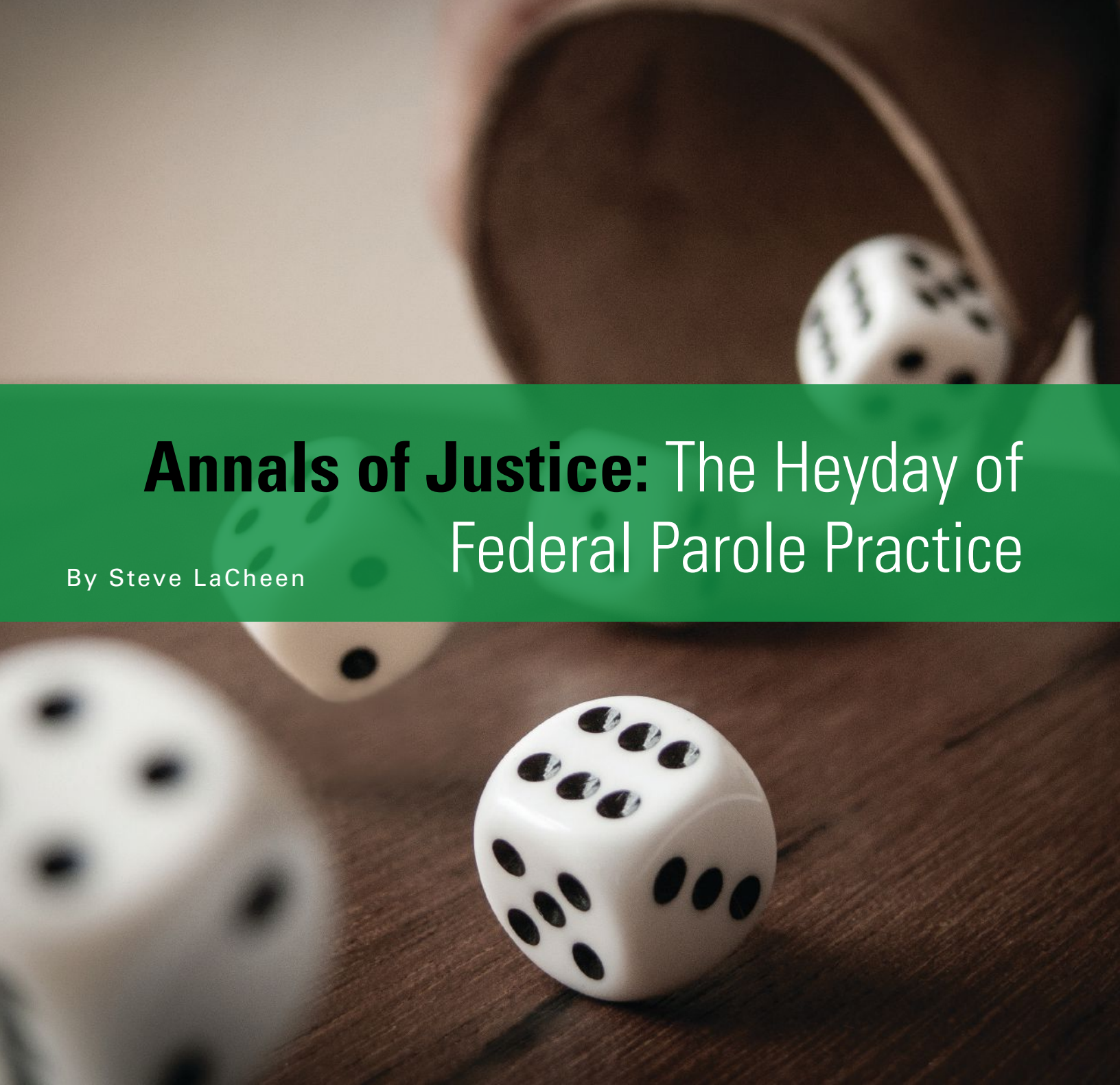

Annals of Justice: The Heyday of Federal Parole Practice

By Steve LaCheen

During a period of about a dozen years, corresponding roughly to the 1980s, I represented several federal inmates at their parole hearings. The hearings, conducted by U.S. Parole Commission Hearing Examiners sitting in pairs, were tape-recorded at the institutions where the inmates were serving their sentences.

To provide some background, inmates convicted of federal offenses committed before November 1, 1987, were sentenced to a specific term, and were generally eligible for parole at the one-third mark. If denied parole, they "maxed out" of their sentences at roughly the two-thirds point. The Parole Guidelines were advisory, not mandatory. It was the role of the Hearing Examiners to confirm the information in the inmate's file; to give him an opportunity to "put a face on his case"; to enable them to judge his rehabilitative potential, and then make an individualized decision as to his parole-worthiness.

Strictly speaking, the Examiners did not grant or deny parole; they recommended a presumptive parole date, which was confirmed, amended, or reversed at the Regional Office of the Commission by a decision issued about 21 days later. That decision was appealable to the Regional Division and again to the National Board. Once the administrative procedural appeal process was exhausted, an inmate could take his case to court by way of a Petition for Writ of Habeas Corpus. The standard for such review, however, was rigid; so, chances of relief from adverse parole decisions were almost non-existent.

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That said, there was a fair chance of getting a reasonable recommendation from the Hearing Panel if an inmate had proper representation and was lucky enough to draw Examiners who were committed to doing the job they were charged to do; that is, determine whether the particular inmate was an appropriate candidate for parole. Inmates not so lucky in the panel they drew were almost always denied an early parole date.

Enter the Hearing Examiners. They were a "mixed bag," to say the least. Non-lawyers, they spanned the spectrum in intelligence, knowledge, understanding of human nature, temperament, and, most of all, their perception of the nature of their charter. Some saw themselves as extensions of the executive function, some of the judicial, some of the police power, and some as human lie detectors. Early on, it became clear to me that the entire system was skewed along a fault line that was not just beneath the surface, but a crack in the foundation.

An inmate who proclaimed his innocence was simply denied parole or given a maximum release date; one who offered an excuse for his offense was treated almost as harshly. And almost every ethnic Italian inmate from within 90 miles of New York was considered a "made" member or "wannabe" associate of Organized Crime, whether his file was stamped with the dreaded "O.C." or not. If he denied the alleged affiliation, he simply got no play from the Examiners. And the "ground rules" for lawyer representatives were even more limiting.

The first words addressed to counsel attending an inmate's parole hearing were a warning that the lawyer was permitted to attend the hearing on behalf of the inmate not as his Lawyer, but as his Representative. There would be no retrial of the case, and no legal argument. The Representative would be permitted to address the panel for five minutes, after the Examiners had verified the file data, including the offense conduct detailed in the inmate's pre-sentence report, by which time the proceedings were for all intents and purposes over and the recommendation a foregone conclusion.

Considering such restraints, of what value was it for the inmate to be represented by an attorney? The answer, simply put, was that such proscriptions propounded by non-lawyers were regarded by experienced criminal defense attorneys as a challenge to find a way to present every possible mitigating factor warranting the exercise of sympathetic discretion, seemingly without attempting to relitigate the inmate's case or saying anything that might be interpreted as a denial of guilt. How? By leveling the playing field.

First and foremost, we initiated the practice of submitting a memorandum to the Parole Commission in advance of the hearing, which included the inmate's version of his offense, his clear acceptance of responsibility therefor, as well as our calculation of the applicable guidelines, and a presentation of mitigating factors and any documentation we thought would be helpful. The information we planted in the file could not be ignored, and often forced the Hearing Examiners to entertain and consider the very forensics they devoutly desired to avoid. It also enabled the inmate to dodge the bullet of the double-barreled trick question – Do you admit the charges? Why did you do it? – because he could simply refer to the written material already submitted.

Another stratagem was to arrange for my case to be pushed back to late morning or the afternoon session. Although inmates with attorney representatives were given list priority, I wanted to ensure that the Examiners had already heard several cases, many of which would have involved more serious offenses than committed by my white-collar clients; so, my case would automatically receive some intangible benefit on that basis.

I also always brought some document – most often a letter of support from family or a prospective employer or some corrective information – to submit to the panel immediately after they concluded their verifications, just at the point at which the panel's interrogation was to begin. Sometimes it was just some fact that needed to be brought to the attention of the panel; for example, a change in the law, the disposition of a co-defendant's parole hearing, evidence that came to light after the inmate's sentencing. Oft times, however, once gaining the floor, our comments morphed into a forensic sum-

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mation, sometimes serious, sometimes comedic – sometimes simply "to provide clarification" – whatever it took to keep the tape running.

Whatever the content, the purpose was to put our "pitch" on the record – to have it become an integral part of the recording of the proceedings – so when the tape was reviewed at the Regional Office, they couldn't simply ignore our presentation, as they could if it had been just "five minutes at the end." Extending the hearing for as long as possible became a tacit game; and I learned I had established my credentials with the Examiners when I was asked on one occasion, "Is this going to be a one-cassette or two-cassette hearing?"

Once the hearing was concluded, the inmate and his representative were excused from the hearing room. The Examiners discussed the case for about five minutes, and then reconvened to announce the recommendation they would be making to the Regional Commissioner. Surprisingly, we often obtained the recommendation of an earlier presumptive parole date than called for by the Parole Guidelines.

One reason for our level of success was that the Examiners were "on circuit." They traveled from one federal prison to another, spending a day or two at each, often conducting as many as several dozen hearings each day, generally starting with the inmates serving the most serious sentences ("behind the wall"), and ending up with the inmates serving less serious sentences (in the adjoining prison camp). There was a clear difference between the two classes of parole-seekers, which worked to the advantage of the "white-collar" offenders who made up most of my clientele, especially when we were able to arrange to have our hearing pushed back to a time later in the day's schedule.

Another reason for our modest but noticeable success was the very fact that lawyers acting as parole representatives grasped the fact that the Hearing Examiners, none of whom were themselves lawyers, all knew (or thought they knew) the Law of Conspiracy –

which they loved to wield like the mallet in a Whack-a-Mole game to silence any inmate's attempt to paint himself a lighter shade than his more culpable co-defendants – and knew how to dodge that bullet. Lawyers also had the advantage of having some acquaintance with the Rules and Procedures Manual of the U.S. Parole Commission, and the calculation of the guidelines, and avoided making time-wasting arguments that were not relevant to the parole determination. The lawyers' knowledge of the playing field was seen, albeit grudgingly, by the hearing examiners as a factor which to some extent made up for the extra time dealing with a lawyer-representative involved.

Most important, however, the lawyers came to know not only the playing field, but the players. As previously mentioned, the Hearing Examiners were a "mixed bag." And since there were no more than a dozen assigned to the Northeast Region, we saw them in varying combinations of pairs, at the various institutions throughout the circuit, and quickly came to know their respective temperaments, their intelligence levels, emotional quotients and, generally speaking, what presentations they would and would not respond to favorably.

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That said, parole representation was to a great extent, a game of chance. The Commission would never disclose in advance which Examiners would be presiding at hearings at a particular institution; so, we only learned that when we showed up at the institution and were able to read on the sign-in sheet which Examiners were on board. The line-up for the hearings themselves were a crapshoot for several reasons. One of the two Examiners generally conducted the hearing while the other thumbed through the file; which did what generally determined the tenor of the hearing. At the more crowded institutions, there were generally two panels sitting, and an inmate's hearing could end up before either, depending upon which panel was available for the next case on the list. And, finally, the Examiners often changed partners after the lunch break.

It was sometimes possible to avoid a particularly harsh panel by juggling your place in line; and on at least one occasion I convinced my client to postpone his hearing until the next list two months later when I learned that the Examiners sitting that day were the two most harsh, least sympathetic Examiners who I knew would give him a two-year setback.

One of the beneficial side effects of this niche practice was that every good result was immediately broadcast to a captive audience, each one of whom was a potential client. A favorable outcome would result in a half-dozen calls or contacts from inmates who were scheduled for hearing two months hence; so there was ample time to obtain and review the file, meet with the responsible family members, and prepare a pre-hearing submission.

It was, in retrospect, one of the most rewarding as well as one of the most enjoyable aspects of my practice during that period. In addition to the personal benefits to me, the clients very often received a much more favorable recommendation than they had anticipated, especially those who grasped the core concept of the applicable guiding principle; that is, that the Commission's main goal was to try to predict, and prevent, recidivism, which the Commission measured on a scale on which the Offender Score was at least as important as the Offense Score. An inmate who grasped that truth did not waste the Hearing Examiners' time by protesting innocence. In fact, the more encompassing the inmate's acceptance of responsibility, the more likely an earlier parole date.

Representing federal inmates seeking parole was a great practice, and I hoped it would continue ad infinitum. Unfortunately, as they always do, the clock-hands turned, the winds of political rhetoric blew strong and hot, setting the stage for changes pandering to politicians' lust to be perceived as Tough on Crime. So, it was with the Revenge of the God-Fearing against Those Soft on Crime, the judicial "goats" who were deemed responsible for revolving-door justice. Mandatory Sentencing Guidelines were established, and the "bath water" of Parole was thrown out with the "baby" of the judiciary's erstwhile free hand at sentencing.

In 1984, Congress passed the Sentencing Reform Act, to become effective three years later, applicable to every federal offense committed after November 1, 1987. The moving force behind the abolition of parole was somehow linked to the idea that judges had been too lenient, and the U.S. Sentencing Guidelines would require the judges to impose the same or similar sentence upon defendants convicted of the same or similar offense, while taking into consideration extraordinary factors which would take a particular case out of the "heartland," and allow for an individualized departure from the guidelines.

More drastic, and far more important to the individual federal defendant, was the abolishment of parole in favor of determinate sentencing, which deprived the inmate of even the possibility of earning early release based upon rehabilitation, or a drastic change in circumstances, or an appropriate reduction to bring that inmate's punishment in line with sentences imposed by other judges in similar cases, or even by the same judge who may have imposed disparate sentences upon co-defendants in the same case. The abolition of parole not only deprived an inmate of a "second look" but longer-range reconsideration of his sentence as well.

It was, unfortunately, a failed panacea. In the first five years or so, cases were subjected to a slavish adherence to the guidelines by many judges. The next five years saw many judges finding extraordinary reasons to depart downward from the applicable guidelines in seemingly ordinary circumstances, while others resolutely stuck to the script. In short, it took 15 years before the U.S. Supreme Court ruled that the Sentencing Guidelines were advisory not mandatory; and the pendulum swung back to a position closer to where it had

been before the "Law and Order" revolution.

But the main self-correcting aspect of federal sentencing as it had existed before 1987 – the possibility of reconsideration by either the sentencing judge three or four months post-sentence, or the possibility of corrective adjustment by the Parole Commission several years later – was never resuscitated, and the only chance a defendant had of having his sentence reviewed and reconsidered exists in the possibility of an inmate having a limited basis to earn a post-sentence reduction based upon cooperative efforts deemed by the government in its sole discretion to have provided "significant assistance in the prosecution or investigation of another."

The grounds upon which a sentenced inmate could do something to advance the date of his scheduled release shifted from his potential to avoid recidivism to his value to law enforcement efforts as a conscript in the War on Crime.

But, over the next two decades, that protocol proved itself a failed experiment, counter-productive to the stated purpose of the federal sentencing statute, and the winds of change were beginning to blow. They are still howling, and the criminal justice system is once again a work in progress; but they haven't gotten around to re-instituting Parole yet.

That, of course, is an inviting subject for an editorial.

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