



# The Fancy Broccoli Show

Prison Talk & Jazz  
A voice for some of the voiceless

on independent radio  
WVKR 91.3 Poughkeepsie NY

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Following is a transcription of an interview with New York attorney Peter Sell, conducted on the Fancy Broccoli Show on December 3<sup>rd</sup>, 2006, in which he discusses the class action law suit that he has filed, along with Middletown lawyer Robert Iseks, claiming that persons with an A1 felony conviction, serving life, are being discriminated against at their parole hearings.

DJ Julie: So, it's 3:34 in the afternoon. Our guests are here and our guest interviewer, Amy, is here and she will be talking to attorney Peter Sell, and I think I'm just going to hand over the mic to her. Hi, Amy.

Amy: Hi, Julie.

DJ Julie: Amy looks thrilled.

Amy: No, I am. I am thrilled. I'm always thrilled to be here. I'm going to start by reading the disclaimer: The opinions expressed today are those of the Fancy Broccoli Show and its guests and correspondents and do not necessarily reflect the opinions of the station management or college administration. And like Julie said, our guest today is Peter Sell, who's one of the three attorneys that's filing a class action suit against New York State and Governor Pataki for unfair parole practices. Good afternoon, Peter.

Peter Sell: Good afternoon, Amy. Thank you for having me.

A: Great, thanks for coming. We're very pleased. And we're going to start right off. I want to know...we're going to work our way from today backwards.

PS: Okay.

A: Could you tell us what the lawsuit is, and what's the status of it right now, today?

PS: The lawsuit is, was filed to be a class action lawsuit against George Pataki, the governor of the state, the Chairman of the Division of Parole, and the New York State Division of Parole. And it is about the...what we allege to be, a policy instigated by the governor to the state parole board to deny parole to A1 violent felony offenders as a matter of course, without consideration to the rest of the factors that are enumerated by a statute, which they are supposed to consider in determining whether or not an A1 violent felony offender is granted parole.

A: And could you say what some of those are? Could you tell us what some of those factors are that they're supposed to consider?

- PS: Sure. The factors that the board is supposed to consider includes the seriousness of the offense. It is also supposed to include the prior criminal record, any statements made by the board...made to the board by the crime victim or the victim's representative, deportation orders that might be outstanding for the inmate, as well as the inmate's institutional performance and adjustment – the types of programs that the inmate has been participating in while inside, whether the inmate has received any disciplinary infractions, and that sort of thing.
- A: So, by filing this lawsuit, you're saying that that is not what's happening.
- PS: We are alleging that the parole board is basing the decision entirely on the nature of the offense and the inmate's past criminal history, and not based on their performance while they have been incarcerated.
- A: So what is it that makes you think that's what's happening?
- PS: Well, the case originated from the statistics that we have seen. We've seen statistics that say before Governor Pataki took office that the rate of release for inmates convicted of A1 violent felony offenses was somewhere in the neighborhood of 28%, and since that time, the rate of release has declined to approximately 3%. And because of that sharp decline from about 1 in 4 inmates being granted parole to 3 out of 100, we think that there must have been some kind of change in overall policy. So we started taking a look at that, and that was the beginning of the case.
- A: Now, when you say the percentages have dropped, does that in any way matter if it's their first parole appearance, second appearance, or is it just being paroled at all for this class?
- PS: It's my understanding that those numbers are based on being released at all, not necessarily at their first appearance.
- A: Okay. And as we sit here today, what's the status of the suit?
- PS: The case has...a complaint has been filed. An answer by the state attorney general's office has been filed. The state attorney general's office has also filed a motion to dismiss, otherwise known as a 12b6 motion.
- A: When was that? When did they do that? Was that like at the beginning of the case or is that just recently?
- PS: That was filed at the beginning of the case.
- A: Okay.
- PS: And in fact it was filed at about April 28<sup>th</sup> of this year. And we responded, they replied, and the judge, Judge Bryant, who is sitting on this case, made a decision in...at the end of May of this year.
- A: Okay.
- PS: And since he has issued his ruling, we have moved forward with discovery in the case.

- A: Which, could you just...we have...our audience is made up of all sorts of people. Lay people is a big part of the audience, so could you just tell us what the discovery phase is, what that means?
- PS: Absolutely. In a civil litigation case, such as this one, if the case survives a motion for summary judgment, which this case has, then the litigants will move forward with what's formally called as, "discovery." Discovery is the part of a case where the parties exchange information that they have. The plaintiffs, we get to ask the defendants, the state, for information, statistics, files, documents – everything that we think that they have that will help us prove our case – and they get to do the same of us.
- A: Now is there anything that they don't have to turn over to you?
- PS: They don't have to turn over things that are privileged and confidential. Certain things like attorney-client privilege. There's also an executive privilege that's out there. The executive privilege has to do – my understanding of executive privilege – has to do with things that are called pre-deliberative memoranda. Pre-deliberative memoranda include drafts of legislation that they think the state should pass. They don't have to disclose anything that has to do with their thought process on what should take place in the state. But if it was a final draft that they sent to the state, that's the kind of thing that would need to be disclosed. The state attorney general might disagree with me, and there is some play in the executive privilege – what exactly it encompasses – but that's my understanding of the privilege.
- A: Now how do you know that they've turned over everything? I mean, how do you know that there's not something that would be really important to this case that they haven't told you about? Do you have people, interns or do you and the other two attorneys that are working on this, have time to be looking at all the different things that might be available out there that you need?
- PS: Well, as you mentioned I'm working with Robert Isseks and Alex Smith, and they are out of Middletown. I work out of Manhattan. And we will look at every document that is disclosed to us in discovery. We also have, you know, other resources that may be available to us to make sure that everything that they do give us is looked at. But there are serious consequences for failure to disclose things that are required to be disclosed in discovery, so we take the state at their word when they say that they're giving everything to us that they're supposed to give to us.
- A: And they take you at your word, also?
- PS: Absolutely.
- A: And that's pretty much...
- PS: Yes, it's a professional privilege and everybody is presumed to operate honestly in the discovery process.
- A: All right. So the state moved to have it dismissed.
- PS: Yes.

- A: On what merits? I mean, why would they...what reason did they give for thinking that this case shouldn't move forward?
- PS: They argued in a similar way that they argue that if an individual case comes up, say, in an Article 78 procedure – and I know that this might be a little technical – but let's say an individual inmate argues that they shouldn't have been denied parole, and they bring an Article 78 case, which is a state court action in state court, saying that they were wrongfully denied parole, and the state will respond to that individual case with certain reasons why parole was properly denied. And it's my understanding that they brought up the same sorts of claims to deny our case that they did...that they would have done in any individual case. So those reasons, particularly, would be that the parole board has discretion to decide whether or not an individual inmate is granted or denied parole. And because they have this discretion, any challenge to their discretion should not be heard and should not be successful.
- A: So the fact that that was denied, their motion to dismiss was denied, that's, like, one for you, right? I mean, that means there's some credence to the case?
- PS: Yes, yes. The 12b6 motion...the standard in which the court looks at the 12b6 motion is such that they must presume all of the allegations made in the complaint as true. So, one of the allegations that we raised was that the governor instigated a policy, and passed that policy on to the parole commissioners, the policy being that if someone was convicted of an A1 violent felony offense, then parole should be denied. Now, that policy, if true, would grant plaintiffs a win in their case...in our case. And because that was the standard, that the judge had to look at the case and the 12b6 motion, he decided in our favor.
- A: So, what advantage is the judge, Judge Bryant...
- PS: Yes.
- A: ...going to have deciding if this is a class, indeed, that the state judges don't have?
- PS: The advantage in this case is that it would be reviewed...it would be looked at by Judge Bryant as a class action. A class action is distinct from an individual action in that in a class you get to look at everybody who's a member of the class. In this case, the class that we're talking about right now is everyone convicted of an A1 violent felony offense, who has received a statute anywhere from the minimum up to the maximum. The minimum being if someone was convicted as a youthful offender, I think it's 5 years to life, and the maximum, if you're convicted as an adult, would be 25 to life. So, what we're asking the judge to do is instead of looking at the parole board's use of their discretion in an individual case, looking at the record that the parole board looked at, the hearing that the parole board had with the inmate, looking at the record of the inmate, their institutional performance, what programs they took, if they took any other classes outside of the programs given to them by the state, looking at whether or not they received any disciplinary tickets or infractions while they were inside, looking at all of an individual's case, and deciding whether or not the parole board properly exercised their discretion.

In this case, the judge will be able to look at every single inmate who is a member of this class and look at the decisions side by side, in seriatim, one after the other, and see, collectively, if the parole board is exercising their discretion or if it looks more like they are deciding the cases based on this policy, which the state court has already said that the parole board is not allowed to issue decisions based on their own penal philosophy.

A: So, how many people that are in prison now...do you know how many this is going to affect? How many this affects right now?

PS: I do not have the numbers on that.

A: Hundreds? Thousands? Any idea?

PS: Absolutely no idea. We are in the middle of discovery now and that kind of thing will be disclosed to us – it hasn't been disclosed to us yet.

A: Oh, so that's part of the information that you get in the discovery. That's, like, something you would be asking the state for, is the numbers?

PS: Yes.

A: So, without those numbers, what made you think that this is a policy? What made you think that there's enough people that fall into this category to pursue this case?

PS: Well, if the numbers...if the total number of people who would be in the class are a hundred or a thousand, we looked at the rate of denial, and because of the percentages...

A: Right.

PS: ...that's what drew us to be in this complaint.

A: Okay. I heard Robert Isseks speaking down at Family Empowerment Day 2 a few weeks ago...

PS: Yes.

A: ...and the lifers at Otisville, the group that got that whole event together, and he had asked if anyone had questions, to send them in. And they as a group have sent a list of questions, only one of which...they sent 15 questions and only one of which is not one that I had covered in mine.

PS: Okay.

A: But just out of respect for all the work that they put into Family Empowerment Day and getting this together, I'm going to read right down their list of questions, so some of them may be a little repetitive of what we've already done.

PS: Okay, very good.

A: But let's go right down them. Question number one...

PS: Okay.

A: What are the steps in the lawsuit and how long does each step take?

PS: Impossible to answer. Each case is individual. Some cases can begin and end in a matter of weeks, some cases can take several years. Because it's a class action case, it will take longer. This class action case has the potential to take dozens of months because of the size of the case and the number of documents that we anticipate will be disclosed to us. We're working very hard on reading through all the documents and deciphering them and collecting the information that there is in them, and we're going as fast as we can. We haven't received everything in discovery yet, we haven't given them everything in discovery yet, so that process is still ongoing. So it's really impossible to say that this case will be done by X date.

A: So, is there a time frame? Do you have to turn over all your material that's requested in discovery by a certain date? Is there, like, a 6-month limit on exchanging information in the discovery phase? Is there any type of time limit on that?

PS: No, there is no time limit.

A: So, you could be in the discovery phase for a year?

PS: Right, but we wouldn't want that as plaintiffs representing this class. We want this to move as quickly as possible.

A: But do they? Does the state?

PS: I don't know what their motivation is, if they want to drag this on for much longer, or if they want to dispose of it quickly. I don't know that.

A: Okay. And once the discovery phase is finished, what's next? What happens then?

PS: What happens next would most likely be, but not necessarily will be, motions for summary judgment. That's a technical phase of the case where the litigants, either the plaintiff or the defendant will file what's called a motion for summary judgment, and that's asking the court to decide, based on everything that's been disclosed in discovery, decide that a trial is not necessary in this case – there are no issues of fact that need to be revealed at a trial and decided at a trial. That just based on the motions, the court can make a judgment and rule in favor of that party. So, if the plaintiffs file a motion for summary judgment, usually the defendants will file a cross-motion for summary judgment. Basically, everybody wants the judge to decide the case without the need of a trial and calling witnesses and hearing testimony.

A: Does that happen?

PS: It happens. It happens often. I'm not sure if it's going to happen here, but it's a possibility.

A: I hope so. [laughter]

PS: [laughter]

A: Okay. Question number two...

PS: Okay.

- A: ...what can go wrong to delay certification or any other part of the suit? So, could you just explain what certification, the class certification, is?
- PS: Class certification is a part of the process where the plaintiffs move the court for an order declaring that there is, in fact, a class of individuals that can be represented adequately by particular attorneys – myself, Bob Isseks, Alex Smith – and that they all have common issues that can be ruled on all at once. It is a way of preserving judicial economy, so that if there are 1,000 inmates in this class, we don't have 1,000 separate cases on the same thing, it's all handled by one case. The question was how...what kind of delay can take place?
- A: Yeah, what can go wrong to delay certification, or any other part of the suit?
- PS: Um, there are pretty strict rules in terms of how long the defense needs to respond for motion for class certification and the judge, in this case, has been very good about making his legal rulings in an expeditious manner. So, I don't anticipate there being undue delay. It'll just be a matter of process. Once the motion for class certification is filed, the defense gets a chance to answer, we get a chance to reply, and then the judge rules. If the question is if there's going to be an unreasonable delay, I don't anticipate there being an unreasonable delay.
- A: All right. Now, we've gotten a lot of letters here at the show asking how to be part of the class. Maybe we can just go to that now. What do you have to do to be included in this class? Do you have to sign up?
- PS: You have...no, you do not have to sign up. That's very important...that's a very important point you made.
- A: Okay.
- PS: You do not have to sign up. You have to be someone who is an inmate in a New York State prison, and have been convicted of an A1 violent felony offense, and that's it. If you meet those criteria, and you've never heard about this case, you'll still be a member of the class if the class has...if the class will be certified. If it's going to be certified, you're going to be included. You don't even have to know that the case is taking place.
- A: But don't you also have to have completed your minimum and been to the board and been denied?
- PS: Yes, yes. That will...thank you for reminding me. That's also required in order to be a member of the class.
- A: So, now I know you said you've gotten hundreds and hundreds of letters from people inside, you know, with their inmate status report and their final decision. Are you still looking for those?
- PS: That's...we were at one point looking for inmates to send us a copy of their inmate status report and their parole hearing transcript, if they had it, as well as the decision by the parole. But now, at this point in discovery, we anticipate that being disclosed to us by the defense, so it's less important that you send it

in. But if you'd like to send it in just to make sure that we have a copy and we do see it, feel free to do that.

A: And that would only be if you had been denied for the severity of the crime or something similar to that without any, like, additional crimes or offenses while you were in prison, correct? That's only if...

PS: Right. Well, because the class hasn't been certified at this point, it's impossible to say who will fit exactly those criteria. But it looks like, at this point, if you were convicted of an A1 violent felony offense and the reason for your denial of parole was limited to the crime, a description of the crime, the nature of the offense, and your criminal history, or the fact that you were on parole or probation at the time that the crime took place, if that...if those are the sole reasons why parole was denied, then it looks like you'll be a member of the class.

A: Okay, back to the Otisville guys' questions.

PS: Okay. Mhmm.

A: How do you see things changing if this suit is successful?

PS: There would be...that's hard to say. I mean, my guess is as good as yours, Amy.

A: Okay. Want me to guess?

PS: Sure, go ahead.

A: No, no. Go ahead. [laughter]

PS: What we're asking for, for relief in this case, is a new hearing... a new parole hearing for each of the individuals who would be members of the class. So, if we are successful, then they will be granted new hearings. And we would also require some kind of...I think we would require...some kind of assurance or consent agree or judicial oversight or something that would, that would guarantee, or would ensure, that the parole board is making their decisions properly, based on the proper criteria and no longer based on what we allege to be a policy of denying parole to the class.

A: So, would that be some sort of change in Executive Law 259i or...

PS: No...

A: I mean, how would...

PS: Well, that's...

A: How do you enforce 259i then?

PS: That's the question.

A: Okay. [laughter]

PS: And that would be up to negotiation between us and the defense, the state attorney general's office, the governor, the people that have been sued in the lawsuit. If there's going to be a settlement, then that's something that we should all discuss and figure out how that's going to take place. But at this

point, they're denying that there is a policy to go around Executive Law, Section 259i, as you mentioned.

A: Okay. Now, do you see at all...just say you were successful...

PS: Mhmm.

A: ...how about guys that made it out after their fifth, sixth or seventh board? Could there be any type of civil lawsuits on their part, going back against the state for denying them, if they had been denied for the reasons, simply because of the nature of the crime or the severity of the crime, would they have any legal recourse?

PS: Possibly. It's impossible to say. If an individual can say that their...that their parole was denied based on this policy, then it looks to me like they would have a case. But it also looks to me like that would be nearly impossible to prove. What we're doing is, we are looking for stray remarks in this case in discovery and in our discussions and meetings with other people, such as the Family Empowerment Day that we were at a few weeks ago. We are looking for information that people might have about the governor's policy – what the policy is and who he communicated it to, and that sort of thing. Now, we think that it is an overarching, general policy, and we think that that's what we're going to find. But it would...to answer your question, I think it would be hard to say in any individual case that the policy operated on an individual case. So, I think that kind of lawsuit might be difficult, but it might be worth a shot.

A: Stray remarks...you mentioned stray remarks. Can you just, you know, embellish that a little? What's a stray remark?

PS: Stray remarks can come from the governor himself, or someone who speaks on behalf of the governor, or someone that the governor has spoken to. And, basically, it is a statement that might be off the cuff, it might be prepared, but it is a statement that reveals the government's policy...the governor's policy...will reveal the communication of that policy to the parole board members. It'll be something that'll implicate the defendants in this case as violating the statute. It's basically an admission, is another word for it. It's a statement that would jeopardize the defendants' success, in this case.

A: All right. Now, would a statement that alleges that the decisions are predetermined, would that fall under that?

PS: Yes.

A: You know, by someone in power affecting one of those decisions?

PS: Yes.

A: That would be considered a stray remark?

PS: Yes.

A: All right, back to the questions from Otisville.

PS: All right.

A: Okay, how will it change the board's use of 259i?

- PS: Right now, it's our understanding that they are looking at 259i and one of, I think it's the first criteria under 259i, is to consider the seriousness of the offense. And the state right now is arguing that they are considering the seriousness of the offense and they're weighing it very heavily. Our argument is they're not allowed to use seriousness of the offense as the only criteria to determine whether or not parole should be granted. So, if we are successful in this case, it looks to me like the seriousness of the offense would have to be explicitly only one of the factors to deny parole, if parole is denied. Does that make sense?
- A: Yeah. But how would you ever possibly know if they were using that as, like, one third of the weight or, you know, one fifth of the weight?
- PS: Well, that's...I'm not exactly sure, but I have given this a lot of thought. I think that one of the ways that we could recognize that they are not using seriousness of the offense as the only criteria is if they mentioned another reason why parole should be denied. If we...the state talks...the courts talk about the decision as a balancing test, that they're allowed to balance the factors enumerated in 259i. And if on one side of the balance you have the inmate's institutional record, and their performance in any kinds of programs and whether or not they received any degrees, like a GED, if that's all on one side of the balance, perhaps things to balance in favor of being granted parole, and on the other side of the balance you put the seriousness of the offense and perhaps whether there was any disciplinary action taken against the inmate while they were incarcerated...if that's how the balancing test takes place, then there should be something on the side of the balance to deny parole other than the seriousness of the offense. Otherwise, it looks to me like they're only considering the seriousness of the offense as a reason to deny parole.
- A: So, you win the case, and these decisions keep coming out like they are, the percentages don't change, would the parole board be in contempt?
- PS: Again it's another hypothetical, these are all very difficult...but yeah...
- A: [laughter] Okay, but they're fun, aren't they?
- PS: They are fun. Under those criteria, it looks like they would be in contempt, yes.
- A: Thank you.
- PS: You're welcome.
- A: All right, what is a time frame before we start seeing results? I guess that kind of falls under the same question, we don't know a time frame, right? But once the case is decided, how soon would they be held to the new standards? Or not the new standards, but...
- PS: Once the case is decided, whether through settlement or after trial, the parole board would be held to the new standard right away, immediately.
- A: Okay, next business day?
- PS: Absolutely.

- A: [laughter] Okay. If the inmates get hit during this waiting period, should they send you an update of the status report and release decision notice?
- PS: It's not necessary, unless there is something in the status report and the decision notice, and probably more likely, in the transcript of the hearing that tips them off to there being a policy of denying parole to them, or to this class of prisoners, then that's the kind of thing that we would love to see. But if everything seems ordinary and nothing's remarkable, then it's not necessary to send it to us. But if you do send it to us, we'll read it and we'll consider it.
- A: Okay, before we go on I just want to take a station ID break. You're listening to WVKR 91.3. Vassar College in Poughkeepsie, NY. Okay. How will the suit affect future parole boards under different governors ten, fifteen, twenty years from now?
- PS: Impossible to say.
- A: Is that another hypothetical?
- PS: Another hypothetical.
- A: Okay, then we'll move right on. What happens if the suit is lost?
- PS: Then the state is entitled to continue as they've been continuing, and parole rates could stay at 3%, they could drop even further. They don't need to make any change whatsoever if we lose this case.
- A: Is there an appeals process if you lose?
- PS: Yeah, there is an appeals process...
- A: Would you guys do that?
- PS: [laughter] It depends on what the loss looks like, it depends on what the judge's ruling against us would look like. Um, depends.
- A: How do you physically read all the materials that are sent to you? With just the three attorneys working on this, how do you...I mean, you hear about these parole boards that meet and they have these stacks of files...
- PS: Mhmm.
- A: ...you know, two feet high and they read all of them within an hour or two and make all these decisions, so...
- PS: Step one is a very comfortable chair. Adequate lighting, step two.
- A: [laughter]
- PS: And you just go through it and as you start going through it, some of them are more heart wrenching than others and if you just keep an eye on what this is about and how important it is, then it's enough to keep you going. And it will take hundreds of hours, but it's something we'll do.
- A: So, this is a good time to ask you, how did you get into this? I mean, why did this case attract you? Out of all the work that you could be doing...like, what's your field? What kind of law do you practice? Criminal law, or what?

PS: Criminal law. I represent some people on their parole appeals. I represent some people on criminal appeals, and I also do these sorts of civil rights cases. And this one is just very exciting to me. I like the issues that are involved, the legal issues as well as the social issues that are involved. When I think about this case, I think that I am on the morally right side, and socially right side, and so that's enough to keep me going and keep working hard at it.

A: Did someone bring this to your attention, or just through your practice did you see that this is the trend that was happening with the rate of drop in parole releases for people convicted of these felonies?

PS: Well, Robert Isseks, who I'm working with on this case, Robert Isseks and Alex Smith, they might be the premier prisoner civil rights attorneys in the state. And they were just seeing decision after decision, denial after denial, and decision looking like a rubber stamp, one after the other. The parole board would say...would describe the nature of the offense, and then say one of two or three rubber stamp reasons for denying. And because of that, something looked wrong. He looked into it a little further and found out, you know, maybe something really is going wrong. And he brought me on board, and we filed the suit.

A: Could you just tell us what those three reasons that are constantly used over and over again...I'm sure 99% of the people listening have heard them over and over again, but the three reasons for...the three things that are supposed to allow you to be released on parole...what those three considerations are?

PS: Sure. One of them it might say, "Release at this time would deprecate the seriousness of the offense as to undermine respect for the law." Another one would say, "Release at this time would not be in the best interest of society." And the third might be, "Release at this time would jeopardize public safety," or something to that effect, public safety or public welfare, something like that.

A: Okay. Well, I guess we just answered this – what made you guys decide to defend prisoners' rights to a fair parole hearing? So, I guess we kind of covered that.

PS: Yeah, we kind of covered that.

A: Yeah. What will happen to inmates from the suit who have two, three, four five 2-year or 1-year hits? Will they just be entitled to a new hearing just like someone that's only had one or two hits?

PS: If we win, yeah, everybody would be entitled...everyone who's denied for just the nature of the offense and their criminal history would be entitled to a new hearing, if we win. And the hearing would be decided on the basis of the criteria that we...that are set up in 259i. We would require proper enforcement of those considerations.

A: Okay, question eleven is the one that I didn't have covered in my notes.

PS: Uh oh.

A: What do you suppose will happen (another hypothetical)...

- PS: [laughter] I love these.
- A: ...to the inmates with high profile cases? Does that make anyone...does that make someone more dangerous just because your case is high profile?
- PS: It shouldn't...just because it's been in the press, and people might have seen it on TV or read about it in the newspaper, that shouldn't theoretically make a consideration because the factor of it being a high profile case is not enumerated in Section 259i. And if it was, then it would be a proper consideration, but because it isn't, it shouldn't be.
- A: Why has the appellate division in lower courts turned a blind eye concerning the parole board decisions?
- PS: Well, I'm not so quick to say that they have been turning a blind eye to parole board decisions. I think that the lower courts have been taking a strong look at whether or not the parole board is properly exercising its discretion. It's just been very difficult to say on an individual, case-by-case basis that the parole board has been applying an overarching policy as opposed to looking at the individual's record and making a decision based on that alone. One of the benefits of the class action is that the judge in this case is going to be able to look at all of the parole board decisions, and see them next to each other, and realize that they look very, very similar to each other. So similar that it looks like there might be a policy at work here, instead of just individual discretion.
- A: But there have been, at the state level, there have been more judges that have been taking the parole board to task, lately, saying that, you know, you're not...this isn't the way that the case should have been decided, give them a new hearing. Hasn't there been more of that, or has it just been publicized more?
- PS: I don't think it's been publicized more, I think we are seeing the ones...that people are being released. I don't know that it's happening more and more, but we are starting to see it on the cover of the New York Law Journal when somebody is being released on an Article 78 petition.
- A: And John Caher, who's written some of those articles for the Law Journal, last time I spoke with him, he said that the parole boards...the parole board members that were making these decisions seemed to be taking more care and more time to be more flowery with their decisions. They're adding more words, making the decisions longer, all the ones he had reviewed, instead of just using one of those three reasons that we talked about. Have you noticed any of that, or is...?
- PS: I haven't been reading very many decisions that have been issued in 2006, so I would defer to John Caher's judgment on that.
- A: Okay. Why do you think it took so long for someone like you to notice the unfairness of the parole board?
- PS: [laughter] Fair question. In I think it was 2004, there was a case, Wilkinson vs. Dotson, out of the United States Supreme Court. And what that case said was that inmates who challenge the duration of their incarceration are handled

one way, and inmates who challenge the procedures upon which they are being incarcerated are handled a different way. Let me put that in other terms. If someone is challenging the fact that they were denied parole, and they say that the court improper...not the court...if the parole board improperly denied them parole, then they are asking for habeas corpus relief. They want to be freed. Free the body. But if an inmate, as held in *Wilkinson vs. Dotson*, is challenging the procedures upon which the parole board issued their decision, then that is not a habeas corpus petition, and that is something that can be brought up in this sort of case. So once the Supreme Court made it clear that what we would be doing, asking for new hearings, instead of asking for release of all of this class of inmate, then it gave us an opportunity to file this case.

- A: I like that. Do you think lawyers will or should be present during parole hearings, and is that a good solution? Now some states, they are, right? Some states, can't you have legal representation when you go before the parole board?
- PS: I'm not sure, I don't know.
- A: I think so. I'm looking around trying to see if anyone here knows. [laughter]
- PS: [laughter]
- A: But do you think it would be a good idea? Do you think that would be a balancing factor, if you will?
- PS: I don't know. There are benefits to not having any representation other than the inmate's own representation, you know, their personal representation before the parole board. I think there are pluses and minuses to both sides, but I don't think that the lack of legal counsel at the parole board hearing has led us in this direction. Like, I don't think this case would be changed if counsel were allowed inside during the hearing.
- A: Now, how about filing Article 78s? Do you think that people that file them on their own [inaudible]...attorney when they file their Article 78?
- PS: Not necessarily. I think it depends on the quality of the filing. I've seen some very well-written, very well-crafted, pro se briefs. I've also seen some that aren't as good. So it just depends. Attorneys certainly have more resources at their fingertips to file a more comprehensive brief, but perhaps some inmates have more time to dedicate to their own Article 78 petitions.
- A: All right, the last question from the Otisville guys is how will all of this affect Article 78s? I don't know if they mean the frequency of or the quality of or the decisions.
- PS: It wouldn't affect whether or not they could be filed. There might be, if we win, there might be more Article 78s filed in order to be granted their hearings. There might be some filed in order to state that they were improperly denied earlier, but this case should handle all of those questions that would be raised in an Article 78 petition because everyone would be

granted a new hearing, and that's basically what an Article 78 petition is asking for, is a new hearing.

A: There's one more question and then we're going to take a musical break here.

PS: Okay.

A: Do the outcomes of cases in other states have any outcome...any influence on how this case comes out? I know you said you were in Michigan. I know there's a case in Michigan, a class action suit.

PS: Yes, there is a case and I'm...I think I'm familiar with that case. I read about it.

A: Can you just tell us a little bit about that case? And then...

PS: Well, they're arguing similar constitutional violations that we are. They're also arguing that there's been an ex post facto violation.

A: Meaning?

PS: Meaning that inmates who were incarcerated to a fixed sentence are being held in prison for longer than that fixed sentence. So, for example, if somebody pleads guilty...um...actually, let me tell you a story.

A: Okay.

PS: If...you've seen Law & Order on TV, correct?

A: I like the show.

PS: I like the show. It's a very good show.

A: George doesn't like it.

PS: Oh, well...sorry George.

A: [laughter]

PS: Sometimes you will have...and Bob tipped me off on this story, so I'm going to...Robert Isseks...I'm going to give you his story, but in my words. They're in a cell, and this is before there's been any conviction, and the D.A., so it's the defense attorney, 20-to-life. The defendant says I don't want to...I'm not going to take 20-to-life. So he says, "I won't go any lower than 15-to-life," and the defendant and the defense attorney talk, and then the defense attorney says, "Ok, we'll take 15-to-life." And that's kind of what this case is about, because right now, there is no difference between a defendant pleading guilty and serving 15-to-life than 20-to-life, because he's being denied for those 5 years anyway. And it's just not fair. And in fact, it's an ex post facto violation, in my opinion, to say that there has been a difference. Because really, if the defendant knew then that he would be denied parole for those 5 years, he would've rolled the dice at trial and seen if he could get off entirely. But that's not really out there in the public. People who are making a decision whether or not they should plead guilty to 20-to-life versus 15-to-life aren't seriously considering the fact that 15 years down the line, they're going to be denied parole anyway. They think that there's an actual difference between a

sentence of 15-to-life and 20-to-life. But because it hasn't played out that way, there's a strong possibility that there's an ex post facto violation there.

A: So, do you think that decisions that are made in other states will have any effect on the outcome of this?

PS: Well, they can have an advisory effect. They can have a persuasive effect.

A: Right, they're not precedent-setting or anything, but they can...

PS: Exactly.

A: ...the judge can take that into consideration?

PS: Yes. That's correct. And I think this judge would.

A: Judge Bryant?

PS: Yes.

A: Okay. All right, we'll be right back with our guest, Peter Sell, right after this musical break.

DJ Julie: This is Keith Jarrett by request. Who's it from, the request?

A: Bob Isseks.

DJ Julie: Oh! Wonderful. The absent attorney. Here's Keith Jarrett.

[break]

A: You're listening to the Fancy Broccoli Show, 91.3 WVKR, Vassar College in Poughkeepsie, NY. And that wasn't a request by Robert Isseks. Peter had told us that Robert Isseks liked that music.

PS: [laughter]

A: And who was it? Keith Jarrett, correct?

PS: Yes.

A: Yes, so that's why we played it.

PS: Thank you.

A: And the name of the song was, "Paint My Heart Red." It was from the Carnegie Hall concert.

PS: Fantastic.

A: Okay, Peter, we've been talking about the lawsuit that you have filed.

PS: Mhmm.

A: Now, with the change in the governor, we have Elliott Spitzer coming in now, how is that going to...is that likely to affect the decision, Judge Bryant's decision?

PS: No, no.

A: So, the atmosphere...the political atmosphere should stay...should not affect what the judge does, right?

- PS: Exactly. What it might affect is the settlement posture of this case.
- A: Meaning?
- PS: Meaning the state A.G. who's representing Governor Pataki...
- A: The attorney general?
- PS: The attorney general, I'm sorry. They're the attorneys that are handling the case for the defendants. They might decide to settle the case more quickly or they might to fight it more vociferously...based on the change in the governor's office. I'm not sure how it's going to affect it, but it's possible that it could.
- A: Right. And, just say that the new governor comes in, the atmosphere changes, and the release rates go up to 30%.
- PS: Mhmm.
- A: What would that do to your suit, if your suit had not been settled yet? Would that change it or would it still be an active suit because of the decisions that have already been made?
- PS: Yes, it would still be an active suit because of the decisions that have already been made. And so we would continue going forward with it because it's based on the past, or what will soon be the past, governor's parole policy and how it affected the decisions from 2004 through 2006. So, if in 2007 the rate of parole goes up, the people who were denied parole in 2005 who hadn't had their hearings yet, or 2006, who still might have been subject to the past policy, those people would still be affected and they would still be entitled to a new hearing.
- A: One of the things that we get letters about, people ask a lot, are part of when they...when they're...we get lots of letters from guys that lay out their arguments of how the parole process should be corrected and what's wrong with it now. And one of the things that they talk about is a due process liberty interest.
- P: Mhmm.
- A: Can you talk about the difference between due process liberty interest and minimal due process?
- P: Yes.
- A: Thank you.
- PS: A due process liberty interest is something that inmates do not have. They do not have a due process liberty interest into being released on parole. That means that...federal due process, as laid out in the United States Constitution, does not say that an inmate has a right to be released on parole. Plain, flat-out, that's the rule. However, there is an argument that they have minimal due process rights to proper parole procedures and practices. That means that if the state has this parole process, and the state has, like New York does, if the state, like New York, has a set of guidelines for when parole should be granted, then minimal due process requires that the actual state actors, in this

case the New York State parole board, follow those guidelines that are laid out by the New York State legislature and are enumerated in Executive Law, Section 259i, the parole board to follow what's been laid out in the statute. But inmates do not have a federal right to be granted parole, anyway.

A: So, other than what you'd already told us about sending in parole decisions, inmate status report, is there anything that the people hearing this show, or just anybody in New York State that's in prison or outside of prison, what can we be doing...is there anything we can be doing to help with this case or is it beyond that point now? Is it just...

PS: It's not beyond that point now. If there is...every once in awhile, the governor, somebody who speaks for him or somebody who has overheard...who he's spoken to, or somebody who speaks for him has spoken to, every once in awhile they might have talked about parole and parole policy and parole practices. If they did that, and they mentioned what the governor's policy was on parole, or how he communicates those policies to the parole board, that kind of thing we'd be interested in, no matter what it is. If they say...if the governor was telling people that the parole board is completely independent, that's the kind of thing that we want to hear about because we want to know the truth about what actually happened in this case. If the governor was telling people that he does have a parole policy and, you know, this is on the other extreme of the hypothetical that we like to play here...

A: [laughter]

PS: ...that the governor had a policy of denying parole to everybody in this class, then that's the kind of thing that we would like to hear, too. Because if that's the truth, then that's what needs to come out in this case.

A: And that's what you were referring to before as your "stray remarks" - that would fall under that?

PS: Yes, those are the kinds of stray remarks.

A: So, the judge, hearing an Article 78, just has the power to call for a new hearing?

PS: Mhmm.

A: And what we see now is there's many cases where the Article 78s, especially when there's not a lawyer involved, it seems that they're not respond...and even when a lawyer is involved, they're not responded to in a timely fashion, the next hearing comes up. Is it even worth it? Do you recommend filing, you know, appealing your parole decision if you're denied and filing an Article 78 if the administrative appeal is denied? Do you...I mean, many organizations that have been involved in things like Family Empowerment Day and many other aspects of it, and a lot of the guests we've had on this show have said, "Always do it. You've gotta do it. You've gotta file." Do you think that that...that's true? That that should be done?

PS: Yes, I agr...I completely agree with that opinion, that you should file your administrative appeal and your Article 78 and hopefully you have enough

time to file an appeal of the denial of your Article 78. And everything should happen as quickly as it can happen, in order not to have the case mooted out. Mooted out meaning a new parole hearing is coming up, is going to take place before a final decision on the merits after all the appeals process for...about the prior parole hearing. And I think it's a good idea to do that to put the state court judges on notice about what's actually taking place, because they wouldn't read the hearing transcript, they wouldn't read anything about the inmate's file, they wouldn't know exactly what is taking place without people bringing it to their attention. So, I think it's a good idea for that reason as well as the individual reason, that you might prevail.

A: Now, the judge's power to only demand a new hearing and then the number of Article 78s that end up...you know, that ends up being mooted before...because they go back to the parole board before their...a decision is ever made...

PS: Mhmm.

A: ...before we talk about the benefits that the Judge Bryant has, that he's going to see all these cases, be able to sit down and read this, one right after another, so he can see a pattern or a policy or something, evidence itself ...

PS: Mhmm.

A: At what point...shouldn't the...the number of appeals that are put in, the Article 78s, wouldn't a judge, a state judge that's hearing these Article 78s, seem to notice a pattern himself? I mean, why don't they?

PS: Not necessarily. I mean, Judge Bryant, in this case, is going to see all of them, and an individual judge, sitting in a state supreme court, would see a handful, but a handful is certainly not enough to establish a pattern. So I don't fault them for not seeing a pattern, but I think we should definitely give them an opportunity to rule on the merits of the case and take a look at it themselves.

A: Okay. [laughter]

PS: I mean, the other thing is, and I think it's important to note, is that this case is not arguing that all of the A1 violent felony offenders should be released, or that any of them should be released. What we're arguing is that the state parole board hasn't been applying the statutory factors in the proper way, hasn't been applying all of them...in fact, they've only been applying one of them, and that's...the important part of this case, is that they're not deciding parole decisions in the right way. We're not saying that any of these guys should be let out, we're just saying, "Give them a fair shot before you decide whether or not they should be let out."

A: And earlier you said that one of the reasons you decided to take this case was that you felt you were on the moral...morally right side.

PS: Mhmm.

A: Did you...when you're deciding whether to take a case like this, is it the chance of success that determines whether you take it, or because the...of the effects that it will have if it's successful? You know what I mean?

- PS: They're all...I'm sorry go ahead.
- A: Is...which one's more important or are they just...are they both considerations?
- PS: They're all factors. At this point in the practice, one needs to consider the likelihood of success, because if you're Sisyphus, and you're just rolling the hill...the ball up the hill, that's not going to do anybody any good. But if it's an important case and you really need to bring it to people's attention, then yeah, that's another factor that you work in. But given the kinds of cases and the number of cases and the size of the cases that are already on my plate, then I will be a little more selective about which ones I can take.
- A: Even if this case isn't decided in your favor...
- PS: Mhmm.
- A: ...like, in the instance of the voting rights, where people could...people that have life on parole, you know, we went down and listened to a hearing down in federal court on that, and although they decided that they didn't have a right to vote...
- PS: Mhmm.
- A: ...one thing that came out of that was the judges noticed this...the way the census is done, so that people living in prison in an upstate community are counted as members of that community instead of members of the community they came from, and all sorts of federal money and state money is allocated based on that. Do you see that...even if this case doesn't success...succeed in court, do you think that it might be turning on some lights for the people that watch this, the people that follow these things, people in the legal community, the state judges I was talking about before that don't have the advantage of seeing all those cases? Do they read something like this and could it affect the decisions they're making at a local level? Another...another theoretical here...[laughter]
- PS: Well, one of the important things that Judge Bryant...one of the important results from Judge Bryant's decision was to publicize and the New York Law Journal and John Caher have definitely written about it, about this case, and it's also appeared in other publications, is it has publicized the fact that if there is this penal policy, if there is this penal philosophy about who should stay in and who should be granted release, then that policy is illegal. You're not allowed to map onto an individual's release decision your theory about whether this kind of person should be released. The idea is that everybody should be judged...all the inmates should be judged on an individual basis, and if a sentencing court and, in some cases, a district attorney, has decided that 20 years, say, for example, is enough time to punish an individual for a crime that they were given, if the sentencing court and the district attorney and if there was a victim's statement present at the time that the individual was sentenced, if everybody agreed that 20 years was enough, then it shouldn't be the province of the parole board 20 years down the line to say, "Well, 20 years

isn't enough," and I don't think that the state statute gives them the right to do that.

A: So, they shouldn't be acting as a sentencing court?

PS: That's correct.

A: A second court?

PS: Right, that's why they shouldn't rely exclusively on the nature of the offense, which the sentencing court knew at the time the sentence was issued, and the inmate's criminal history, which the sentencing court knew at the time the sentence was issued. There should be other factors considered, and they would have to be negative factors against release in order to make a decision that the inmate should be denied parole.

A: Okay, so what's next? I mean, this...what's the next step? You said you had something going on the 14<sup>th</sup> of this month?

PS: On the 14<sup>th</sup> is the next court appearance for this case, and I'm not certain what's going to take place at the next court appearance, but we're in the middle of discovery, the state attorney general is turning documents over to us, and we're going through all of the documents, so we'll definitely have a better idea about the status of the case at that point, and perhaps the judge just wants a status update about what is taking place. So, we are anticipating discovery to continue, likely through the end of the year, of gathering documents and perhaps making more requests.

A: How can we follow the progress of the case? How can we, here at the Fancy Broccoli Show, follow the progress of the case so that we can keep the people that listen to the show updated on this? Is there...does it come out in some sort of publication or is there...?

PS: The daily happenings of what takes place in court are not necessarily published, but, you know, feel free to give me a call and I'll give you a status update.

A: All right, I will.

PS: Okay.

A: And, hopefully, if we come across another big success during this case or something, you'll be willing to come back or maybe Bob can come back or...

PS: Absolutely, without question.

A: ...Alex.

PS: Yep, absolutely.

A: All right. I want to thank you. Is there anything you want to add, is there any...oh, contact information...if people want to mail...

PS: Sure.

A: ...their things, if could you give the address where people can mail any accounts of stray remarks or...

- PS: Absolutely. Contact information, if you want to mail accounts to us, and that's the easiest way to handle all this information, is by the mail...
- A: Okay.
- PS: You could send it to: Robert Isseks and/or Alex Smith, at 6 North Street, Middletown, NY 10940. That's: 6 North Street, Middletown, NY 10940.
- A: Great. Peter, I want to thank you again, very much...
- PS: Thank you, Amy.
- A: ...for coming on.
- PS: My pleasure.
- A: Okay, and we'll talk to you again soon.
- PS: Very good.
- A: All right Julie, I'm going to turn the show back over to you.
- DJ Julie: Okay. A little bit of dead air, here. Okay, well thanks, Amy and thanks, Peter, for that interview. It's 36 minutes after 4:00, and we're going to get back to the music for just a bit, and then we've got a good stack of letters to read. It looks like about a dozen letters. So, this is Eric Reed from a recent album entitled, "Here," and this is a Rodgers & Hart tune, "It's Easy to Remember."