I. PURPOSE: This Directive sets forth the policies and procedures governing the presumptive release program for nonviolent incarcerated individuals whereby eligible individuals who satisfy all statutory, program, and disciplinary criteria may be released to Community Supervision without the necessity of a personal appearance before, and a grant of parole by the Board of Parole.

II. BACKGROUND: An incarcerated individual eligible for presumptive release may be released to Community Supervision at the expiration of the minimum sentence, or earlier if the individual also qualifies for merit time as set forth in Directive #4790, “Merit Time,” and as outlined in Section IV. Pursuant to Correction Law Section 206, the conditions of release for any individual granted presumptive release shall be fixed by the Board of Parole. Any otherwise eligible individual who is not granted presumptive release to Community Supervision for any reason shall appear before the Board of Parole for consideration of discretionary release to Community Supervision at the regularly scheduled time, or as soon thereafter as is practicable.

III. ELIGIBILITY: An incarcerated individual must satisfy all criteria set forth in this section to be eligible for presumptive release.

A. Crime, Sentence, Commitment, and Prior History Criteria: An individual cannot presently be serving a sentence for, nor previously have been convicted of, any of the following crimes, or an attempt or conspiracy to commit any of the following crimes:

1. An A-I felony.
2. A violent felony offense.
3. Manslaughter in the second degree.
4. Vehicular manslaughter in the first or second degree.
5. Criminally negligent homicide.
6. Incest.
7. An offense defined in Article 130 of the Penal Law (sex offense).
8. An offense defined in Article 263 of the Penal Law (use of a child in a sex performance).
9. A hate crime as defined in Article 485 of the Penal Law.
10. An act of terrorism as defined in Article 490 of the Penal Law.
11. Aggravated harassment of an employee by an incarcerated individual.
12. Any out-of-state conviction which has all of the essential elements of any of the offenses listed in 1 through 11.

B. Disciplinary Record Criteria: An incarcerated individual must not commit any serious disciplinary infraction. A serious disciplinary infraction shall be identified as behavior which results in criminal or disciplinary sanctions as follows:

1. Any conviction for a State or Federal crime that was committed after the individual was committed to the Department of Corrections and Community Supervision.

2. A finding made under Directive #4932, “Standards Behavior & Allowances,” Section 253 (a Tier II hearing), except as noted, or Section 254 (a Tier III hearing) of violation of any of the following rules as described in Section 270.2 of 7 NYCRR (or the “Standards of Incarcerated Individual Behavior, All Institutions”):
   a. 1.00--Penal Law offenses.
   b. 100.10--assault on incarcerated individual.
   c. 100.11--assault on staff.
   d. 100.12--assault on other.
   e. 101.10--sex offense.
   f. 101.20--lewd conduct.
   g. 104.10--rioting.
   h. 105.12--unauthorized organization (if the violation occurred before May 28, 2008).
   i. 105.13--gangs (Tier III only).
   j. 105.14--unauthorized organizations (Tier III only).
   k. 108.10--escape.
   l. 108.15--abscondence.
   m. 113.10--weapon.
   n. 113.13--alcohol (if the violation occurred before December 1, 2020).
   o. 113.24--drug use.
   p. 113.25--drug possession (if the violation occurred before December 1, 2020).
   q. 113.31--alcohol/intoxicant use.
   r. 113.32--alcohol/intoxicant distribution.
   s. 113.33--drug possession.
   t. 113.34--drug distribution.
   u. 117.10--explosives.
   v. 118.10--arson.
   w. 118.22--unhygienic act (Tier III only).
   x. 180.14--urinalysis test.
3. Receipt of a disciplinary sanction at a Tier III hearing which includes 60 or more days of confinement if the time actually served was 60 days or more on the particular penalty.

4. Receipt of any recommended loss of good time as a disciplinary sanction as a result of a Tier III hearing.

C. _Frivolous Lawsuit:_ An individual must not have filed an action, proceeding, or claim against a New York State agency, officer, or employee that was found to be frivolous pursuant to Section 8303a of the Civil Practice Law and Rules, or Rule 11 of the Federal Rules of Civil Procedure.

D. _Alien Status:_ A foreign-born incarcerated individual who is subject to deportation or exclusion, and potentially eligible for a conditional parole pursuant to Section 259-i(2)(d) of the Executive Law, is not eligible for presumptive release consideration.

E. **Program Criteria**

1. An incarcerated individual must successfully participate in all assigned program(s) and/or work assignment(s) and be awarded a certificate of earned eligibility pursuant to 7 NYCRR Part 2100.

2. An individual shall not be eligible for presumptive release if the individual:
   a. Entered the Shock Incarceration Program but failed to successfully complete the program for any reason other than an intervening circumstance beyond the control of the individual.
   b. Was a participant in the temporary release program but was removed for any reason other than an intervening circumstance beyond the control of the individual.
   c. Was temporarily placed in a relapse program.

F. **Outstanding Warrants, Detainers, Commitments and Open Charges**

1. An incarcerated individual is not eligible for presumptive release if the incarcerated individual’s file reveals any of the following:
   a. An out-of-state or federal felony warrant.
   b. A felony arrest warrant for a crime which is not barred by the statute of limitations as provided by Criminal Procedure Law section 30.10.
   c. A violation of probation warrant where the sentence of probation was imposed for a felony.
   d. A concurrent and/or consecutive commitment to a local NYS jurisdiction for a definite sentence that will have to be served in local custody.
   e. A concurrent and/or consecutive out-of-state or federal commitment.
   f. An open felony charge in New York State.
2. If there is a warrant or an indication of a warrant as described in subsection III-F-1-a, b, or c, the Offender Rehabilitation Coordinator must initiate correspondence to the warrant issuing authority or agency to determine the status of the warrant and whether any charge is still outstanding. If no response to the official Departmental communication is received within 30 days of the request, it will be construed that the warrant in question is no longer active and is not a bar to the individual’s presumptive release.

3. If there is an indication of an open felony charge in New York State, which is not barred by the statute of limitations as provided by Criminal Procedure Law Section 30.10, the Offender Rehabilitation Coordinator must initiate correspondence to the charging authority to determine the status of the charge.

If no response is received to official Departmental communication within 30 days of the request, it will be construed that the charge in question is no longer active and is not a bar to the incarcerated individual’s presumptive release.

IV. EFFECT ON MINIMUM PERIOD OF SENTENCE
   A. An incarcerated individual otherwise eligible for presumptive release may be released after the expiration of the minimum or aggregate minimum sentence reduced by merit time if such allowance is granted pursuant to Correction Law Section 803(1)(d). The program criteria for earning merit time is set forth in Directive #4790.
   B. An individual identified in subsection IV-A, who is serving an indeterminate sentence for any Class A-II through Class E drug offense may earn Supplemental Merit Time in the amount of an additional one-sixth of the minimum period of such sentence imposed for the drug felony. Reference supplemental program criteria in Directive #4790.

V. PROCEDURE
   A. Presumptive Release Reviews
      1. The records of an individual eligible for presumptive release under the criteria set forth in Section III shall be reviewed by facility Guidance staff prior to the individual’s Presumptive Release Merit Eligibility Date or Presumptive Release Initial Parole Eligibility Date.
      2. The individual’s program history and record will be reviewed by a Supervising Offender Rehabilitation Coordinator, Deputy Superintendent for Programs, and Superintendent, or their respective designees to identify any individual whose behavior, subsequent to commitment to the Department, may be regarded as inconsistent with the intent of Correction Law Section 803(1)(d), Correction Law Section 805, and public safety.

Factors which will be viewed negatively include failure to participate in an assigned program or removal from any assigned program for reasons other than intervening circumstances beyond the control of the individual.

Negative factors include:
   a. Poor program participation/efforts.
   b. Disciplinary removals.
   c. Refusal to participate in any recommended program.
3. The following additional factors, if present, must be noted and taken into consideration by the Commissioner or Commissioner’s designee in the review of the individual for presumptive release:
   a. Any recommendation from the sentencing court and/or the District Attorney to the letter from Department staff, pursuant to Executive Law Section 259-i, requesting a position on the possible release of the incarcerated individual to Community Supervision.
   b. Any statement made to the Board of Parole by the crime victim or victim’s representative, pursuant to Executive Law Section 259-i.
   c. Any letter received from a sentencing court and/or District Attorney expressing a position on the incarcerated individual’s potential eligibility for, or participation in, any other Department program.
   d. Whether the individual has been designated as a central monitoring case (CMC) pursuant to Directive #4922, “Central Monitoring Cases.”
   e. Any Order of Protection. If there is or was during the current term of incarceration an order of protection, the Offender Rehabilitation Coordinator must attempt to obtain all available information, including, but not limited to:
      (1) The identification of the court which issued the Order, the date the Order was originally issued and whether there have been any extensions or modifications.
      (2) The relationship to the incarcerated individual of the person or persons covered by the Order.
      (3) Whether the incarcerated individual has ever violated or attempted to violate the Order.
      (4) Whether the Order was in any manner related to an incident of domestic violence.
   f. Evidence of escape or attempted escape.

B. Presumptive Release Determination:
   1. Presumptive release determinations shall be made by the Commissioner or Commissioner’s designee after Central Office review.
   2. The decision of the Commissioner or Commissioner’s designee to grant or withhold presumptive release is final, except as provided in subsection V-B-4.
   3. The presumptive release determination notice shall be delivered to the incarcerated individual approximately one week following review by the Commissioner or Commissioner’s designee.
   4. A determination to grant presumptive release may be revoked at any time prior to an individual’s release to Community Supervision if the individual commits a serious disciplinary infraction as defined in subsection III-B, or fails to continue to perform and pursue their assigned program plan or earned eligibility plan, or if information that would have affected the Central Office review subsequently comes to light and indicates that the parole release decision can best be made after an appearance by the incarcerated individual before the Board of Parole.
VI. EFFECT OF THE PRESUMPTIVE RELEASE DETERMINATION

A. Any incarcerated individual who is granted presumptive release and a merit allowance may be released to Community Supervision at a date computed by subtracting the merit time allowance from their parole eligibility date.

B. Any incarcerated individual who is granted a presumptive initial earned eligibility certificate may be released to Community Supervision at the expiration of the minimum sentence.

C. If a presumptive merit allowance is denied by the Commissioner or Commissioner’s designee, either due to the nature and circumstances of the crime, or due to the individual’s prior history, character, or background, or due to one or more questions raised in the individual’s file, such denial represents a determination that the parole release decision can best be made following the incarcerated individual’s appearance before the Board of Parole. Therefore, the individual will not be eligible for presumptive release consideration at any subsequent time. The presumptive release denial is not an indication one way or the other as to the individual’s suitability for possible release to Community Supervision.