

Inmates stay, you pay

Scores of prisoners in state could have been released for deportation years ago

By James M. Odató

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BATAVIA — Khari Henry is about to get deported to Kingston, Jamaica. Federal officials took hold of him in August from state prison officials, relieving New York taxpayers of the \$62,000 in annual expense they'd spent for six years running to hold him in a state facility.

But scores of others like Henry, who could have been released for deportation years ago, remain imprisoned throughout New York's multibillion-dollar corrections system. They're being turned down for release by a state Board of Parole that often refuses to dislodge foreign criminals from their cells, preventing federal immigrations agents from sending them to their homelands.

The board rejects their paroles for vague or unspecific reasons. As a result, New Yorkers spend tens of millions of dollars annually in operating and capital funds, according to a Times Union review. In some cases, the board refuses to grant a parole hearing, exercising their discretion.

An imposing figure at 6 feet 4 inches and 249 pounds, Henry projects ferociousness with tattoos on his thick inner arms spelling out "LION PAWS"; the boyish smile reminds you that he's only 29. His prison records show several fights and lengthy stays in solitary confinement, and transfers to various housing units and different prisons.

"They say they're so worried about me being a bad person," he said in a recent interview at the U.S. Immigration and Customs Enforcement's Buffalo Federal Detention Facility. "But you could have sent me back to my country."

Indeed, he could have had a one-way ticket to his homeland years ago. He was only let out of prison in August because he had "maxed out," having served every day of his maximum six-year sentence for selling cocaine and marijuana, including near a school in New York City.

Henry is one of 281 non-citizen prisoners in the state's heavily guarded lockups who have been seen by the Parole Board and denied release even though they have permanent orders of deportation issued against them. Most are in for violent crimes. But according to Parole Board policy arranged administratively in 2004, nonviolent felons like Henry can be turned over to ICE after serving half of the minimum term of their sentence. Last year, the Parole Board considered 77 eligible for release and let ICE take control of 60 of these non-violent felons.

However, many more could have been escorted out the door if the board adopted Executive Law. It says non-violent alien prisoners can be deported as soon as they come into the prison system.

Violent felons are eligible for release once they serve their minimum sentence. While federal immigration officials are eager to remove these felons, ICE can't begin removal proceedings and assume the cost of that detainee until they are handed over. "Why aren't they releasing them to ICE? I don't have an answer to that," said Ross Feinstein, an ICE spokesman.

"What's the point of keeping somebody who isn't going to be here in the future?" asked Edward Hammock, a lawyer who served as chairman of the Parole Board for eight years through 1984. He said these felons should be kicked out of the country to become someone else's problem.

Many other inmates — the Department of Corrections and Community Supervision isn't sure of the number — are also deportable because a court has issued orders to expel them to their homeland. But they have yet to see the Parole Board.

Hammock, who has criticized the board for rejecting paroles, said its members may be fearful of a backlash if they are seen as going easy on felons. "It appears they conclude that they're treating them as any other offender and ignoring the fact that they're deportable," Hammock said. "The law doesn't require them to give any more weight that the individual can be deported. I don't think they're in violation of the law, (but) their conduct may be in violation of the spirit of the law."

The state holds 56,000 inmates, and about 10 percent are aliens. Each prisoner costs the state \$62,000 a year, according to DOCCS, although the state gets federal aid to defray the expense of holding the non-citizen inmates.

Correction officials estimate the cost to New York taxpayers is \$42,800 a year per inmate. By that measure, the state is paying at least \$12 million in costs for deportable prisoners who have been denied parole after a hearing — twice the budget of the Parole Board.

The sum could be much greater if one factors in deportable prisoners who haven't yet seen the board. Prison officials have been unable to provide an estimate.

A recent DOCCs report said 5,933 foreign-born prisoners are being held, most of them for violent felonies. That includes 2,186 illegal aliens, 110 Cubans expelled from Cuba, 390 awaiting some sort of status and 2,140 legal permanent residents who are subject to deportation for committing crimes in New York. Top countries of origin are the Dominican Republic, Jamaica and Mexico.

The state says that non-violent foreign prisoners who are released for deportation tend to stay in prison a few years before they are let go. Of the 2,155 non-violent criminals from

foreign nations sent home between July 1995 and the end of 2010, the average stay in a state prison was 27.3 months prior to completion of their minimum term of imprisonment, saving the state \$151 million in operating and capital costs by their early release. Similar data for violent foreign-born prisoners was unavailable, but DOCCS said 14,054 criminal aliens were transferred to ICE between 2002 and 2011 for deportation or other action, and another 469 were handed over to federal marshals in 2011 for prosecution on charges of illegal re-entry.

Some criminal defense attorneys say the Parole Board is keeping deportable prisoners too long.

"It's crazy," said Karen Murtagh-Monks, executive director of Prisoners' Legal Service of New York. "I've seen parole decisions where they don't even recognize the possibility of conditional release for deportation only."

Parole Board Chairwoman Andrea Evans declined interview requests. Board lawyer Terry Tracy said the board takes into consideration deportation status.

Its policy for non-violent felons' eligibility for release was set because members decided a meaningful track record would be established once a deportable inmate had serve half the minimum sentence. Tracy said some deportable criminals aren't seen because the board has a policy of requiring a response from the district attorney, defense lawyer and the sentencing judge before it will schedule a hearing for A-1 felons.

"All the factors are taken into account," he said. "Cost isn't a factor."

Anthony Annucci, executive deputy corrections commissioner, said he could see a problem with releasing alien prisoners for deportation, as it could be viewed as preferential treatment by domestic inmates. "It sends a wrong message — if I'm getting out early only because I'm foreign-born," he said, noting that he cannot speak for the Parole Board. "At the end of the day, public safety is not just dollars and cents." He said district attorneys tend to object to early releases: "It's not about money; it's viewed as a reward."

For Julio Borrell, serving 12.5 to 25 years for armed robbery and other crimes, the Parole Board's two denials of his release is maddening. He's complained to courts and to government officials in aggressively worded letters. He said the board acts as if it cannot release him so as to protect the streets of New York, even though he would be headed back to the Dominican Republic.

Borrell, currently at Wende Correctional Facility in western New York, has served 18 years and has had an order of permanent deportation pending against him for a decade. "They're just ignoring it totally," he said.

Borrell's record, however, is not that of a model prisoner: He has more than 40 "tickets" for violating prison rules, including violent conduct. The parole board tends to take note of

tickets, according a Times Union review of several parole hearing transcripts of foreign-born inmates denied parole despite orders of deportation. It also listens to prosecutors, and the Queens district attorney's office has strongly recommended Borrell be deported only after he serves his maximum term because of his record of violence.

Borrell said he's been targeted as a troublemaker by guards, and claims they have broken the typewriters he uses to write appeals and objections. "If you are assertive, intelligent, demand your rights, they start a complaint against you, and it follows you from one jail to the other," Borrell said.

After turning him down in 2009 and 2012, the Parole Board told him to come back in November 2013 to try again. "It is our opinion that your release at this time remains incompatible with the public safety and welfare," the board wrote earlier this year. "You need to deal with your anger issues and develop self-control."

Borrell said the board is violating the law by not disclosing their deliberations on deportation. He calls for creation of a separate bureau to deal strictly with deportation release cases.

He was deported before, in 1978, after an earlier conviction, but returned and was convicted of a weapons possession charge in 1988, receiving parole in 1991. He said he wants to live in the Dominican Republic and not return to the U.S. again. That would expose himself to a lot more prison time — a 10-year federal sentence for illegally returning to the States, plus serving any term remaining on his New York sentence.

At age 58, he faces staying in state prison until Aug. 21, 2019.

His wait is not nearly as long as others who could have been deported long ago. Several of those being held despite orders of deportation are in for much more violent crimes, such as murder.

Alfredo Delahoz, 62, has been serving time in state facilities for 37 years for his part in an armed robbery that led to the shooting death of a security guard. His gun was still loaded when he was arrested at the scene; he said he did not do the shooting. He was sentenced to 25 years to life for second-degree murder and was eligible for parole, and deportation to the Dominican Republic, in January 2000.

At his parole hearing in September, Commissioner Joseph Crangle remarked on Delahoz's unusually good record. "It's very rare for inmates to come in from of the board without any tickets," Crangle said. "I'm commending you for that."

"If I could give my life to the victim, I would give my life to the victim," Delahoz told the board. But it rejected him once again, saying despite many supporting letters and solid

prison performance "discretionary release is not warranted. ... There is a reasonable probability you would not live a law-abiding life."

Cheryl Kates, a Rochester defense lawyer who represents several deportable prisoners held many years beyond their eligible release dates, said the Parole Board's actions are a mystery. "With a budget crisis," she said, "why are they still here?" Parole board members — gubernatorial appointees who serve six-year terms — do not offer detailed explanations on their parole decisions, Hammock said.

In a case in 2007, they decided to let Sorin Cherlea go back to Russia even though he was described by commissioners as dangerous. He had been convicted of kidnapping and attempted murder, and was initially denied parole because the board considered his crimes of a "terrorist nature." He was convicted of taking a woman captive at knifepoint and threatening to detonate an explosive strapped to his body when police pulled him over in 1990. Eight months after turning down his parole in September 2007, the board granted a conditional release for deportation. Corrections officials were puzzled by the move.

Still, Cherlea, who came into the prison system in 1992, had served longer than necessary for a conditional release. He had an order of deportation and had served more than his minimum sentence of 15 years.

In a state Supreme Court case involving a drug offender, Carlos Vargas, who has been deportable to the Dominican Republic since 2009, Judge George B. Ceresia Jr. ruled last November "a final order of deportation does not automatically entitle an inmate to such release." The Parole Board, he said, can use its discretion. Other courts have ruled similarly.

Vargas, serving a 10-year term for a 2006 conviction for first-degree criminal possession of a controlled substance, argued that he had served his minimum in July 2010 and couldn't even get a hearing. Ceresia said he did not have a statutory right to be seen.

Prison officials say that from 2002 to 2011, 74 percent of all criminal aliens were released to ICE, and a similar percentage of all eligible non-violent aliens get deported each year under early release. DOCCs received more than \$640 million in federal reimbursement for housing undocumented criminal aliens during the period.

A deported inmate's return to a state prison is highly unlikely, DOCCs studies show. "The bottom line is they are criminals and they are in our system for a reason," said Peter Cutler, a DOCCs spokesman. "Society expects them to be there."

Big Khari Henry, who is waiting for ICE to dispatch him to Jamaica, said he cannot predict what the future holds, but stressed: "I can't do jail anymore."

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