

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
DANIEL SAMS, et al.,
Petitioners/Appellants,

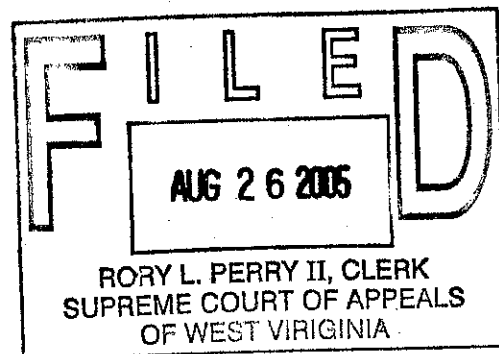
v.

Case Numbers 26647, 26909, 26910, 27308,
27309 and 26911

PAUL KIRBY, Commissioner, Division
Of Corrections,
STEVEN D. CANTERBURY,
Executive Director of the Regional Jail
And Correctional Facility Authority, et al.,
Respondents/Appellees.

**REPORT OF WEST VIRGINIA PAROLE BOARD
REGARDING MASTER PLAN**

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STATUS REPORT

Since the Long-Term Plan for Reducing the Number of State Prisoners Held in County and Regional Jails was issued on September 20, 2002, the statistics on parole releases are as follows:

Fiscal Year 2002/2003 – During this Period, the Parole Board granted parole for 871 inmates and denied parole for 1452 inmates. This was a grant rate of 37%.

Fiscal Year 2003/2004 – During this Period, the Parole Board granted parole for 784 inmates and denied parole for 1536 inmates. This was a grant rate of 34%.

Fiscal Year 2004/2005 – During this Period, the Parole Board granted parole for 943 inmates and denied parole for 1590 inmates. This was a grant rate of 37%. During 2005, the monthly grant rates have ranged from 30% to 44%. (see Exhibit One).

The Long-Term Plan looked at a parole grant rate of 28.3% and recommended the development of “policies that would allow for grant rates to increase, therefore reducing overcrowding and the need for new construction, but not unduly jeopardizing public safety.”¹ The difference between the 28.3% rate and the subsequent higher rates represents 577 inmates released on parole. Using a 65% success rate for parolees,² the difference in release rate represents 375 inmates removed from the prison population. The Long-Term Plan, however, used a grant rate of 41.5% in calculating future prison populations. The difference between the actual parole grant rate and the higher 41.5% rate represents 370 inmates. Using the same 65% success rate for parolees, there is a gap of 240 inmates in the Long-Term Plan’s projections due to the lower parole grant rate.

¹ The West Virginia Parole Board was not a party at the time of the 2002 Long-Term Plan.

² West Virginia’s rate for parolees who complete their term of supervision without revocation was 65% in 1999. In 1999, the average success rate for all states was 42% and 53% if California is not included in the average. (see Exhibit Two: “Trends in State Parole, 1990-2000”; Bureau of Justice Statistics Special Report, Oct. 2001.)

Assuming that all other elements of the Long-Term Plan had been met, this gap would have meant that inmates would have had to wait 1 ½ to 2 months in a regional jail before transfer to a Correctional facility.³ This time period does not equate to the type of long term incarceration in a county/regional jail that was found objectionable in State ex rel Sams v. Kirby, 208 W.Va. 726, 542 S.E.2d 889 (2000).

The statistics on parole revocation are as follows:

2003 – From January through December 2003, the Parole Board revoked parole in 255 cases (25 based on new felony convictions).

2004 - From January through December 2004, the Parole Board revoked parole in 240 cases (19 based on new felony convictions).

2005 - From January through July 2005, the Parole Board has revoked parole in 190 cases (19 based on new felony convictions).

During this period of time, the rate of revocations as a percent of the closure of parole cases has continued to be below the national average. The rates have been 38% (2002), 36% (2003) and 33% (2004)(see Exhibit Three). Similarly, the percentage of parole violators as part of the overall commitments to prison has remained at about 10% every year (11% in 2001, 10% in 2002, 10% in 2003, and 9% in 2004)(see Exhibit Four). This is consistent with 9.7 % in 1999, which was well below the average of 34.8 % for all states for 1999.⁴

The Long-Term Plan, however, assumed that revocations not based on a new felony conviction (i.e. “technical”) would be cut from an average of 185 to an average of 93 per year. This assumption has not happened. Given the subsequent average of 25

³ The average monthly release rate for fiscal year 2005 was 162 inmates per month.

⁴ Exhibit Two, “Trends in State Parole, 1990-2000.”

revocations for felony convictions per year, the overall rate of revocations as a percent of closure of parole cases would have had to been under 20% to meet the assumption of the Long-Term Plan. The fact that revocations have not lowered reflects that even before the Long-Term Plan's recommendations, parole revocation proceedings were instituted after the parole officer had exhausted efforts to get the parolee to comply with the terms of parole or the parolee had recommenced criminal activity. Unfortunately, there appears little to be gained in this area without compromises to public safety that neither the Parole Board nor Parole Services is willing to make.

**The "Standards" for Parole Release Reflect a Public Policy Decision, Which
Emphasizes Public Safety, Rehabilitation and Appropriate Consequences For Each
Crime and Criminal**

"The board of parole, whenever it is of the opinion that the best interests of the state and of the inmate will be served, ... shall release any inmate on parole" W. Va. Code, § 62-12-13(a). The parole determinations of the "best interests" involve several considerations, including public safety, length of an indeterminate sentence for purposes of deterrence and punishment, rehabilitation/re-entry of inmate into society. As recognized in the Long-Term Plan, the use of parole to help alleviate prison overcrowding is one of many considerations in determining the "best interests of the state," and is not the overriding consideration. While the Parole Board has raised the rate of parole grants, its determinations are primarily based on factors other than overcrowding⁵ and represent current public sentiment which is conservative regarding

⁵ Parole Board's Procedural Rules, 92 C.S.R. § 6.10, state "The Board shall assess all factors together to determine whether: a. The inmate can and will conduct himself in a lawful manner if released, and b. Whether release is in the best interests of society considering public safety and rehabilitation goals. The

crime and the appropriate consequences for such criminal activity. This approach reflects the Parole Board's beliefs as to the best interest of the state regarding parole.

**The Average Sentence Served for Violent Crimes in West Virginia is Not Disparate
With Neighboring States**

When the Long-Term Plan was put forward in 2002, the statistics regarding time served for violent crimes⁶ was as follows:

<u>Mean Time Served (months)</u>	<u>1993</u>	<u>1996</u>	<u>1999</u>
West Virginia	76	50	62
Kentucky	77	71	n/a
Ohio	61	71	64
Pennsylvania	54	61	80
Maryland	63	59	57
Virginia	41	50	62
Tennessee ⁷	48	58	65
Alabama	n/a	n/a	n/a
Montana	61	54	60
Alaska	65	71	63
All States	46	50	53

The actual sentences (time served) in West Virginia for violent crime, although longer (9 months) than the overall average actual sentences for all fifty states, are comparable (if not more lenient) to those of surrounding states. The Parole Board grant rates, in conjunction with statutory good time and sentence lengths, are not causing West Virginia inmates to serve unacceptably longer sentences. While there are many reasons for a backlog of inmates in the regional jail, it is not because West Virginia is out-of-step in its sentences and Parole Board policies.

Board will not parole an inmate if the circumstances of the inmate's specific criminal act merit continued punishment, other factors notwithstanding."

⁶ Violent Crimes are murder, manslaughter, rape, other sexual assault, robbery and assault. Exhibit Two, "Trends in State Parole, 1990-2000." This Special Report does not provide the same detailed statistics for non-violent crime.

⁷ Tennessee, Alabama, Montana and Alaska were the states used in the Long-Term Plan's comparison of parole grant rates.

**The Parole Board's Grant Rate Must Remain Flexible In Order To Reflect
Evolving/Changing Public Views On The "Best Interest" Of The State**

As reflected in the historical data, parole grant rates can and do fluctuate and change. Change in grant rates primarily occur because new appointments to the Parole Board view parole differently, because experiences on the job mould the Parole Board Member's subsequent decisions, and because (most importantly) the public's views on parole evolve/change and the Parole Board responds to such views.⁸ The Parole Board is cognizant of the need to reduce the back log of inmates in the regional jails and that the Parole Board can help reduce the back log. However, the Parole Board cannot commit itself to a particular grant rate or policy determination as to the "best interest of the state" under W.Va. Code § 62-12-13a. Parole determinations hinge on what is the best interest of the state and such a determination of best interest should (and is) ultimately be placed with the public. Here, the Parole Board is statutorily held responsive to the public by the elected Governor who may appoint and dismiss Parole Board members in order to carry out his policies. As such, if the Parole Board is acting in a manner contrary to the best interest, the Governor and the public have recourse.⁹ While the Parole Board believes it is appropriate to help in a manner consistent with the best interests of the State, the Parole Board does not believe it is appropriate for it to enter into binding agreements/decisions that will place important policy decisions regarding parole beyond the public's and governor's power to change.

⁸ For example, the sharp drop in the parole grant rate in 1992 is, in part, explained by the public outcry after a parolee violently kidnapped and raped a woman in February of that same year. See Parkulo v. West Virginia Board of Probation and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1996).

⁹ If the public and Governor wish to have Parole Board members who will grant parole to most inmates who are eligible for parole as has been urged by the appellants, it is well within their prerogative to do so.

**Courts, Prosecutors and Defense Attorneys Can Play A Role In The Determination
Of Parole Release Of Individual Inmates.**

In reviewing the 2002 Long-Term Plan, there is an additional manner in which courts, prosecuting attorneys and defense attorneys can reduce the back log of inmates, to-wit: identifying inmates who should be released on parole.

In every parole hearing the Parole Board requests the opinions of the sentencing Judge and the prosecuting attorney. While such opinions are not binding, they are certainly given much weight. These opinions are important because the Parole Board must determine the necessary minimum length of the indeterminate sentence for purposes of punishment and rehabilitation.¹⁰ The Judge and prosecuting attorney can identify for the Parole Board those cases, in which the crime or inmate does not merit incarceration/punishment beyond (or far beyond) the minimum of the indeterminate sentence. These opinions are also important because the crime(s) committed and the criminal history help indicate the likelihood of continued criminality and the level of danger that criminality poses to society. As representative of their communities, the Judge and prosecuting attorney can identify inmates who would be acceptable risks in the community if released on parole.

Recommendations by the Judge and prosecuting attorney, while not binding on the Parole Board, are influential and are items for which defense attorneys can bargain/urge. There is no prohibition against a plea agreement in which the State agrees to recommend early parole. There is no prohibition against the prosecuting or defense attorney asking the judge to include a recommendation to the Parole Board for an early

¹⁰ Part of rehabilitation is to convey to the inmate the seriousness of his offense. A "slap on the wrist" often emboldens a criminal to believe he can do the time (or lack thereof) for that particular crime.

parole release should the inmate conduct himself/herself well while in prison. A defendant/inmate serving a sentence of 1 to 10 years will more than likely be paroled much earlier with a positive recommendation than an inmate who has the Judge and prosecuting attorney informing the Parole Board that they oppose parole. Such advocacy can have a substantial benefit to a defendant/client, as well as contribute an earlier parole release for a number of inmates.

Revocation On Technical Grounds Have Not Proven To Be An Area In Which The Number of Revocations Can Be Reduced.

It appears that the Long-Term Plan in 2002 made two assumptions regarding the reduction of “technical” parole violations: one, that “technical” meant non-criminal¹¹ conduct, and, two, that Parole Officers were not already making serious efforts to remedy non-compliant behavior before resorting to revocation proceedings.

The West Virginia Division of Corrections’ “Parole Revocation Profile 1998 and 1999” research¹² found that out of the 221 parolees revoked in 1999, the number of violations¹³ of “Standard Rules” was highest in the following categories:

Possession/Use of Illegal Drugs	243
Failure to Report to the Parole Officer	124
Behavior that threatens and/or could result in imprisonment	105
Failure to inform Parole Officer of residence change	85
Violation of municipal, state, federal law	69
Leaving the prescribed area of supervision w/o permission	68

The distinction between “technical” violations and criminal activity assumed by the Long-Term Plan was not validated in this data as several of the most frequent “Standard

¹¹ The Long-Term Plan stated “[t]echnical violations involve such matters as failure to maintain suitable employment, failure to report change of address within 72 hours, use of alcohol, and other non-criminal violations of the rules of parole.” p. 8.

¹² This research was included in the 2002 Long-Term Plan.

¹³ Over half the revoked parolees (111) had 6 or more separate violations and a parolee may have violated a particular Standard Rule more than once.

Rule”/“technical” violations were based on criminal conduct.¹⁴ Moreover, many of the other “Standard Rules” required conduct that the public would consider essential and minimally burdensome to a parolee, such as meeting with your parole officer and letting your parole officer know where you live. The “technical” violations typically leading to parole revocation are not violations that the public expects the Parole Officer and Parole Board to ignore.

More importantly, at the time of the Long-Term Plan there was no serious study into whether Parole Officers had already been giving parolees second, third, fourth chances after committing parole violations. In all revocations for 1999, there were 15 felony convictions/violations, 72 Conditions violations, 1008 Standard Rule violations and 362 Special Conditions violations, which was an average of 6.6 violations per parolee. This data indicated that parolees back in 1999 were not getting revoked upon their first violation. Since the Long-Term Plan was issued, Parole Officers have been using electronic monitoring¹⁵ and a written graduated sanction policy by Parole Services is currently being reviewed by the National Institute of Corrections. “Technical” parole violations, however, have not gone down since 2002 as assumed by the Long-Term Plan. This is primarily because the elements of the graduated sanction policy recommended by the Long-Term Plan were already being used by Parole Officers. Generally, when a parolee comes up for a revocation hearing based on “technical” violations, the issue has not been whether the parolee should be given a second chance, but whether the parolee

¹⁴ “Technical” violations would also address those revocations based on felony conduct, for which the revocation proceedings took place before the felony charge became an official conviction.

¹⁵ In the first year of operations, 103 parolees were placed in the program with 63 successful completions. In the second year of operations, 93 parolees were placed in the program with 45 successful completions. In the third year of operations, 77 parolees have been placed in the program with 50 successful completions.

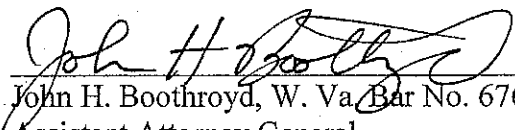
should be given a third, fourth or fifth chance.¹⁶ While Parole Services continue to refine graduated sanctions, it is unlikely that this refinement will create the type of reductions envisioned by the 2002 Long-Term Plan.

CONCLUSION

Since the Long-Term Plan was issued in 2002, the Parole Board has taken into account the need to help reduce West Virginia's inmate population and has done so while upholding other important state interests, such as public safety, punishment and rehabilitation. The Parole Board believes that the "best interests of the state" are not static and it will continue to evaluate its policies and practices in light of the evolving issues in State ex rel. Sams v. Kirby.

RESPECTFULLY SUBMITTED,
WEST VIRGINIA PAROLE BOARD
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¹⁶ Even where the parolee does not present a criminal threat to the community, at some point the parolee's rehabilitation is compromised by allowing him/her to continue to violate reasonable conditions of parole without appropriate consequences. Such toleration eventually sends the wrong message to the parolee that he/she can do whatever he/she wants and no one will take action.

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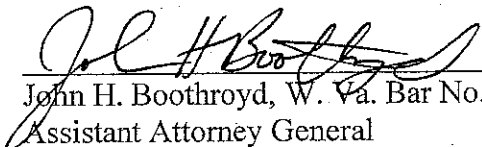
CERTIFICATE OF SERVICE

I, John H. Boothroyd, counsel for appellee, the West Virginia Parole Board, do hereby certify that I have served the foregoing **REPORT OF WEST VIRGINIA PAROLE BOARD REGARDING MASTER PLAN** by mailing a true copy thereof by U.S. mail First class postage prepaid, on August 26, 2005 to the following:

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