast to upwards of 24% approval rates for initial appearances system-wide in 2013 as discussed above), and 75% of people reappearing before the Board were denied. Of note, in the first four months of 2013 there were two Parole Commissioners who sat on the parole panel three out of the four hearing dates, while a third Commissioner sat on the parole panel twice, raising some questions about whether commissioners are adequately rotated across facilities. Also of concern, while all Commissioners who sat on the panels at Collins in 2013 had above 90% average denial rates in a 92% to 96% range for initial appearances, the average denial rates, although a limited sample, ranged from 25% to 100% for reappearances.

In addition, incarcerated persons have complained about the large volume of cases of Parole Commissioners and in turn the failure of Commissioners to give enough time or consideration to each individual case. With the Board currently having 14 Parole Commissioners that hold around 16,000 hearings per year in three-member panels, each Commissioner has almost 3,500 cases per year. Parole applicants have complained that due in part to the large volume of cases, Commissioners spend very little time on each case, often do not receive a

<sup>16</sup> DOCCS, *Under Custody Report: Profile of Inmate Population Under Custody on January 1, 2013*, p. 6.

person's file until just prior to an applicant's hearing, and often only one member of the panel has actually read the file prior to the hearing.

Compounding the difficulty for Parole Commissioners to make individual determinations, parole applicants have complained that they are not provided an adequate opportunity to present the information they wish to provide during parole hearings. People have described having only 10 minutes to present information about many years of incarceration or events that may have taken place decades earlier. For example, people incarcerated at Woodbourne at the time of our visit in February 2012 conveyed a sense that hearings were unnecessarily rushed, making it extremely difficult to adequately demonstrate applicants' appropriateness for release, particularly in instances where decades' worth of information had to be taken into consideration.

Problematic in a related manner, parole applicants complain that the BOP is increasingly conducting parole hearings by video-conferencing, denying applicants the ability to meet face-to-face with the Commissioners who will decide their fate. At Groveland, for example, according to staff, since 2008 the BOP has used videoconferencing, rather than live interviews, to assess applicants. Staff indicated that 10 applicants are called down at a time to what used to be a visiting room at the facility, and then one by one go in for interviews that on average last about 10 minutes. The Board members then talk amongst themselves immediately after an interview to make a decision before moving on to the next applicant. In the same manner at Cape Vincent, one survey respondent documented that parole hearings take place via videoconferencing in the prison's infirmary; and complained that 15 or more parole applicants are placed in the hearing room at one time and have to listen to every other applicants' hearing. Similarly, parole hearings at Watertown are done exclusively by videoconferencing; the Supervising ORC (SORC) and another ORC generally go to Syracuse where the BOP is sitting, while the applicant is in Watertown. Staff indicated that the ORCs will often talk to the Parole Commissioners and the Commissioners will often ask them questions either prior to, or during a hearing, about the applicants file, Rap Sheets, previous incarceration, or other information.

Such procedures raise concerns about whether parole applicants are provided a meaningful opportunity to receive a fair assessment. Having only 10 minutes per interview is insufficient when an applicant often is trying to address activities and circumstances from many years of incarceration and prior to incarceration. Particularly now with the use of COMPAS and the case plan, people may need even more time to address these additional aspects under consideration by the Board. In addition, the use of video-conferencing may deny a parole applicant the opportunity to provide the Board with documents not already in their presence. Moreover, allowing only staff the ability to communicate with the Board, primarily outside of the presence of the applicant, raises some concerns about undue influence and a lack of an opportunity to fully address any Board concerns. Also, particularly when a parole release decision is so discretionary and can sometimes turn on Board Commissioners' perceptions of an applicant, video-conferencing denies an applicant the opportunity to have an in person, face-to-face conversation with the Commissioners that could influence the Board's decision. Despite the limitations and complaints about video-conferencing, it appears that video-conferencing is continuing to expand to additional prisons. For example, staff at Sullivan reported in November

2013 that they had recently switched from in-person interviews to video-conferencing two months prior to our visit.

In addition, despite the technological capabilities, applicants complain that proceedings are not adequately recorded and shared in a timely manner with applicants for use on appeals or in preparation for future hearings. Another complaint raised by incarcerated persons has been that parole applicants are not provided access to all of the materials considered by the BOP, and thus do not have an opportunity to refute potentially false information, explain other information, or more generally prepare to address any concerns of the Board. Moreover, in New York State, unlike some other states such as Massachusetts, parole applicants are not able to be represented by counsel at parole hearings, who could help in the presentation of material during such hearings. In a related manner, parole applicants at some facilities have complained about the lack of assistance in preparing for their parole hearings, including assistance with preparing a parole packet to submit to the Board and preparing for the interview itself. For example, many people at Woodbourne complained about counselors not working closely enough with parole applicants and the lack of assistance in preparing for parole. Facilities could make parole preparation more of a priority by including it as part of transitional services. For example, at Livingston, staff indicated that they help to prepare incarcerated individuals get ready for their BOP appearance through the Transitional Services Phase III program. Specifically, as of the time of our visit in December 2012, one week of half-day programming was facilitated by IPAs to answer questions about the COMPAS risk-assessment, what risk level an individual will likely receive and what the expectations would be for that level. Such programs should be expanded at Livingston and other facilities across the state.

Overall, combining the unrepresentative composition of the Board, the arbitrary and Commissioner-dependent nature of parole decisions, the Board's large volume of cases, the short length of parole hearings, the use of video-conferencing, and the difficulties obtaining quality parole hearing recordings in a timely manner raise serious concerns about the fundamental fairness of parole hearings. When individuals' lives and freedom are dependent on the outcomes of such proceedings, it is imperative that those individuals have the opportunity to fully participate and to receive fair and complete evaluations of their cases.

**E) The Merger and the Processes in DOCCS Facilities Prior to Applicants' Board Appearances Show Progress, Potential Benefits, and Some Concerns in Implementation**

Interviews with staff, as well as surveys and interviews with incarcerated persons, have indicated some positive progress made in the merger between corrections and parole in the state prison system, the implementation of the use of COMPAS, and the initiation of a case plan, as well as concerns about the ways in which the merger, the use of COMPAS, and the use of the case plan have been and will be implemented.

*1) The Merger*

The merger of DOCS and Parole into DOCCS, including the merger of parole and counseling functions into the same staff members, could theoretically have positive effects. The

role of the prison system should be to work with an incarcerated person from the first day of incarceration to help prepare that person for successful return to the community. By creating a continuum from the moment that a person is incarcerated, up until release by the BOP and through the time of release from parole supervision in the community; and by aligning staff responsibilities to carry out that continuum of responsibilities, the merger theoretically should help to more acutely focus the prison system's role on preparation of incarcerated persons for return to the community. Moreover, given that former correction counselors had much more contact and interaction with incarcerated persons than parole officers did, ORCs who carry out both functions and therefore have more interaction with incarcerated persons should have more knowledge about parole applicants and thus be able to submit more accurate and complete parole materials to the BOP.

Staff and some incarcerated persons at various facilities recognized the potential value of the merger, as well as some improvements in the merger process as the implementation has occurred. For example, a staff member at Watertown expressed his opinion that, although it had been a difficult transition, the overarching purpose of the merger makes sense in order to be able to follow a person from the time s/he is first incarcerated, identify the individual's needs, and work with the person toward meeting those needs while incarcerated and upon release. Some staff at Watertown who had done counseling work in the community likened the case plan to a treatment plan, allowing staff and an incarcerated person to look at the individual's program needs and then track the person's progress every 90 days. In addition, staff at Cayuga indicated that it was positive that after the merger, incarcerated persons could ask all of their questions to one person, their ORC, rather than having to ask counselors some questions and facility parole officers other questions.

Despite these positive aspects, in practice there have been concerns with the implementation of the merger that could negatively impact people's ability to obtain parole release. Specifically, many staff members and some incarcerated persons at various prisons expressed frustrations with a perceived rushed nature and lack of planning for the merger. More specifically, people raised concerns about inadequate consultation and preparation of both staff and incarcerated persons, as well as overall insufficient staffing levels to carry out all of the parole and counseling responsibilities. With respect to preparation of staff, particularly in the early stages of the merger but also as the processes have progressed, many ORCs reported that they were not fully trained or skilled, and yet were required to be preparing materials for parole applicants going to the Board. For example, staff at Five Points in February 2013 – after the merger had fully taken place and all ORCs had responsibilities for parole and counseling work over a year after the merger went into effect – still expressed reservations about the trainings that had taken place and the failure of staff to be able to understand and navigate the new computer system in particular.

In a related manner, many staff members complained that the merger created additional responsibilities to an already overburdened staff. During the early stages of the merger and even after it had been fully in effect for almost a year and a half, staff at various CA-visited facilities, including Cape Vincent, Greene, Collins, Watertown, and Cayuga, had complaints about the extra workload caused by the merger, the increase in administrative duties to an already overburdened staff, the substantial time commitment needed for completing interviews and

assessments, and overall some resentment about the process. Exacerbating the difficulties faced by staff in being able to properly produce and submit parole materials, some facilities had less staff after the merger, and in particular many former parole officers left facilities in order to work in the field, thereby leaving facilities with even less staff skilled in parole work and making the transition more difficult for the overburdened former correction counselors.

As a representative example, at Watertown, all of the former facility parole officers, including two general parole officers and one supervisor for the unit, left the facility after the merger. At the time of our visit in June 2013, the facility had five ORCs, all of whom were former correction counselors, including one for ASAT, one for transitional services, and one SORC for counseling. The facility did not have an SORC for parole at the time of our visit; they had submitted a waiver in order to replace the SORC. If at full capacity, staff indicated the facility should have had six ORCs plus two SORCs. Watertown was thus down two vacancies, one ORC and one SORC. Even at full capacity, this level of staffing would be below what the facility had prior to the merger, when they had a total of nine people in positions that would become ORCs and SORCS (six correction counselors, two POs, and two supervisors). Not surprisingly, some staff at Watertown complained that the state had taken two full time jobs and merged them into one, and that it continued to be difficult to learn the parole work, particularly when the former parole staff were not at the facility to show former counseling staff how to do it. Although not always as stark as at Watertown, various other facilities, such as Collins, Cayuga, and Sullivan, indicated similar issues of departing facility parole officers, staff with limited experience with parole hearing preparation, and overall insufficient staffing levels.

While some staff at various facilities have expressed that the process has begun to get easier as time has gone on and the merger becomes more fully implemented, there are still concerns that i) some parole applicants may not have a fair opportunity for parole release because of inadequacies in their paperwork or preparation; ii) facilities may still be insufficiently staffed to effectively carry out all the responsibilities of counseling and parole work; and iii) lingering resentment and incomplete about the merger and the resulting processes could lead staff to undermine the effectiveness of the entire process involving COMPAS and the case plan.

Specifically, the overburdening of staff, the lack of sufficient preparation of both staff and incarcerated persons, and the potential lingering resentment has potentially caused parole applicants to face a more difficult time at the BOP. While some of the negative impact will be discussed more fully below, specifically with respect to the use of COMPAS, staff at various facilities reported that the completion of paperwork to submit to the Board was often done much closer to applicants' parole hearing appearances than intended. Moreover, information from staff has raised concerns about the quality of the information submitted to the Board. For example, staff at Watertown noted in June 2013 that while staff members are doing what they can in the circumstances, even Parole Commissioners have been upset by what materials the facility is submitting to the Board. Also, some incarcerated persons during our visits expressed confusion about the merger. For example, at Woodbourne in February 2012 and Altona in July 2012 and still ongoing at other facilities later in the merger process, survey participants and interviewed persons have expressed confusion regarding parole policies and procedures, how the merger would affect BOP-decision-making, and how persons could address concerns about parole issues and proceedings. Again as discussed further below with respect to COMPAS, this failure to

adequately explain the impact to parole applicants negatively impacts their ability to prepare and present their case to the Board.

In addition to the fact that an overburdened staff might negatively impact people's appearances before the Board, some staff raised concerns that the additional parole duties and the focus on parole made staff less able to complete their counseling and other responsibilities. For example, some former correction counselors at Woodbourne expressed concerns that higher level officials did not believe that the counseling work was as important as the parole work, and as a consequence, were not planning to dedicate as much time to training former facility parole officers on the counseling work and were sometimes requiring staff to disproportionately give up counseling activities in order to complete parole tasks. Similarly, some staff at Five Points were frustrated that the parole work in the facility had been prioritized to such a degree as to limit the ability of staff to engage in counseling work or running group sessions. Moreover, although some staff believed that the merger helped improve the relationship between former correction counselors, other former correction counselors expressed concern that their involvement in parole, particularly given the high level of denials, could compromise parole applicants' trust in them and in turn their ability to effectively carry out their counseling functions. For instance, some staff at Five Points expressed concerns about a potential conflict of interest between their role as a counselor aimed at helping an individual and their parole role because if someone is denied parole then it can harm the therapeutic relationship and the level of credibility built up over potentially years.

Overall, having ORCs carry out both counseling and parole functions can be a beneficial step toward focusing DOCCS' role on preparing incarcerated persons for return to the community and ensuring that those preparing parole materials have greater knowledge about parole applicants. In order for ORCs to carry out their responsibilities effectively in that manner, there needs to be a sufficient number of staff members, and all of the staff members have to be thoroughly trained and have adequate time to carry out both counseling and parole work.

## 2) *The Use of COMPAS*

Very similar to the overall merger, the past two years have seen the full implementation of the use of COMPAS at the facility level, some concerns about the ways in which the implementation have taken place and whether staff may be undermining its objectivity, and again, most importantly, questions about whether the COMPAS has any meaningful positive impact in practice since the Board appears to be ignoring it for purposes of its release decisions.

On the positive side, COMPAS appears to have been fully implemented across the DOCCS system, and it appears to be serving its intended function of creating a more objective basis for assessing an individual parole applicant's risk to society upon release. Conversations with ORCs completing the COMPAS indicated precisely why there is a need to use an objective risk assessment instrument rather than assessments made arbitrarily by staff. Staff at both Greene and Cayuga, for example, expressed their subjective opinions that COMPAS underestimates the risk of people convicted of the most serious crimes, including murder. Such statements indicate that individual staff persons could, without objective bases, view a person to be a high risk simply based on the nature of the person's crime of conviction, when objective evidence-based

factors in fact indicate a low risk. Similarly, staff at various prisons have expressed their dislike for the fact that the COMPAS takes away their own influence, based on what they describe as their professional judgment. Again, while the staff view their diminished role as a negative aspect of COMPAS, it indicates that COMPAS is serving the function of infusing more evidence-based objective risk criteria into the process.

However, some incarcerated persons have raised concerns that parts of the COMPAS are not always accurate, and that it is sometimes difficult to correct inaccurate information. During our visit to Woodbourne in February 2012, for example, many incarcerated persons complained that COMPAS was being completed without adequate input from the persons being evaluated and sometimes contained incorrect information, including about such personal issues as family support. Although the facility stated that some of the problems may have resulted from the learning curve during the early stages of the merger and implementation of COMPAS, still as of mid-2013, the facility reported that a parole applicant typically receives his assessment only five days before his parole hearing. Similarly, some people incarcerated at Collins complained in May 2013 that staff sometimes do not ask the questions they should ask to get information from applicants, then make assessments about applicants based only on short meetings every few months, and that it is difficult to resolve disputes with the information generated through COMPAS. Even staff comments about how they translate answers into the form raised concerns about whether staff are really capturing the intended answers of applicants or using proper interviewing and recording techniques to ensure that applicants are answering the questions with the allowable responses. While many facilities have now indicated that people are able to obtain copies of their COMPAS printout, and that the facilities now have some processes in place for people to raise objections to aspects of the COMPAS, people sometimes are not able to obtain copies of the COMPAS until shortly before their parole hearing, and it still remains difficult for some to rectify errors or disputes found in the COMPAS results.

Additionally problematic, information provided by staff indicates that many staff – particularly former parole officers – do not understand or accept the empirical validity of the COMPAS, which in turn raises questions about whether staff could be undermining its objectivity. As noted above, part of the bias against COMPAS seems to stem from a misunderstanding of objective risk factors and what actually indicates that a person is more or less a risk to the community. Indicating potential additional confusion or misunderstanding of COMPAS, different staff members at different facilities indicated different perceptions about the influence that individual applicant answers can have on the risk assessment. Some staff at Five Points, for example, have made allegations that incarcerated persons attempt to manipulate the COMPAS results to obtain a lower supervision risk level by providing false answers when completing the COMPAS. By contrast, at Watertown, when asked whether parole applicants ever try to mis-represent information in order to influence their risk level, a staff member indicated he had never seen that happen. When further asked how accurate COMPAS seemed to be at assessing risk, a staff member indicated at first that the instrument sometimes shows *higher* risk than there should be, but later changed to state that it was mostly accurate. This staff member explained that he did not know where the risk score came from or how it was calculated, but that it seemed accurate most of the time.

These potential misconceptions and lack of acceptance of the validity of COMPAS by staff raises concerns about whether staff could be undermining the implementation of COMPAS. First, staff overrides of COMPAS results raises concerns, particularly when staff rely on inappropriate information as the basis for such overrides. For example, Groveland staff said that some parole applicants have been charged with, but not convicted of, more serious crimes than the crimes they were actually convicted of. Staff indicated that COMPAS allows them to rely on those more serious criminal charges even if the person was not convicted of them, in order to indicate that a person is a higher risk to society than would otherwise be seen in the COMPAS results. Such a reliance on criminal charges that a person was never found guilty of raises serious questions about the constitutionally protected presumption of innocence in our criminal justice system. While staff at Collins indicated in April 2013 that with the COMPAS 8.0 staff are not able to create an override for the supervision level generated from COMPAS, and only the bureau chief can make such an override, staff at Cayuga reported in July 2013 that they can put disagreements they have with the COMPAS in parole notes, and can in fact still override the COMPAS if they provide a justification.

In addition to concerns about staff overrides for inappropriate reasons, there are concerns about staff who do not override COMPAS results but still remain skeptical of COMPAS. According to the company that developed COMPAS, Northpointe, staff should expect overrides on the order of 10% of the cases.<sup>17</sup> During interviews with ORCs at multiple facilities, the degree of skepticism of the COMPAS seemed much greater than only one in ten cases. Moreover, many staff who expressed disbelief in COMPAS results indicated that they did not often override those results. There are therefore concerns about whether those staff who do not override COMPAS results but still do not believe in those results, may undermine the implementation of COMPAS in other ways, such as the manner in which they, as discussed above, complete COMPAS answers, submit other parole paper work, or interact with Parole Commissioners.

Most importantly, regardless of whether the COMPAS has been implemented properly at the facility level, the Board has appeared to be generally ignoring the level of risk presented by COMPAS. As discussed above, numerous incarcerated persons have complained that people with low risk scores continue to be denied release. At the very least, there is confusion and a lack of information and understanding among staff and incarcerated persons as to COMPAS, how risk levels are determined, and what COMPAS should be and is currently being used for by the BOP. COMPAS is a complicated instrument that uses complex formula to translate various factors into overall risk and needs scores. When compounding the lack of clarity about how individual answers and factors translate into those scores with the failure of the Board to even issue written procedures about how COMPAS is to be used by the Board and what weight it should be given, staff and incarcerated persons are left with incomplete knowledge about the process. Most troubling, applicants are thus participating in a process of completing the COMPAS without an understanding of how the COMPAS risk scores are being developed, whether the COMPAS score is being used by the BOP, and if so how it is being used. This failure to provide an adequate explanation leaves parole applicants without a fair understanding about how they are being judged, including how their answers in a COMPAS interview are translated into risk and needs scores and then in turn used by the Board. In turn, this lack of understanding leaves parole

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<sup>17</sup>Northpointe, "Practitioners Guide to COMPAS," p. 28, Feb. 9, 2012.

applicants without an adequate opportunity to prepare for their parole hearings and renders the decision-making process about parole release even more fundamentally unfair.

Overall, it is very important that an evidence-based risk and needs assessment instrument is used for assessing what services and programs are appropriate for individuals and for evaluating individuals' appropriateness for parole release. While DOCCS has fully implemented the use of the re-entry COMPAS and begun using the reception COMPAS, there are serious concerns about whether staff and incarcerated persons have been sufficiently trained and informed about the COMPAS to meaningfully and effectively use it. Also, there are concerns about whether even though the procedures have changed, the organizational culture may be harder to change, which could in turn affect the implementation of COMPAS. Moreover, the COMPAS must be used in conjunction with the case plan and the provision of programs and services inside of DOCCS prisons and out in the community. Most importantly, the Board must use the COMPAS as an objective, evidence-based tool for assessing parole applicants' risk and release those individuals who have demonstrated low risk.

### *3) The Initiation of the Case Plan*

As noted above, DOCCS began implementing the case plan in the spring of 2013 and at least some facilities have made substantial progress at initiating case plans for incarcerated persons. Combining COMPAS with the case plan provides a potential mechanism for assessing individuals' needs, designing a program and treatment plan to meet those needs, tracking progress of attainment of the goals of that plan, and ultimately preparing for reintegration into the community and demonstrating readiness for reentry to the BOP. The question about whether these new processes will result in substantive changes in outcomes for incarcerated persons depends upon: i) whether the case plan process is implemented in a meaningfully different way than previous processes; and ii) whether the changes are fully integrated within a broader system of DOCCS programming opportunities and BOP decision-making.

With regard to the case plan processes, staff at different facilities, and even within the same facility, had varying views on how similar or different the case plan process was from previous quarterly counseling reviews. A staff member at Watertown, for example, indicated that the case plan was more extensive than the information in the previous quarterly reviews, such that there is now a goal and a task for each area, including education, vocational, ASAT, ART, transitional services, and that staff will now review the progress toward the goals in each area, as well as the areas in need of improvement, at the quarterly reviews. Staff indicated that in the past the quarterly reviews were simply a check on whether a person had done the program on their list or not; now the quarterly reviews are more in depth, and more time consuming, because the staff and the incarcerated person have to come up with steps to meet the goals and there is more incarcerated person participation in the process. Even this staff member, however, indicated that the change was somewhat a substantive change and somewhat just additional paperwork.

Collins staff also indicated that the work was basically the same as what they used to do with quarterly reports but that the work was more involved and takes about twice as long to complete. Compared to the old status reports, staff indicated that the case plan will include short

and long term goals agreed upon by staff and the incarcerated person, as well as more specific tasks to achieve those goals. In addition, the case plan will stay with a person from the time s/he is incarcerated through supervision on parole. Similarly, staff at Cayuga reported that the focus of the case plan is now on programs and goals, breaking down those goals, and then tracking the achievement of those goals. Cayuga staff relayed that some examples of goals that people will set up include making their conditional release date, completing programs, obtaining a high school diploma, working on family issues, quitting smoking, and other physical health goals. For example, an individual could create a Need – family connections; Goal – maintain family connections; Activity – maintain contact with family; and Task – write to family regularly; and then the ORC will track progress on the goal by following-up on how much a person has written. Staff indicated that the process was similar to before the merger but just done differently, though some staff thought it was more work but also more effective.

Even if the new case plan and merged ORC process results in a more individualized and goal centered plan and tracking mechanism, the ultimate determination of how substantive the changes are in practice is whether the changes will have an impact on people's ability to participate in programs that will help them prepare for release and whether the BOP will release people who have meaningfully participated in the programs and the process. According to the National Institute of Corrections (NIC),<sup>18</sup> the TAP was intended to be:

***a collaborative product involving prison staff, the offender, the releasing authority, community supervision officers, human services providers (public and/or private), victims, and neighborhood and community organizations. TAP describes actions that must occur to prepare individual offenders for release from prison, defines terms and conditions of their release to communities, specifies the supervision and services they will experience in the community, and describes their eventual discharge to aftercare upon successful completion of supervision. The objective of the TAP is to increase both overall community protection by lowering risk to persons and property and by increasing individual [incarcerated person's] prospects for successful return to and self-sufficiency in the community. The TAP is structured around a target release date, which . . . connotes a strong expectation that all parties—the facility, the releasing authority, and the [incarcerated person]—will abide by the terms of the plan, and that if the [incarcerated person] achieves the elements described in the TAP and maintains good behavior while confined they will be released on the target release date.***<sup>19</sup>

Unfortunately, as discussed above, there has not been any substantial change in the decision-making by the BOP, either in terms of the numbers of people released or the bases for release decisions. Also, as discussed further below, there has not been an expansion of program opportunities to match any identified activities and tasks.

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<sup>18</sup> New York was selected in early 2004 to participate in NIC's Transition from Prison to the Community Initiative.

<sup>19</sup> *Transition from Prison to Community Initiative*, National Institute of Corrections, 2002, available at: <http://static.nicic.gov/Library/017520.pdf>.

Overall, it is too early to judge whether the case plan, in conjunction with the COMPAS, will help incarcerated persons prepare to successfully return to their communities and in turn to demonstrate their appropriateness for release to the BOP. A fully developed and integrated case plan can be an important continuing process of identifying needs and goals, assessing progress, evaluating and re-designing programs, and providing documentation of progress for evaluation by the BOP. However, even if used to its fullest, this tool can only be effective if done in conjunction with a DOCCS system that provides beneficial program opportunities and the BOP evaluates people's accomplishments, readiness for reentry, and objective risk.

**F) The BOP Fails to Provide Guidance to Applicants on What They Can do to Prepare for Release, and DOCCS does not Provide Sufficient Program Opportunities**

Many incarcerated persons have complained that the BOP does not provide sufficiently detailed explanations for parole denials, failing to explain how the various statutory factors were weighed or why a person's accomplishments, low risk score, or positive disciplinary record did not demonstrate the applicant's suitability for release. Further, parole applicants have complained that the Board does not provide recommendations for what applicants can do to be released. Rather, according to applicants and in reviewing a small number of decisions, the Board often will note or even commend applicants for all of their accomplishments and still deny parole release based on the nature of the person's crime of conviction without explaining why the crime outweighed the accomplishments and indicated that the person was not ready for release.

Moreover, even if the Board provided guidance as to what programs or activities a person should pursue, DOCCS prisons often do not provide sufficient opportunities for applicants to continue to enhance their preparation for return to their communities and in turn improve their chances for release. With declines in budget allocations for programming staff, and in turn decreased programs, across the system DOCCS prisons are less and less able to provide meaningful opportunities for people to improve their lives, increase their preparedness for their return to their communities, and demonstrate to the Board their readiness for release. One of the main stated purposes behind the merger and other changes from the 2011 amendments was to have DOCCS focus from the first day persons are incarcerated on preparing those individuals for successful return to their communities. Yet despite the implementation of new procedures through the case plan and COMPAS, the lack of program opportunities in DOCCS, the denial of release to people who successfully complete the programs offered to them, and the failure of the Board to provide direct guidance on how a person can become ready for successful return to their communities indicate that no substantial change or improvement has taken place.

*1) The Lack of BOP Guidance and DOCCS Programs Can have a Particularly Negative Effect on Long-Termers Who Have Spent Many Years in Prison*

Currently and formerly incarcerated persons have frequently described the potential devastating impact of a parole denials, particularly repeated denials for long-termers. For example, a formerly incarcerated person who had been denied parole multiple times by the BOP before being released recalled how people who were denied release would respond in various ways. Some people would find somewhere to cry and others would act out in response. While

others would try to fortify themselves to do what they have to do in order to be released at the next Board appearance, that type of response becomes increasingly harder in the face of repeated denials. As the person stated, the impact of repeated denials can be demoralizing because the implication of the denials is that you and anything you accomplish inside of prison is worthless. As another formerly incarcerated person described, some people who are denied parole become bitter, in a way that stays with them for a long time, including after they ultimately are released. As another person conveyed, the possibility of release on parole often serves as “a light at the end of the tunnel” and so a parole denial can cause people to lose hope.

*Looking at the way parole keeps hitting people appearing in front of them leaves [no] hope for people coming up for appearance. I can't change the past, but I can change.*  
- Person incarcerated at Fishkill

The negative impact of parole denials is even more acute because of the lack of opportunity for people to improve their chances for release and better prepare for return to their communities. Particularly for long-termers who are denied by the Board and have completed all of their basic DOCCS programming, many across the DOCCS system are left to languish in prison with little positive opportunities. With only a small number of college programs available across the state ever since incarcerated persons were eliminated from eligibility for federal Pell grants and New York State Tuition Assistance Program (TAP) grants, and with limited support for peer-led or volunteer programs, many long-termers have few opportunities after being denied parole to continue to grow or demonstrate additional readiness for release prior to their next Board appearance.

Long term incarcerated persons have described the need and usefulness to have a variety of additional programming opportunities for those denied parole – both for these persons' own well-being and for their ability to be successful upon release. For example, people incarcerated at Otisville who were part of the Lifers and Long-Termers organization there described that since the majority of long-termers at Otisville were arrested in their early 20s or late teens and many have now spent decades in prison, there is an incredible need for programs, particularly related to computers, other technology skills, and marketable job training, to help them adjust to the new society to which they will return. As one incarcerated person described for himself, “In over 18 years of incarceration things have changed in the world – particularly technology; . . . [including] cell phones or looking online to do job searches; if we're gonna prepare to go home then we need to learn these skills.” Others emphasized the need for work release in order to provide opportunities for people to understand more the world to which they will return.

Despite these commonsense needs, there are few college opportunities, very few computer literacy or other technology courses, and few and diminishing opportunities for work release. For example, one of the major complaints raised by people incarcerated at Woodbourne was that they have satisfied their vocational and educational requirements and there are few additional programs available to them. Similarly, at Livingston, some survey comments specifically lamented the limited program opportunities for self-improvement that could help them demonstrate to the BOP their appropriateness for release. Representative of many other prisons, for long-termers there is very little program at Livingston because 63% of the population already have a GED, and the facility does not have a college program other than correspondence

courses. As one survey respondent noted: "There should be more programs to help me better myself so that when the time comes for me to see the Parole Board, I can say that I did more than just read books. I have a lot of time on my hands and I feel helpless in this prison."

Even those places that do have college programs, those programs are very limited in capacity. For example, while Hobart College positively offers limited college courses at Five Points, only 33 people were enrolled at the time of our visit in contrast to the 1384 people incarcerated at Five Points, 687 of whom already had a GED. As a result, numerous survey respondents reported that there were few programs available, other than porter positions or recreation, for those who had completed all of their required programs.

In addition to the lack of college or other DOCCS programming, there appears to be decreasing support from facility administrations for peer-led programs, and even support for lifers programs varies across facilities. While prisons such as Fishkill, Otisville, and Attica allow lifers or long-termers organizations to operate and thereby allow incarcerated persons to provide peer support to each other, other facilities do not help to facilitate such meaningful programs. For example, some incarcerated persons at Cayuga lamented the lack of programs for long-termers, and one person even specifically stated that he attempted to get a lifers program at the facility in the past, but that the administration was not interested in supporting it.

Incarcerated persons themselves recognize the negative psychological impacts that the lack of programs can have on people who are denied parole. For example, a person incarcerated at Fishkill spoke about the hopelessness that has resulted following the failure of the 2011 amendments to bring about meaningful change and the continued denials of parole over and over for the seriousness of the instant offense. Similarly, people incarcerated at Woodbourne described living in a "state of limbo" and felt they were denied hope or motivation to continue to grow and change.

Moreover, many currently and formerly incarcerated persons also described the negative impacts of repeated denials on not only the individuals denied, but also on the operation of the prisons and the DOCCS system. First, the demoralization that can occur following repeat parole denials can lead people to become less willing to engage in beneficial activities and can lead some to engage in problematic or disruptive behavior. As one survey respondent from Clinton stated, "prisons would be a lot less violent if Parole let [people] go home after completing mandated programs." Similarly, an incarcerated person at Otisville described how many men and women in prison are "silent sufferers" who at some point can no longer remain silent and act out in non-productive ways. Another formerly incarcerated person described how some people lash out after being denied parole and find themselves in solitary confinement in the SHU, which only decreases their chances of parole release in the future.

In addition, the growing aging population in prisons that has resulted in large part from repeated parole denials can have a major impact on the ability of the prison to provide programs and services to the people incarcerated there. Over the last 11 years, while the total prison population in New York state decreased by 21%, the number of people in prison aged 50 and over increased by 64%, meaning that there are now over 9,000 people aged 50 and over incarcerated in New York State prisons. Studies suggest that people in prison aged 50 and over

are approximately 10-15 years older in terms of their physical and mental state, pose the least safety risk and are the least likely to commit new crimes if released, and can cost two to four times as much to incarcerate than younger people. As one survey respondent from Clinton recognized, repeated denials has led to a growing population of aging persons in prison and can prove very difficult for those aging individuals:

*One of the most common problems and always overlooked is the aging and growing amount of old [incarcerated persons] that are simply 'forgotten' that mind you are no more a threat to society than the average senior citizen. Whatever their criminal past was, is paid in full when you examine the illnesses that are both physical and mental and . . . that as old men and women they can no longer keep up and participate in a system that was designed for an overwhelmingly younger generation. . . . When [an incarcerated person] starts to age with years . . . the sentence lapses into a realm that the society condemns as torture to the extent as being cruel and unusual punishment.*

Taking it a step further, some currently and formerly incarcerated persons have described how the current operation of the BOP can undermine the rule of law and contradict part of the whole purpose of incarceration of encouraging people to refrain from crime. As one formerly incarcerated person explained, repeated denials based on the nature of the crime or criminal history causes people to lose faith or respect in the BOP, DOCCS, the entire prison system, the rule of law, and society as a whole. When people are sentenced by a judge and told that if they rehabilitate themselves, participate in programs, and prepare themselves for return to their communities that they will be rewarded with release, those individuals often buy into that system and work hard to utilize their time in prison in a beneficial manner. Then, when they are denied parole after they have done what they were told they were supposed to do, and achieved accomplishments even above and beyond those expectations, they begin to disrespect the law and the whole process and system. As one formerly incarcerated person who had been denied parole multiple times explained, "we are told that how our society works is that we reward people who abide by the rules, we reward good behavior and punish bad behavior; and yet the Parole Board is punishing good behavior." In turn, people begin to view the injustice and arbitrariness of the system and society and in turn lose the will or desire to continue to be a contributing member of that society. As another formerly incarcerated person stated, "when the State fails to follow its own rules, it erodes the rule of law."

*Not just refusing parole; refusing humanity.  
- Person incarcerated at Otisville*

Overall, repeated parole denials in conjunction with limited program opportunities for long-termers can have devastating impacts not only on the individuals denied parole, but also the prison system and society as a whole.

2) *People are not Always Able to Even Complete General Mandatory Programs Prior to Appearing before the Board*

In addition to the lack of opportunities for long-termers who have already completed mandatory programs, decreased program budgets across the DOCCS system also mean that

people are not always able to even get into the basic mandatory DOCCS programs – academic, vocational, substance abuse treatment, and transitional services – in a timely manner before they go to the Board. Incarcerated persons at various facilities have complained about getting denied parole by the BOP for not having completed a mandatory program for which they had been on a waitlist and not had an opportunity to complete prior to appearing before the Board. At Cape Vincent, for example, multiple survey respondents complained that the facility did not take steps to ensure that individuals who had required programs for purposes of time credits or parole were able to participate in those programs in a timely manner, which had a negative impact on people's chances of being released. Another survey respondent referred to Cape Vincent as a "hit jail" meaning few if any individuals get released on parole, and as seen in the data in the first section of this testimony, Cape Vincent had low release rates particularly for initial appearances.

Similarly, one of the major concerns raised by people incarcerated at Cayuga during our visit in July 2013 was the difficulty in getting into ASAT and ART prior to their earliest release dates or appearing before the Board. Although staff refuted that people were not completing their mandatory programs before going to the Board, many people interviewed during our visit raised concerns that they were not able to complete these programs prior to appearing before the Board, and that they were denied by parole as a result. Cayuga's program capacity and enrollment at the time of our visit were consistent with these concerns. Specifically, like many prisons across the state, the facility has experienced a decrease in the size of the ASAT program over time: between our visit in 2008 and our visit in 2013, the program had been cut in half from a capacity of 120 to 60. At the time of our visit, there were 60 people enrolled in ASAT, and more than seven times that number – 433 – on a waitlist. Especially because the program lasts at least six months and because Cayuga had a relatively larger number of people who are close to their potential release dates, the vast disparity between the size of the program and the needs of the people incarcerated at the facility created an environment where people were going to have difficulty completing their mandatory programs in a timely manner. Similarly for ART, while there were 36 people enrolled at the time of our visit, there were 465 people on the waitlist.

The problems of people not able to complete their mandatory programs prior to appearing before the Board must be seen in light of the general trend across DOCCS of decreasing program opportunities. System-wide program budgets have declined at a rate disproportionately higher than the decline in the prison population. Specifically, the last three years have seen a 12.5% decrease in program staffing levels and a 30% reduction in non-personal program services funding, while for example security staff levels declined only 6.3% and security non-personal services funding was reduced only 8%. The impacts of these program budget cuts were seen at many prisons across the state, where the programming needs of the people incarcerated at those facilities often far exceeded the capacities to meet those needs, large waitlists were prevalent, and program reductions and closures occurred too frequently. As one representative example, at the time of our visit to Collins in May 2013, only one third of the people incarcerated in need of a GED were enrolled in an academic class, four vocational shops had closed since 2009, ASAT had a waitlist that was four times the number of people enrolled, and hundreds of people were on a waitlist for ART and Thinking for a Change.

Some staff at some facilities have at least recognized the importance of providing opportunities for people to complete mandatory programs prior to appearances before the Board

or release, particularly at prisons with larger numbers of people with shorter sentences. For example, at Watertown, staff indicated that program prioritization depends on persons' specific needs for the BOP and reentry and that they in particular attempt to quickly place people who have an opportunity to attain a GED into an academic class. Despite such sentiments and attempts, still the lack of program capacity mean that even staff who recognize the importance of placing people into required programs prior to Board appearances are not always able to do so in a timely manner.

Overall, program cuts and capacity issues across the DOCCS system raise concerns about the ability of DOCCS to provide people with the opportunity to participate in mandatory programs in a timely manner prior to appearing before the Board. Particularly given that the 2011 amendments to the Executive Law and the implementation of the case plan re-emphasizes DOCCS role as one of helping incarcerated persons prepare themselves for return to their communities, it is imperative that DOCCS have the program capacity to provide the requisite opportunities for such preparation.

#### **G) The Overuse of Discipline and Solitary Confinement Negatively Infringes on People's Ability to be Released on Parole and Return to their Communities**

There are currently nearly 4,000 people held in the isolated confinement of Special Housing Units (SHU) on any given day in NYS prisons, and thousands more in keeplock. People in such confinement spend 23-24 hours per day without any meaningful contact or programs. People are regularly subjected to such treatment for months and years at a time. Such conditions have long been shown to have potentially devastating psychological effects and to exacerbate people's needs and problematic behaviors. This use of isolated confinement is in direct conflict with the purported goals of the incarceration and parole system discussed throughout this testimony, and re-emphasized by the 2011 amendments to the Executive Law, of focusing people's time while in prison on preparing for their return to their communities. Placing people in isolation for months and years at a time is completely counterproductive as well as inhumane. Moreover, although as described above a clean disciplinary record will not be used by the Board as a reason to release someone, being placed in the SHU or keeplock is generally used against an applicant during a parole interview and thereby decreases the likelihood of release. In turn, essentially SHU time not only isolates a person, but often can mean that the person will spend more time in prison. As an example, looking at the facility specific data for the whole system above, Upstate C.F. – which is a facility used solely for purposes of SHU confinement – had the lowest release rates for any DOCCS prison, with a release rate of initial appearances of two percent and a release rate for all reappearances of 12%. Similarly, Southport – another complete disciplinary lockdown facility – had some of the lowest release rates of any prison with only 7% of initial appearance applicants released and only 11% of people reappearing released.

#### **H) Medical Parole Has been Vastly Underutilized, Leaving Many Ill People Languishing or Dying in Prison**

In addition to the general failure of the BOP to release individuals who should return to their communities, the limited use of medical parole, and the overly burdensome and delayed processes of medical parole, continue to allow large numbers of people to die in prison when

they should have been released and even more people to languish in prison at great expense to the state budget and our humanity. According to New York State Executive Law §§ 259-R and 259-S, the BOP has the power to release a patient, other than those convicted of murder in the first degree and related charges, on medical parole if that patient “has been certified to be suffering from” either a “terminal condition, disease or syndrome and to be so debilitated or incapacitated as to create a reasonable probability that he or she is physically or cognitively incapable of presenting any danger to society” or a “significant and permanent non-terminal condition, disease or syndrome that has rendered the [patient] so physically or cognitively debilitated or incapacitated as to create a reasonable probability that he or she does not present any danger to society.”

Although these provisions have the potential to cover a substantial number of people in NYS prisons, the use of medical parole has been very limited and the long amount of time taken to fill requests has made it very difficult for people to secure release through medical parole. In August 2013, it was reported that a relatively low 2,730 requests for medical parole were filed for the twenty year period between 1992 and April 2012. Of that limited number of requests filed, the state released only 381 people, averaging less than 19 people per year. At the same time, 950 of those applicants died prior to release, and the state actually only outright denied 86 requests. Moreover, the situation does not appear to be one that is improving. For example, in 2011, while 206 requests were filed, the state released only five people, while 29 people died and only 11 requests were outright denied. In 2012, 11 people obtained medical parole, six with terminal illness and five with nonterminal conditions. Particularly for those who lack the resources or abilities to pursue the necessary steps to obtain their release in a proactive manner, medical parole is a very limited resource in need of expansion. Someone incarcerated at Otisville recalled a fellow incarcerated person who died just before he was getting ready for parole and then asked, “does parole do anything for the aging in prison and those who develop certain illnesses like cancer?”

The limited use of medical parole is a function of both DOCCS and the BOP. With respect to DOCCS, requests for medical parole have to go through a long process involving multiple individuals and departments and ultimate discretion with the DOCCS Commissioner as to whether to refer the case to the Board. Specifically, requests for medical parole are made by DOCCS staff to the Commissioner or the DOCCS Division of Health Services. If a determination is made by the DOCCS Office of Classification and Movement that the applicant in question is eligible for medical parole, the DOCCS Commissioner then has full discretion to decide whether or not to order a medical evaluation and discharge plan. If one is ordered, a physician will conduct a medical evaluation, after which the Deputy Commissioner or Chief Medical Officer will make a recommendation to the Commissioner about medical parole, and ultimately the Commissioner will determine whether to certify the applicant as meeting the criteria for medical parole and thus refer the case to the BOP for consideration for release on medical parole.<sup>20</sup> The BOP, as in other parole release decisions, then has discretion as to whether or not to release the applicant on medical parole.

The result of the overall failure to have a more expansive medical parole process, in conjunction with the restricted submissions by DOCCS and the general repeated denials of

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<sup>20</sup> Medical Parole, DOCCS Directive #4304, March 1, 2013.

parole by the BOP, leaves not only people dying in prison who should have been released, but also leaves many more persons languishing in prison who are so physically and/or cognitively impaired that there no longer seems to be any justifiable reason to keep them in prison. Continuing to incarcerate this large and growing percentage of elderly people in prison is inhumane, ineffective, and a tremendous economic burden. One stark example of this situation included the patients in Fishkill C.F.'s 30-bed in patient Long Term Care Unit (LTC) in the prison's Regional Medical Unit (RMU) and its 30-bed Unit for the Cognitively Impaired (UCI). The demographics of patients in the LTC are generally people with serious medical conditions who are unable to function in the general population and need skilled nursing care beyond that which is available in the typical prison infirmary. The medical staff provided us with a redacted list describing the medical conditions of each LTC patient; the most prevalent conditions were cancer; diabetes and complications from that disease; liver disease, primarily from hepatitis C; hypertension and its complications; and chronic obstructive pulmonary disease. On the date of our visit in April 2012, medical staff estimated that 50% of the patients in the LTC were terminally ill. In addition, at Fishkill's UCI, of the 26 people in the unit at the time of the CA's visit, nine patients suffered from some form of dementia, two additional patients suffered from other cognitive disorders, and other patients suffered from a range of other conditions including chronic obstructive pulmonary disease, diabetes, and hypertension. Most of the people interviewed during our visit had substantial cognitive impairments. UCI staff estimated that typically about 25 out of 30 patients in the unit generally need at least prompting to complete daily living tasks like feeding and showering, and 60-75% need physical help with such tasks. UCI staff reported that most people leave the UCI by dying, going home, or being transferred to the long-term care unit for treatment of a serious medical condition.

Fishkill staff stated that in the past they have submitted applications for individuals for medical parole, particularly in the UCI after modifications to the medical parole statute allowing persons with significant medical or mental health disabilities that were not terminal illnesses went into effect. Staff indicated that initially they began submitting lots of paperwork for medical parole applications, but then backlogs required them to limit submitting any such paper work. In the end, staff indicated that they did not believe that any UCI patients had been granted medical parole at the time of our visit. Somewhat more positively, between April 1, 2012 (at the time of our visit) and August 31, 2013, 23 new requests for medical parole were submitted by Fishkill. The facility administration indicated that employees are aware and encouraged to promote medical parole for patients they believe merit such a recommendation, and that 16.7% of LTC patients and 37.5% of UCI patients have been recommended for medical parole review. Unfortunately, of the 23 requests between April 2012 and August 2013, only four applicants appeared before the BOP and only two were granted medical parole. This very low number of approvals is very disconcerting when these are applications being submitted from units comprised of people with terminal illnesses or severe cognitive limitations. Moreover, the fact that only four out of the 23 applicants actually appeared before the BOP raises concerns that DOCCS Central Office is screening out a large number of applicants.

Overall, the limited use of medical parole, like denials of parole more generally, raises serious concerns about the inhumane treatment of people with such substantial medical or mental health limitations, and the costs of continuing to incarcerate these individuals who should be

released. Making the processes for pursuing medical parole more efficient and substantially increasing the rates of release are necessary to fulfill the intended purpose of medical parole.

**I) The Unnecessary Denial of Parole is Inhumane, Wastes Taxpayer Funds, Denies Communities Valuable Members, and Perpetuates Mass Incarceration**

The repeated denial of parole to individuals who have served the minimum sentence imposed based on the nature of their crime and past criminal history and done everything they can to demonstrate their readiness to return to their communities is an inhumane form of persistent punishment. As discussed above, holding out the promise of freedom as a result of positive action and then perpetually denying that freedom regardless of such action can be devastating and leave people in a state of hopelessness and indefinite uncertainty.

In addition to this huge human cost to the individuals denied parole, numerous incarcerated persons have noted how parole denials also have a large financial cost to the state.

More than ten thousand people are denied parole each year, each denial generally results in an additional two years in prison, and the annual cost per incarcerated person in NYS prisons is \$60,000. Even if one looked solely at the general, non-specialized appearances before the Board and increased the rate

*Instead of wasting taxpayer money having people sit here, they could do something productive for society.*  
- Person incarcerated at Otisville

of release in those categories to only 50% in a single year, there would be approximately an additional 4,000 people released and thus potential savings of approximately 240 million dollars.

Moreover, parole denials not only harm the individuals denied release and taxpayers generally, but also deprive families and communities of valuable and contributing members. The people incarcerated who have been denied have much to offer. Many have accomplished so much despite being incarcerated – including attaining GEDs or college degrees, completing numerous programs, and starting and running groups. Many have transformed their lives, self-actualized, gained invaluable insights, or become spiritual leaders or other types of guides and leaders. Many are fathers, mothers, brothers, sisters, sons, daughters, and grandparents who have a lot of ability and desire to contribute. Many are deeply cognizant of the harms they may have caused others in the past and deeply committed to doing what they can to repair the harm upon return to their communities. As one incarcerated person reflected on crimes in which a person was killed, “The victim has no more opportunities to do anything. But incarceration serves no purpose and all of us can serve another function.” Another pled for society to “let the hands that destroyed the community be the hands to rebuild it.” As demonstrated by so many formerly incarcerated persons, these individuals who are currently languishing behind the prison walls could help support their families and communities, mentor young people, help reduce violence in communities, start businesses, earn masters degrees and PhDs, play leading roles in non-profit and other organizations, and help build a more just and equitable society. Instead, the BOP continues to deny them release.

Overall, the ways in which the Board has been operating have been an extension and perpetuation of the larger systems of mass incarceration, hyper-punishment, and socio-economic and racial injustice. The repeated denials of parole to thousands of people each year based on the nature of people's crimes and past criminal history rather than their accomplishments, readiness

for return to their communities, and actual risk to society must be seen in conjunction with racially biased policing; the unprecedented levels of incarceration across the country; the fact that around 75% of the people incarcerated in NYS prisons are black or Latino; and the lack of opportunities in poor communities of color for education, health care, mental health services, or substance abuse treatment. As one person wrote to the CA in August 2013 after being denied parole release: "The Board of Parole said I am incompatible with the welfare of society, and that I am a risk to the community . . . The Board of Parole [might as well] have been . . . saying I am black and poor and those type of folks are incompatible in America."

#### **IV. CONCLUSION AND RECOMMENDATIONS**

The role of the Parole Board is to evaluate whether an individual is ready to return to her or his community. The primary role of DOCCS is to help people prepare themselves for successful reintegration. Neither of these entities should have a role of sentencing or additional punishment for a crime of conviction or criminal history – roles in the purview of the judiciary and the legislature. The theoretical idea behind the 2011 changes to the Executive Law, including the merger, and the use of COMPAS and the case management plan, could have been a positive step in the right direction of realigning the Board and DOCCS to their proper roles. Theoretically under the new system mandated by the legislature, from the first day a person is incarcerated, DOCCS should work collaboratively with the person to identify the person's needs and goals in order to successfully reintegrate into her/his community and to establish a plan for the person to achieve those goals. DOCCS should then provide the person with the opportunities to pursue and achieve those goals. Finally, the Board should evaluate whether the person has met those goals and release those individuals who have done what they had set out to do in order to be ready to successfully return to their communities.

However, in order to work effectively, such a system needs buy-in and participation from both DOCCS – to provide the necessary programming opportunities – and the Board – to release people who have demonstrated their readiness. Currently, neither DOCCS nor the BOP serves its function properly within this system. Concerning DOCCS, due in large part to a lack of funding for prison-based programs, rather than providing the environment and opportunities for people to engage in meaningful programs that would help people best prepare themselves to return to their communities, as discussed above there is a lack of program and treatment opportunities, particularly for long-termers who have completed mandatory programs. The continuing disproportionate budget cuts to even basic programs, the ongoing failure to restore state funding for more widespread college opportunities, and the insufficient support for peer-led programs and initiatives are some of the ways in which DOCCS is not able to fulfill its role properly.

Moreover, on the parole side, the BOP has undertaken for itself a role that is contradictory to the whole purpose of parole. Rather than fulfilling its proper function of evaluating what people have accomplished, what risk they pose, and whether they are ready to return to society, it has usurped a sentencing role of inflicting punishment based on applicants' crimes of conviction and past criminal history. The Board has not implemented the 2011 mandate of the legislature to realign its role to the proper function. It has not even issued the written procedures it is specifically required to do, and it has not changed its practices by ignoring objective risk assessments, failing to rely primarily on people's accomplishments and

growth, and continuing to deny release to the vast majority of applicants, often based on the nature of the crime of conviction and/or past criminal history. The failure of the Board to change is not surprising given that the Board is comprised almost entirely of people from law enforcement backgrounds, is in no way representative of the communities to which it is supposed to be assessing whether people can return, is a political entity that has seen no accountability from the Governor or the Legislature for its failure to follow the law, and continues to operate under a statute that was written for purposes of a Board with both sentencing and parole release determination powers.

In order to rectify this situation, the Board must have written procedures that explain exactly how the Board will focus on applicants' accomplishments, current readiness for reentry, and actual risk to the community, including through the use of objective risk assessments, when making its parole decisions. In addition, there must be additional legislation that goes further to ensure that the Board relies on forward looking factors of rehabilitation and readiness for reentry, improves procedural protections and applicant participation in hearings, and provides specific guidance for people denied parole along with a clear path on how they can obtain release. Moreover, the composition of the Parole Commissioners must be more representative of the people who are appearing before the Board and the communities to which they will return. Further, the Governor and the legislature must hold the Board accountable by immediately establishing a task force to thoroughly investigate the Board's policies and practices, and by using their powers to appoint more representative Commissioners and remove those who fail to fulfill the Board's proper functions. Overall, the state must release many more individuals in order to reduce the human and financial costs of unnecessary incarceration, and allow valuable family and community members to return to the communities where they belong.

More specifically, we make the following recommendations to relevant policy-makers and stakeholders:

**We recommend that the Parole Board:**

- Issue written procedures as required under the 2011 Amendments to the Executive Law to delineate how risk assessments and rehabilitative factors should be used and make clear that these factors should be given substantial weight in parole release decisions. Such procedures should not only provide direction to Parole Commissioners but also to parole applicants so that they can more fully understand the impact of the amendments on the Board's decision-making and more fully engage in the parole process.
- Release people who have demonstrated their readiness for return to their communities, and have a presumption of release of all parole applicants for whom there is a reasonable basis to conclude that they will remain at liberty without violating the law.
- Focus in its decision-making on parole applicants' accomplishments and transformation while incarcerated, current readiness for reentry, and actual risk to their community – including through the use of objective risk assessments – rather than denying people primarily based upon the nature of their crime of conviction or prior criminal history.

- Provide guidance to people denied parole with specific instructions for steps to take in order to be released.
- Expand the granting of medical parole and take steps to encourage more applications for medical parole, including by making the procedures easier to complete and the processes and decisions more timely.

**We Recommend that the Governor:**

- Appoint BOP Commissioners who are more representative of the communities to which parole applicants will return upon release, including formerly incarcerated persons, family members of currently incarcerated persons, other community members in high incarceration neighborhoods, and other advocates, lawyers, reentry specialists, or other professionals who have worked with incarcerated persons; and remove Commissioners who repeatedly base decisions primarily on the nature of applicants' crimes of convictions without giving due consideration to other factors mandated under the law.
- Mandate the BOP to issue written procedures as required under the Executive Law to delineate how risk assessments and rehabilitative factors should be used and make clear that these factors should be given substantial weight in parole release decisions. Such procedures should not only provide direction to Parole Commissioners but also to parole applicants so that they can more fully understand the impact of the amendments on the Board's decision-making and more fully engage in the parole process.
- Create a Task Force on Parole to comprehensively evaluate and issue recommendations regarding BOP release decisions and the processes leading up to those decisions, and bring about transparency, accountability, and public confidence in the Board.
  - The Task Force should be comprised of a wide representative sample of the communities from which most parole applicants come, including formerly incarcerated persons, family members of people who are incarcerated, other community members in high incarceration neighborhoods, lawyers who have represented many parole applicants, other advocates who work on parole reform issues, and representatives of community-based reentry programs.
  - The Task Force should have a specific mandate to assess and provide recommendations with regard to a) the effectiveness and potential strengthening of the current implementation of the COMPAS and the case plan to ensure evidence-based processes for evaluating parole applicants' readiness for reentry; as well as overall the degree to which the Board b) is serving its proper role of evaluating parole applicants' accomplishments and transformation while incarcerated, current readiness for return to their communities, and actual risk to their community, as opposed to a role of sentencing and punishment based on the nature of crimes of conviction and criminal history; c) has made any changes in its operations toward those ends following the 2011 amendments to the Executive Law; d) is releasing people who are ready for release; and e) is providing

guidance to those denied parole with specific instructions for steps to take in order to be released.

**We Recommend that Department of Corrections and Community Supervision (DOCCS):**

- Ensure that in practice, DOCCS focuses on preparing a person for return to their communities from the first day of incarceration, including by expanding program opportunities and at a minimum increasing timely access to mandatory academic, vocational, transitional services, and substance abuse treatment programs.
- Increase access to quality programming opportunities, including higher education and computer literacy, to long-termers and others who have completed mandatory programs.
- Enhance training of ORCs and incarcerated persons on use of the COMPAS instrument and take other steps to ensure that: a) all ORCS are properly completing, and believe in the validity of, the COMPAS, and other documents submitted to the Parole Board in a timely manner; and b) all parole applicants have a meaningful understanding of how their risks and needs are being assessed.
- Substantially limit the use of isolated confinement and fundamentally transform the response to people's needs and problematic behaviors from deprivation and isolation to additional support, programs, and therapy aimed at helping all individuals prepare for successful return to their communities.
- Increase the submission of applications for medical parole, and help facilitate and encourage more people to apply for medical parole.

**We Recommend that the Legislature:**

- Pass written procedures for the Board – because the Board has failed to do so in the past two and a half years since the legislature mandated them to issue such procedures – that delineate how risk assessments and rehabilitative factors should be used and that make clear that these factors should be given substantial weight in parole release decisions.
- Pass the SAFE Parole Act or other legislation that requires the Parole Board to give fair release consideration to parole applicants based on their accomplishments, readiness for reentry, and objective risk to the community; and to provide people denied parole with adequate direction as to what they can do in order to be released.
- In particular the NYS Senate: confirm Parole Commissioners who are representative of the communities to which parole applicants will return, and who can fairly and objectively assess parole applicants based on applicants' accomplishments, readiness for reentry, and risk to the community rather than the nature of their crime of conviction or past criminal history.