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CONDITIONAL RELEASE BEFORE EXPIRATION OF THE TERM OF SENTENCE

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CONDITIONAL RELEASE BEFORE EXPIRATION OF THE TERM OF SENTENCE

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INTRODUCTION:

When advising a client with respect to his/her sentence exposure and likely prison release date based on jail time credit and time off for good behavior, counsel should also inform him/her of the opportunity, after service of a specified time period in confinement, to apply to the Parole Board or, (in the case of a definite sentence in a county correctional facility [CF]), to the local Conditional Release Commission (CRC) for CONDITIONAL RELEASE from the correctional facility. (Article 12 of the Correction Law [CL] and Penal Law [PL] 70.40).

If such application is granted, the inmate can be released months before his/her sentence has expired. However, since such release is upon conditions (including up to four monthly contacts with the local probation department), and extends for a full year (regardless of the actual length of the jail term imposed at sentencing), there is a risk that a violation, if sustained, could result in the client's return to custody to serve out the balance of his/her sentence.

Therefore, clients who may not be likely to comply with conditions for a full year, may be better off just biding their time in jail until their term has expired (e.g., eight months out of a one-year definite sentence with good-time credit less any jail time accrued pre-sentence), rather than roll the dice on early release only to return like a boomerang and finish the time they started.

To understand CR, counsel should consult both CL §§ 271-275 and PL 70.40 which cross-reference each other. This article will focus principally on CR from a DEFINITE sentence (whether for a misdemeanor or felony conviction), as it differs from CR granted in the context of INDETERMINATE AND DETERMINATE sentences for felony and violent felony convictions.

PL 70.40 (2): DEFINITE SENTENCE:

This statute states that a person who is serving one or more definite sentences of imprisonment, with a term (or aggregate term) IN EXCESS OF 90 DAYS, and (who) is ELIGIBLE FOR RELEASE per CL 273 (1) (a-c), MAY, IF HE/SHE SO REQUESTS, BE CONDITIONALLY RELEASED FROM THE INSTITUTION in which he/she is confined AT ANY TIME AFTER SERVICE OF 60 DAYS OF THAT TERM, EXCLUSIVE OF CREDITS ALLOWED UNDER PL 70.30(4) [good time credit] and 70.30(6) [credit for time spent after return to confinement following escape and resumption of sentence].

In calculating service of the 60-day period, any jail time spent before imposition and commencement of sentence per PL 70.30(3), shall be calculated as TIME SERVED. For example: if the defendant has spent 30 days in jail before being sentenced to a nine-month term of imprisonment, he/she may apply for conditional release after 30 days (because he/she already has 30 days of JT credit in the bank).

It is important to note that CR is within the DISCRETION OF THE PAROLE BOARD; or in the case of a local definite sentence: the local CRC established under Article 12 of the Corrections Law.

It should also be noted that IF THE CR is granted by the CRC, then in order to be eligible, the inmate MUST be serving a definite sentence IN EXCESS OF 120 days, and he/she MAY ONLY BE RELEASED after service of 90 DAYS of such term.

In computing service of the 90 days, the JT credit allowed per PL 70.30(3) shall be calculated as TIME SERVED. Consequently, in the above example (where the defendant has 30-days of JT credit toward TIME SERVED), if the defendant is sentenced to a nine-month definite term of imprisonment, he can apply to the CRC for CR after serving 60 days of such sentence. (If the defendant had been sentenced to four months in jail, he would NOT be eligible for CR because his sentence would not have exceeded 120 days).

A CR granted under PL 70.40(2) shall be upon conditions imposed by either the Parole Board (e.g., as with a convicted felon who receives a definite sentence), in accordance with the Executive Law (EL), or by the local CRC (e.g., where the defendant is sentenced to a definite sentence upon a misdemeanor conviction) in accordance the Correction Law.

CONDITIONAL RELEASE INTERRUPTS service of the sentence(s) and the remaining portion of the term (or aggregate term) is HELD IN ABEYANCE.

Every person so released is under the SUPERVISION OF EITHER NYSDOCCS OR OF A LOCAL PROBATION DEPARTMENT and is in the CUSTODY OF THE LOCAL CRC in accordance with CL Article 12 FOR A PERIOD OF ONE YEAR.

The local probation department must cause COMPLETE RECORDS to be kept of every person released to its supervision per this subdivision. DOCCS may supply to the local CRC and to the local probation department CUSTODY INFORMATION AND RECORDS maintained on persons under the supervision of such probation department to assist in the performance of its supervision responsibilities.

COMPLIANCE WITH THE CONDITIONS OF RELEASE DURING THE PERIOD OF SUPERVISION SATISFIES THE PORTION OF THE TERM OR AGGREGATE TERM THAT HAS BEEN HELD IN ABEYANCE.

THE LOCAL CONDITIONAL RELEASE COMMISSION (CRC):

Pursuant to CL 271, each county, through its county executive, may appoint a five-member commission to determine applications for conditional release and to initiate and adjudicate declarations of delinquency in the event of violations of conditions where such release has been granted. (Decisions require a minimum three-person vote).

1. The members must be college graduates and have at least five years of experience in either criminology, criminal justice administration, law enforcement, probation, parole, law, social work, social science, psychology, psychiatry or corrections.

2. Each member shall serve a FOUR-YEAR TERM, and anyone appointed to fill an early vacancy shall fill out the unexpired term of such vacancy.

3. Any person who serves as a representative of a political party on an executive committee or governing body thereof, or as an executive officer or employee of any political committee, organization or association MAY NOT SERVE on a CRC. The same is true for judges, Sheriffs or District Attorneys.
4. Any member may be removed for cause after notice and opportunity to be heard.
5. The director of the local probation department (or his/her designee), serves as an *ex-officio*, non-voting member of the commission.
6. The local probation department shall ASSIGN STAFF to support the CRC.

CL 272: POWERS AND DUTIES OF THE CRC:

The CRC has the power and duty to:

1. DETERMINE which persons sentenced within the county and serving a DEFINITE sentence of imprisonment (and who is eligible for release per PL 70.40 [2]), MAY BE RELEASED ON CR (and WHEN AND UNDER WHAT CONDITIONS per CL 273);
2. DETERMINE, IN EACH CASE, the need for SUPPLEMENTAL INVESTIGATION (by the PROBATION DEPARTMENT AS NEEDED) of the BACKGROUND of such inmate, and cause any such investigation to be made as soon as practicable;

The results of such investigation along with all other information compiled by the local correctional facility and the COMPLETE CRIMINAL RECORD and FAMILY COURT RECORD of the inmate shall be READILY AVAILABLE when the release of such inmate is being considered. Such information SHALL INCLUDE:

- a. a complete statement of the CRIME
 - b. the CIRCUMSTANCES of such crime
 - c. all pre-sentence MEMORANDA
 - d. the nature of the SENTENCE
 - e. the sentencing court, name of judge and DA
 - f. PROBATION REPORTS and any reports regarding the inmate's social, physical, mental and psychiatric condition and history.
3. THE CRC maintains LEGAL CUSTODY of persons released and placed under supervision of the probation department for ONE YEAR (or until such person is RETURNED to the custody of the local CF in the CRC'S jurisdiction.
 4. The CRC MAY REVOKE the CR of any person in its custody, issue DECLARATIONS OF DELINQUENCY and authorize the ISSUANCE OF A WARRANT for the RETAKING OF SUCH PERSON as per CL 274.
 5. For investigative purposes, the CRC may ISSUE SUBPOENAS to compel the attendance of witnesses and the production of books, papers and other documents pertinent to its inquiry. The minutes of all CRC meetings must be recorded and such records retained according to applicable standards.

6. The CRC members may administer oaths and take sworn testimony.

NOTICE AND COMMENT:

7. The CRC must NOTIFY in WRITING, the sentencing court, the DA, and defense counsel WITHIN FIVE BUSINESS DAYS of receipt of an application for a local CR filed under this article, and provide a 15-DAY PERIOD FOR COMMENT ON SUCH APPLICATION. Comments submitted shall be provided to the CRC and to ALL PARTIES.
8. The CRC shall NOTIFY IN WRITING the appropriate local PROBATION DEPARTMENT PRIOR TO THE RELEASE of the inmate of such department's responsibilities to supervise such person. Such notice shall include: the NAME AND RESIDENCE of the person, the DATE OF RELEASE, the CONDITIONS OF RELEASE and all necessary RECORDS maintained on such person to assist the probation department in the performance of its responsibilities under Executive Law (EL) 256(6).
9. The CRC has the power to TRANSFER the LEGAL CUSTODY of CR persons in accordance with CL 275.
10. The CRC must present an ANNUAL REPORT to the County Legislature of its findings and actions on submitted applications.

CL 273: PROCEDURES FOR APPLICATION AND DETERMINATION OF CONDITIONAL RELEASE:

1. Any inmate eligible per PL 70.40(2), and who has served a MINIMUM PERIOD OF 60 DAYS IN A LOCAL CF (but see CL 273[4]), MAY APPLY FOR CONDITIONAL RELEASE. ELIGIBILITY CRITERIA IS LIMITED TO INMATES...
 - a. who have NOT been PREVIOUSLY CONVICTED and WHO DO NOT STAND CONVICTED: of any crime which would make such inmate INELIGIBLE for MERIT TIME per CL 803 (which allows certain NON-VIOLENT offenders serving indeterminate sentences to earn a possible 1/6th reduction in their minimum term if they have achieved certain programmatic objectives and have avoided serious disciplinary charges), of any crime under PL 235 (OBSCENITY) when the victim was under age 18 at the time of the offense, or any crime which the CRC determines is a CRIME OF DOMESTIC VIOLENCE;
 - b. who have JAIL RECORDS which make them eligible for a sentence reduction under CL 804 (GOOD BEHAVIOR ALLOWANCE UP TO 1/3rd OFF OF A DEFINITE SENTENCE);
 - c. who have VERIFIED COMMUNITY TIES IN EITHER EMPLOYMENT, PERMANENT RESIDENCE OR FAMILY.

The CR application must be made in WRITING, on forms prescribed by the Division of Parole or by the CRC in the county where sentence was imposed,

CRC HAS THIRTY DAYS TO DECIDE THE APPLICATION:

2. The commission shall review and make a determination on the application WITHIN 30 DAYS OF RECEIPT of such application. NO DETERMINATION GRANTING OR DENYING SUCH APPLICATION SHALL BE VALID UNLESS MADE BY A MAJORITY VOTE OF AT LEAST THREE COMMISSION MEMBERS PRESENT.

STANDARD FOR RELEASE:

NO RELEASE SHALL BE GRANTED UNLESS THERE IS A REASONABLE PROBABILITY THAT IF THE INMATE IS RELEASED, HE/SHE WILL LIVE AND REMAIN AT LIBERTY WITHOUT VIOLATING THE LAW, AND THAT HIS/HER RELEASE IS NOT INCOMPATIBLE WITH THE WELFARE OF SOCIETY AND SHALL NOT SO DEPRECATE THE SERIOUSNESS OF HIS/HER CRIME AS TO UNDERMINE RESPECT FOR THE LAW.

3. If CR is GRANTED, the CRC shall SET THE CONDITIONS OF RELEASE in accordance with the rules promulgated by the Division of Parole. The releasee shall be given a COPY OF THE CONDITIONS which shall, where appropriate, require such person to COMPLY WITH ANY RESTITUTION ORDER imposed by a court of competent jurisdiction.

4. NO PERSON WHO HAS BEEN GRANTED CR SHALL BE RELEASED UNTIL HE/SHE HAS SERVED A MINIMUM PERIOD OF 90 DAYS INCARCERATION PER PL 70.40(2), and HAS AGREED IN WRITING TO THE CONDITIONS SET BY THE COMMISSION. SUCH AGREEMENT SHALL STATE IN PLAIN AND UNDERSTANDABLE LANGUAGE THE CONSEQUENCES OF VIOLATING ONE OR MORE OF THE CONDITIONS OF RELEASE.

ON THE CR HOOK FOR ONE YEAR

CR GRANTED:

5. Persons granted CR SHALL, while on such release, be in the LEGAL CUSTODY of the CRC for a PERIOD OF ONE YEAR, or until returned to the custody of the local CF located in the CRC'S jurisdiction. The local PROBATION DEPARTMENT in the CRC'S jurisdiction has the DUTY TO SUPERVISE the person during such CR period.

The CRC SHALL IMPOSE A MINIMUM OF FOUR SUPERVISION CONTACTS PER MONTH while he/she is on CR, UNLESS the commission determines that fewer contacts are appropriate.

CR DENIED:

6. If CR is DENIED, the CRC SHALL INFORM the inmate IN WRITING of the FACTORS AND REASONS for such denial WITHIN 15 DAYS of such decision. (Such reasons must be stated IN DETAIL and NOT IN CONCLUSORY TERMS).

IF AT FIRST YOU DON'T SUCCEED:

INMATES DENIED CR CAN RE-APPLY 60 DAYS AFTER THE DENIAL DATE. (Depending on how much time the inmate owes on his/her sentence, it may be better to just serve out the time rather than labor under the continued oversight of the CRC and supervision of the probation department for a year with the cloud of a possible violation and return to jail looming overhead.

DELINQUENCY: PL 70.40(2) and CL 274

PL 70.40(2) states in pertinent part that when a released person is alleged to have violated the terms of his/her CR, and has been DECLARED DELINQUENT by the parole board or the CRC having supervision over such person, the DECLARATION OF DELINQUENCY shall INTERRUPT the period of supervision as of the DATE OF THE DELINQUENCY.

For a CR, such interruption SHALL CONTINUE until the person's RETURN to the INSTITUTION from which he/she was released.

CL 274:

2. If at any time during the CR period, the CRC, or any member thereof, has REASONABLE CAUSE to believe that the released person has LAPSED INTO CRIMINAL WAYS OR COMPANY, or has VIOLATED ONE OR MORE CONDITIONS OF CR, the commission or such member may DECLARE SUCH PERSON DELINQUENT and issue a WRITTEN DELINQUENCY. Upon such declaration, the commission or such member may ISSUE A WARRANT for the RETAKING AND TEMPORARY DETENTION of such person.

It would appear from the language of this statute that a conditionally released person could be violated not only for his own misconduct but for the company he keeps if such company consists of criminals who he/she knows are engaged in criminal activity. So, for example, if the individual takes up or otherwise associates with someone that he/she knows is selling drugs, he/she could well risk a declaration of delinquency and return to custody.

WARRANT:

2. A warrant issued pursuant to this section, constitutes SUFFICIENT AUTHORITY to the CAO of any local CF to hold the individual named therein in TEMPORARY CUSTODY (pending disposition of the violation).
3. Such warrant may be executed by: a probation officer, other officer authorized to serve criminal process, any peace officer acting pursuant to special duties or any police officer. Any such officer is AUTHORIZED AND REQUIRED to EXECUTE SUCH WARRANT by TAKING SUCH PERSON and having him/her DETAINED as provided herein.

DUE PROCESS/ FIVE DAY NOTICE OF HEARING:

4. The ALLEGED VIOLATOR SHALL, WITHIN FIVE DAYS OF EXECUTION OF THE WARRANT, BE GIVEN WRITTEN NOTICE OF THE TIME, PLACE AND PURPOSE OF THE HEARING.

THE NOTICE SHALL STATE WHAT CONDITIONS OF CR WERE ALLEGEDLY VIOLATED, IN WHAT MANNER AND SHALL INFORM HIM/HER OF HIS/HER RIGHT TO COUNSEL AS PER SUBDIVISION SEVEN OF THIS SECTION.

20 DAYS TO APPEAR BEFORE THE CRC:

5. The alleged CR violator SHALL APPEAR before the CRC WITHIN 20 DAYS OF THE EXECUTION OF THE WARRANT.

At such appearance, the commission shall ask the individual if he/she wishes to make any STATEMENT with respect to the violations. Unless the remarks are exculpatory, it may be better for counsel to do the talking. If the individual or counsel makes a statement, the CRC may make a decision upon it. If the individual remains silent or the commission is not satisfied with any such statement, it will proceed with a HEARING.

THE HEARING/ RIGHT OF CONFRONTATION:

6. At such hearing, the commission may receive ANY RELEVANT EVIDENCE. The alleged violator may CROSS EXAMINE WITNESSES and PRESENT EVIDENCE in his/her own behalf.

RIGHT TO COUNSEL:

7. The alleged violator is entitled to counsel AT ALL STAGES of any proceeding under this section, and the commission SHALL ADVISE HIM/HER of such right upon delivery of written notice per subdivision four above.

FINDING AFTER HEARING:

8. At the conclusion of the hearing, the commission SHALL ISSUE A FINDING. If the commission IS NOT SATISFIED THAT THERE IS A PREPONDERANCE OF THE EVIDENCE IN SUPPORT OF THE VIOLATION, THE COMMISSION SHALL DISMISS THE VIOLATION, CANCEL THE DELINQUENCY AND RESTORE THE PERSON TO SUPERVISION.

IF THE COMMISSION FINDS THAT A PREPONDERANCE OF THE EVIDENCE SUPPORTS THE CONCLUSION THAT THE PERSON VIOLATED ONE OR MORE CONDITIONS OF RELEASE IN AN IMPORTANT RESPECT, IT SHALL SO FIND.

VIOLATION FOUND:

9. Upon a finding in support of the violation, the commission MAY REVOKE THE CONDITIONAL RELEASE, OR CONTINUE OR MODIFY THE CONDITIONS OF RELEASE.

Where the commission REVOKES CR, the violator SHALL BE COMMITTED TO THE CUSTODY OF THE CAO of the local CF to SERVE THE REMAINING TIME ON HIS/HER SENTENCE, IN ACCORDANCE WITH PL 70.40(3).

Where the commission MODIFIES the conditions of release, it shall INFORM THE PERSON IN WRITING OF SUCH MODIFIED CONDITIONS.

10. Any actions by the commission pursuant to this article shall be deemed a JUDICIAL FUNCTION and shall NOT BE REVIEWABLE if done in accordance with law. (If such action is "not in accordance with law," the appropriate avenue to seek relief would appear to be an ARTICLE 78 proceeding).

CL 275: TRANSFER OF CUSTODY AND SUPERVISION OF CONDITIONAL RELEASEE:

3. If a person granted CR resides or wishes to reside in a location outside the jurisdiction of the CRC which has legal custody of him/her, the commission or any member may DESIGNATE ANY OTHER COMMISSION established pursuant to this article to assume custody of such person and may so TRANSFER CUSTODY upon the consent of such other commission.
4. See text for provisions regarding notification of transfer and transmittal of entire case record of the transferee to the receiving commission. (The receiving commission assumes all powers of the sending one and has sole custody of the transferee).
5. See text for provisions regarding notification, transfer of transferee's case file and supervisory responsibilities of the probation department located in the jurisdiction of the receiving commission. (Upon receipt of such information, the receiving department assumes all supervisory responsibilities).

FINAL THOUGHT:

As is evident, while the prospect of obtaining conditional release holds obvious appeal for those eligible inmates who would like to get out of custody sooner than later. But for those clients whose track record suggests that they are not a safe bet to survive a full year's worth of conditions, the old FRAM Oil Filter slogan, "Pay me now or pay me later" may be well worth considering (and choosing the first option). That way, the client may not just be putting off the inevitable (as well as his/her ultimate release from confinement) to a later date.

USEFUL RESOURCES:

A Jailhouse Lawyer's Manual, Columbia Human Rights Law Review, 12th edition
<http://jlm.law.columbia.edu/a-jailhouse-lawyers-manual-12th-edition/>

NYS DEPARTMENT OF CORRECTIONS AND COMMUNITY SERVICE – Directive re: Local Conditional Release (LCR): <https://doocs.ny.gov/system/files/documents/2021/01/9200.pdf>

NYS DOCCS: Application for Local Conditional Release -
<https://doocs.ny.gov/system/files/documents/2019/12/lcr9200.pdf>