

TEMPORARY RELEASE ELIGIBILITY FURTHER RESTRICTED: UPDATE ON VIOLENT FELONY OVERRIDE

Temporary release programs, which include work release and CASAT, have long been considered an effective means of transitioning individuals from prison to the community. At a time when policy-makers are becoming more aware of the importance of “reentry” one would think that the Department of Correctional Services (DOCS) would be using temporary release more often. Unfortunately, just the opposite is true, and over the past several years temporary release participation has declined dramatically because of increased restrictions on eligibility for the program. At its peak in 1994, 27,937 individuals participated in temporary release programs; by 2006, only 2,677 individuals participated – a decrease of 90%.

Recent changes to the temporary release program will result in even fewer individuals being eligible to participate. By virtue of a recent Executive Order, the temporary release program and the violent felony override have been further restricted – restrictions that defense attorneys need to consider when advising clients about the availability of programs while in prison.

To understand this change, it is important to understand the “violent felony override” in general and how it operated until these recent changes were implemented. The “violent felony override” (VFO) is the process by which a defendant convicted of a violent felony, who would otherwise be prohibited from eligibility for temporary release, can obtain an “override” from the Temporary Release Committee chairperson, so as to make the prisoner eligible for temporary release programs. The general regulations for temporary release are set forth in 7 NYCRR §1900.4. Until recently, subsection (ii) of §1900.4(c)(1), set forth the list of crimes for which a VFO is actually available, while subsection (iii) set forth the following procedure for obtaining a VFO:

An inmate who can provide the TRC chairperson with a court-generated document or document generated by the Office of the District Attorney which establishes that his/her current commitment is for a subdivision of one of the above listed crimes which did not involve either the use or threatened use of a deadly weapon or a dangerous instrument or the infliction of a serious physical injury as defined in the Penal Law, shall be otherwise for temporary release.¹

¹ The “court-generated” document is best sought from the Judge at the time of sentencing. It need be only a brief one paragraph certification. Attached is a sample of such a certification that takes into account the recent changes required by Executive Order #9. Submit it to the Judge at sentencing and have the Judge sign it. Make a copy for your file and give a copy to your client. That way it is ready to be produced at the appropriate time for the TRC chairperson. The Order of Commitment may serve this purpose if it is detailed enough to provide the subdivision under which the defendant was convicted so as to inform DOCS as to the exact crime for which he is currently committed.

Thus, diligent defense attorneys could review the list of crimes set forth in subsection (ii) to see if their clients were eligible for a VFO, and then follow the procedure outlined in subsection (iii) to obtain a VFO. This changed, however, in early 2007.

EXECUTIVE ORDER #9

On March 5, 2007, former Governor Spitzer signed Executive Order #9, which restricted individuals convicted of certain violent felonies from participating in temporary release programs. On June 18, 2008, Governor Paterson officially continued this Executive Order. Executive Order # 9 reads in relevant part as follows:

I, Eliot Spitzer ...do hereby order the Commissioner of the Department of Correctional Services to promulgate, modify, adopt, or rescind any rules, regulations, directives, policies or procedures as may be necessary to prevent the future transfer of any inmate to any program of temporary release, when the inmate is convicted of any of the following crimes, or is convicted of an attempt or a conspiracy to commit any of the following crimes:

(6) a violent felony offense that includes as an element: (i) being armed with, the use of, the threatened use of, or the possession with intent to use unlawfully against another of, a deadly weapon or a dangerous instrument; or (ii) the infliction of serious physical injury.

Based upon this Executive Order, DOCS rewrote subsection (ii) of 7 NYCRR §1900.4(c)(1), incorporating the order's limiting language to further restrict the eligibility for temporary release for certain crimes. DOCS did not rewrite subsection (iii), which discusses the procedure for obtaining VFOs. However, after learning that DOCS was denying temporary release to individuals convicted of violent felony offenses described in Executive Order #9 despite the fact that they had procured the documents necessary for a VFO, the Center for Community Alternatives (CCA) contacted DOCS Counsel's Office. We were advised that DOCS is interpreting Executive Order #9 as an absolute bar to participation in temporary release programs for individuals convicted of the types of crimes described in the order. This absolute bar means that even if an individual obtains the documentation described in §1900.4(c)(1)(iii), DOCS will not admit the individual to any temporary release program.

Defense attorneys who read only subsections (ii) and (iii) of 7 NYCRR §1900.4(c)(1), without reading the Executive Order, would reasonably conclude that VFOs are still available to individuals convicted of all the crimes described in subsection (ii). While seemingly conceding that subsection (iii) should have been amended to comply with Executive Order #9 – as subsection (ii) was – DOCS acts as though it has been and refuses to accept VFOs for the specific types of crimes described in the Executive Order. The fact that your client was convicted of a crime that has as an element "possession of a deadly weapon or dangerous instrument with intent to use unlawfully against another" makes him ineligible and the VFO contained in (iii) is deemed by DOCS to be inapplicable. This language excludes, for example, those individuals convicted of possessing a weapon with the intent to use it unlawfully against another (subsection (1) of Penal Law 265.03, Criminal Possession of a Weapon 2d) even if they produce VFO documentation. It is our understanding, however, based on our conversations with

DOCS Counsel's Office, that those who merely possess a weapon without the intent to use it unlawfully against another (subsections (2) and (3) of Penal Law 265.03), may still qualify for a VFO. In this regard, DOCS makes a distinction between "being armed with" a weapon or dangerous instrument and one who merely "possesses" a weapon or dangerous instrument without the intent to use it unlawfully against another.

Defense counsel should now refer to Executive Order #9 and advise clients that they will not be eligible for temporary release, and will not be able to obtain a VFO, for any crime which has as an element any of the following: 1) being armed with a deadly weapon or a dangerous instrument; 2) using or threatening to use a deadly weapon or a dangerous instrument; 3) possession of a deadly weapon or a dangerous instrument with the intent to use it against another; or 4) the infliction of serious physical injury. In addition, if Executive Order #9 does not render a client ineligible for a VFO, counsel should ensure that the certification from the Judge indicates that the current commitment is based upon a conviction for a violation of a particular subdivision and section of the Penal Law which does not include as an element being armed with, the use of, the threatened use of, or the possession with intent to use unlawfully against another a deadly weapon or a dangerous instrument, or the infliction of serious physical injury. A sample certification is attached.

SUPREME COURT
COUNTY OF ONONDAGA STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs.

Indictment No. 2008-0000-1
Index No. 08-0001

JOHN DOE,

Defendant.

It is hereby certified pursuant to 7 NYCRR §1900.4 (c)(1)(iii), (ii) to the New York State Department of Correctional Services that the current commitment of John Doe is based upon a conviction for violation of subdivision () of Penal Law §_____, a crime listed in 7 NYCRR §1900.4 (c)(1)(ii) which is a subdivision of a violent felony offense that does not include as an element either being armed with, the use of, the threatened use of, or the possession with intent to use unlawfully against another of, a deadly weapon or a dangerous instrument, or the infliction of serious physical injury as defined in the Penal Law.

Dated:

Supreme Court Justice