# STATE OF NEW YORK

4916

2023-2024 Regular Sessions

# IN SENATE

February 17, 2023

Introduced by Sen. SEPULVEDA -- read twice and ordered printed, and when printed to be committed to the Committee on Crime Victims, Crime and Correction

AN ACT to amend the correction law, in relation to expanding prison work release program eligibility and participation

**The People of the State of New York, represented in Senate and Assembly, do enact as follows:**

Section 1. Subdivision 2 of section 851 of the correction law, as amended by section 228 of chapter 322 of the laws of 2021, is amended to read as follows:

2. "Eligible incarcerated individual" means: a person confined in an institution who is eligible for release on parole or who will become eligible for release on parole or conditional release within two years. [~~Provided, however, that a person under sentence for an offense defined in paragraphs (a) and (b) of subdivision one of section 70.02 of the penal law, where such offense involved the use or threatened use of a deadly weapon or dangerous instrument shall not be eligible to participate in a work release program until he or she is eligible for release on parole or who will be eligible for release on parole or conditional release within eighteen months. Provided, further, however, that a person under a determinate sentence as a second felony drug offender for a class B felony offense defined in article two hundred twenty of the penal law, who was sentenced pursuant to section 70.70 of such law, shall not be eligible to participate in a temporary release program until the time served under imprisonment for his or her determinate sentence, including any jail time credited pursuant to the provisions of article seventy of the penal law, shall be at least eighteen months.~~] In the case of a person serving an indeterminate sentence of imprisonment imposed pursuant to the penal law in effect after September one, nineteen hundred sixty-seven, for the purposes of this article parole eligibility shall be upon the expiration of the minimum period of imprison-

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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ment fixed by the court or where the court has not fixed any period, after service of the minimum period fixed by the state board of parole. If an incarcerated individual is denied release on parole, such incarcerated individual shall not be deemed an eligible incarcerated individual until he or she is within two years of his or her next scheduled appearance before the state parole board. In any case where an incarcerated individual is denied release on parole while participating in a temporary release program, the department shall review the status of the incarcerated individual to determine if continued placement in the program is appropriate. No person convicted of any escape or absconding offense defined in article two hundred five of the penal law shall be eligible for temporary release. [~~Further, no person under sentence for aggravated harassment of an employee by an incarcerated individual as defined in section 240.32 of the penal law for, any homicide offense defined in article one hundred twenty-five of the penal law, for any sex offense defined in article one hundred thirty of the penal law, or for an offense defined in section 255.25, 255.26 or 255.27 of the penal law shall be eligible to participate in a work release program as defined in subdivision three of this section. Nor shall any person under sentence for any sex offense defined in article one hundred thirty of the penal law be eligible to participate in a community services program as defined in subdivision five of this section. Notwithstanding the foregoing, no person who is an otherwise eligible incarcerated individual who is under sentence for a crime involving: (a) infliction of serious physical injury upon another as defined in the penal law or (b) any other offense involving the use or threatened use of a deadly weapon may participate in a temporary release program without the written approval of the commissioner.~~] The commissioner shall promulgate regulations giving direction to the temporary release committee at each institution in order to aid such committees in carrying out this mandate.

[~~The governor, by executive order, may exclude or limit the participation of any class of otherwise eligible incarcerated individuals from participation in a temporary release program. Nothing in this paragraph shall be construed to affect either the validity of any executive order previously issued limiting the participation of otherwise eligible incarcerated individuals in such program or the authority of the commissioner to impose appropriate regulations limiting such participation.~~]

§ 2. Subdivision 2 of section 851 of the correction law, as amended by section 228-b of chapter 322 of the laws of 2021, is amended to read as follows:

2. "Eligible incarcerated individual" means: a person confined in an institution who is eligible for release on parole or who will become eligible for release on parole or conditional release within two years. [~~Provided, that a person under a determinate sentence as a second felony drug offender for a class B felony offense defined in article two hundred twenty of the penal law, who was sentenced pursuant to section 70.70 of such law, shall not be eligible to participate in a temporary release program until the time served under imprisonment for his or her determinate sentence, including any jail time credited pursuant to the provisions of article seventy of the penal law, shall be at least eighteen months.~~] In the case of a person serving an indeterminate sentence of imprisonment imposed pursuant to the penal law in effect after September one, nineteen hundred sixty-seven, for the purposes of this article parole eligibility shall be upon the expiration of the minimum period of imprisonment fixed by the court or where the court has not fixed any period, after service of the minimum period fixed by the state

board of parole. [~~If an incarcerated individual is denied release on parole, such incarcerated individual shall not be deemed an eligible incarcerated individual until he or she is within two years of his or her next scheduled appearance before the state parole board.~~] In any case where an incarcerated individual is denied release on parole while participating in a temporary release program, the department shall review the status of the incarcerated individual to determine if continued placement in the program is appropriate. No person convicted of any escape or absconding offense defined in article two hundred five of the penal law shall be eligible for temporary release. [~~Nor shall any person under sentence for any sex offense defined in article one hundred thirty of the penal law be eligible to participate in a community services program as defined in subdivision five of this section. Notwithstanding the foregoing, no person who is an otherwise eligible incarcerated individual who is under sentence for a crime involving: (a) infliction of serious physical injury upon another as defined in the penal law, (b) a sex offense involving forcible compulsion, or (c) any other offense involving the use or threatened use of a deadly weapon may participate in a temporary release program without the written approval of the commissioner.~~] An incarcerated individual shall not be eligible for work release if he or she is subject to a sentence imposed for aggravated murder as defined in section 125.26 of the penal law, murder in the first degree as defined in section 125.27 of the penal law, rape in the third degree as defined in section 130.25 of the penal law, rape in the second degree as defined in section 130.30 of the penal law, rape in the first degree as defined in section 130.35 of the penal law, criminal sexual act in the second degree as defined in section 130.45 of the penal law, criminal sexual act in the first degree as defined in section 130.50 of the penal law, persistent sexual abuse as defined in section 130.53 of the penal law, sexual abuse in the first degree as defined in section 130.65 of the penal law, aggravated sexual abuse in the third degree as defined in section 130.66 of the penal law, aggravated sexual abuse in the second degree as defined in section 130.67 of the penal law, aggravated sexual abuse in the first degree as defined in section 130.70 of the penal law, course of sexual conduct against a child in the first degree as defined in section 130.75 of the penal law, course of sexual conduct against a child in the second degree as defined in section 130.80 of the penal law, predatory sexual assault as defined in section 130.95 of the penal law, predatory sexual assault against a child as defined in section 130.96 of the penal law, promoting prostitution in the second degree as defined in section 230.30 of the penal law, promoting prostitution in the first degree as defined in section 230.32 of the penal law, compelling prostitution as defined in section 230.33 of the penal law, sex trafficking as defined in section 230.34 of the penal law, incest in the first or second degree as defined in article two hundred fifty-five of the penal law, an offense of terrorism defined in article four hundred ninety of the penal law, or an attempt or a conspiracy to commit any such offense. The commissioner shall promulgate regulations giving direction to the temporary release committee at each institution in order to aid such committees in carrying out this mandate.

[~~The governor, by executive order, may exclude or limit the participation of any class of otherwise eligible incarcerated individuals from participation in a temporary release program. Nothing in this paragraph shall be construed to affect either the validity of any executive order previously issued limiting the participation of otherwise eligible~~

~~incarcerated individuals in such program or the authority of the commissioner to impose appropriate regulations limiting such participation.~~]

§ 3. Subdivision 2-a of section 851 of the correction law, as amended by chapter 322 of the laws of 2021, is amended to read as follows:

2-a. Notwithstanding subdivision two of this section, the term "eligible incarcerated individual" shall also include a person confined in an institution who is eligible for release on parole or who will become eligible for release on parole or conditional release within [~~two~~] four years, and who was convicted of a homicide offense as defined in article one hundred twenty-five of the penal law or an assault offense defined in article one hundred twenty of the penal law, and who can demonstrate to the commissioner that: (a) the victim of such homicide or assault was a member of the incarcerated individual's immediate family as that term is defined in section 120.40 of the penal law or had a child in common with the incarcerated individual; (b) the incarcerated individual was subjected to substantial physical, sexual or psychological abuse committed by the victim of such homicide or assault; and (c) such abuse was a substantial factor in causing the incarcerated individual to commit such homicide or assault. With respect to an incarcerated individual's claim that he or she was subjected to substantial physical, sexual or psychological abuse committed by the victim, such demonstration shall include corroborative material that may include, but is not limited to, witness statements, social services records, hospital records, law enforcement records and a showing based in part on documentation prepared at or near the time of the commission of the offense or the prosecution thereof tending to support the incarcerated individual's claim. Prior to making a determination under this subdivision, the commissioner is required to request and take into consideration the opinion of the district attorney who prosecuted the underlying homicide or assault offense and the opinion of the sentencing court. If such opinions are received within forty-five days of the request, the commissioner shall take them into consideration. If such opinions are not so received, the commissioner may proceed with the determination. Any action by the commissioner pursuant to this subdivision shall be deemed a judicial function and shall not be reviewable in any court.

§ 4. Subdivision 2-b of section 851 of the correction law, as added by chapter 738 of the laws of 2004, is amended to read as follows:

2-b. When calculating in advance the date on which a person is or will be eligible for release on parole or conditional release, for purposes of determining eligibility for temporary release or for placement at an alcohol and substance abuse treatment correctional annex, the commissioner shall consider and include credit for all potential credits and reductions including but not limited to merit time**, additional merit time** and good behavior allowances. Nothing in this subdivision shall be interpreted as precluding the consideration and inclusion of credit for all potential credits and reductions including, but not limited to, merit time**, additional merit time** and good behavior allowances when calculating in advance for any other purpose the date on which a person is or will be eligible for release on parole or conditional release.

§ 5. This act shall take effect immediately, provided however, that the amendments to subdivision 2 of section 851 of the correction law made by section one of this act shall be subject to the expiration and reversion of such subdivision and section pursuant to subdivision (c) of section 46 of chapter 60 of the laws of 1994 and section 10 of chapter 339 of the laws of 1972, as amended, when upon such date the provisions of section two of this act shall take effect; provided further, that the

amendments to subdivision 2 of section 851 of the correction law made by section two of this act shall expire on the same date as subdivision (c) of section 46 of chapter 60 of the laws of 1994, section 10 of chapter 339 of the laws of 1972, and section 5 of chapter 554 of the laws of 1986, as amended, expire; provided further that the amendments to subdivisions 2-a and 2-b of section 851 of the correction law, made by sections three and four of this act shall not affect the expiration of such section and shall expire therewith.