

0113

**BOX:**

335

**FOLDER:**

3169

**DESCRIPTION:**

Whalen, James J.

**DATE:**

12/04/88



3169

0114

Witnesses:

E. J. Ganet

P. A. Muller

Counsel,

Filed 4 day of

Dec 1888

Pleas,

Wholly

THE PEOPLE

Burglary in the Third degree.  
The second degree.  
[Section 498, 506, 528 and 531.]

28 Dec  
415 miles

James J. Whalen

Dec 7 1888  
JOHN R. FELLOWS,

Dec 13 1888 District Attorney.  
Dec 14 1888  
Dec 17 1888

A True Bill.

Dec 19 1888  
P. J. Ganet  
Pleas  
Dec 19 1888

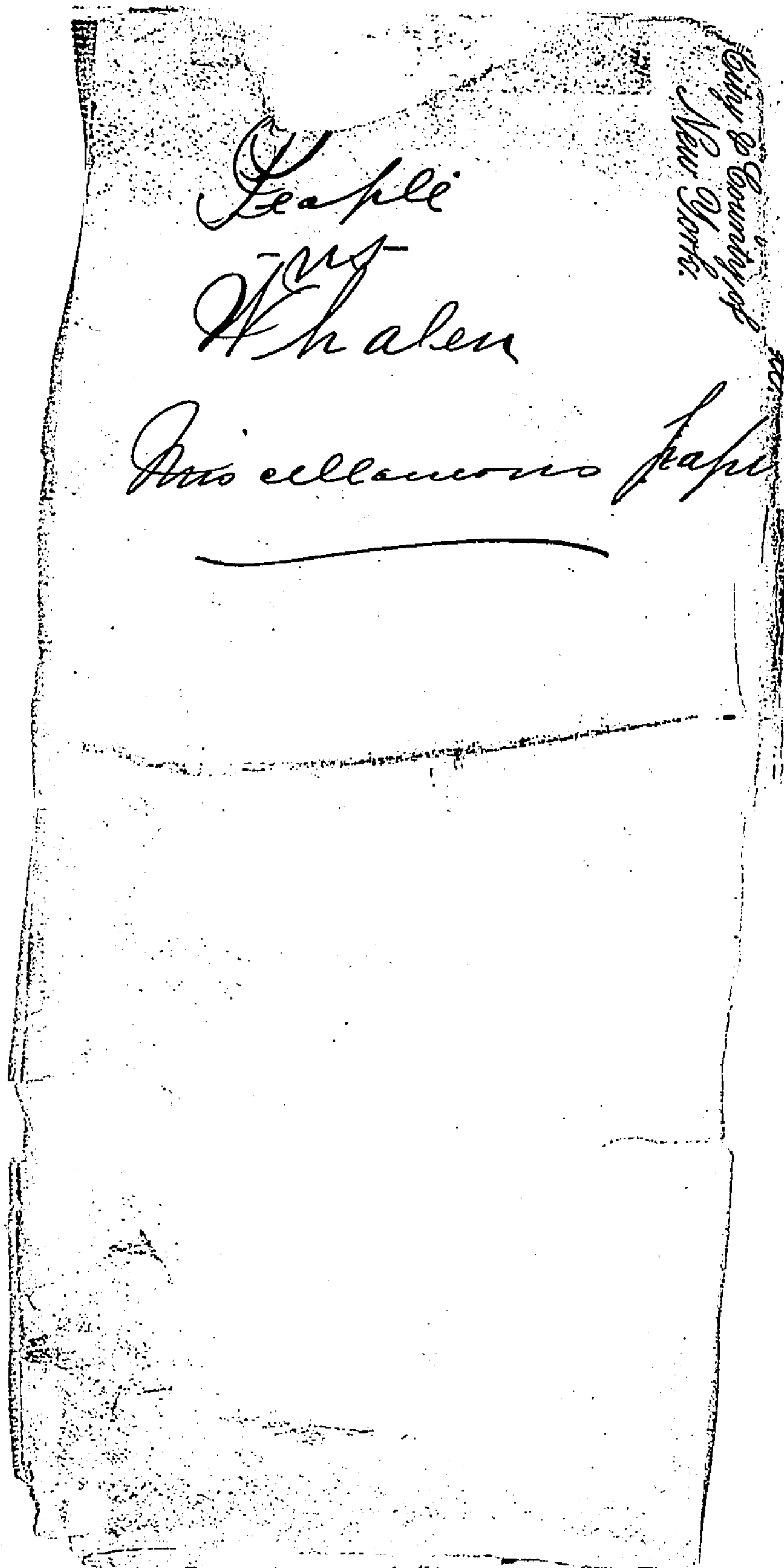
Foreman.

Dec 19 1888  
P. J. Ganet  
Pleas

S. P. 2 and.



0115



0116

*Opinion of Lawrence J.  
in Whalen case  
Law Journal Feb. 6<sup>th</sup> 1911*

By LAWRENCE J.

Western Nat. Bank v. Montgomery—Order granted.  
Whalen v. Brush, warden, &c.—It was decided by Mr. Justice Edmonds in the case of The People v. Potter (1st Parker's Crim. Rep., 47), that the power conferred on the Executive, by the Constitution of 1821, to grant pardons, included the power of granting a conditional pardon, and that on a breach of the condition the pardon became void, and the criminal might be remanded on his original sentence; also, that such power could be exercised by the Court in which the party was convicted, or by any Court of superior criminal jurisdiction. With this decision before me, it is unnecessary for me to trace the power of the Executive to grant conditional pardons back to colonial law, and the Constitution of 1777, by which the common law relating to that subject became merged in the Constitution. By the Constitution of 1846, if any doubt upon the subject as to the right of the Governor to grant a conditional pardon could have theretofore existed, such doubt was removed. By section 5 of article 4 of that instrument, it is provided, that "the Governor shall have the power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law, relative to the manner of applying for pardons." The Acts of 1862, chapter 417; 1863, chapter 415; 1864, chapter 321; 1874, chapter 451; 1879, chapter 373, and 1886, chapter 21, were passed merely to carry out this provision of the Constitution of 1846. As I stated to counsel upon the argument, a Justice of this Court, sitting at Chambers, will never pronounce an act of the Legislature unconstitutional, unless its alleged conflict with the organic law is so apparent as to be seen at a glance. In this case, so far from any such conflict between the statute and the Constitution being apparent, it seems to me that the act and the Constitution are perfectly harmonious, and that the position assumed by the counsel for the petitioner is untenable. Even if there were any such conflict, the act must give way to the provision of the Constitution, which expressly vests the Governor of the State with power to grant a conditional pardon, and it appears from the papers submitted to me that the petitioner in this case accepted the commutation which he received under his first conviction, under the condition that, if during the period between the date of his discharge by reason of such commutation and the date of the expiration of the full term for which he was sentenced, he should be convicted of any felony he should, in addition to the penalty which might be imposed for such felony committed in the interval aforesaid, be compelled to serve in the prison or penitentiary in which he may be confined, for the felony for which he was so convicted, the remainder of the term, without commutation; which he would have been compelled to serve but for this commutation of his sentence. The prisoner having received his conditional pardon or commutation of sentence under those terms, and the Governor having exercised the power conferred upon him by article 4, section 5 of the Constitution heretofore referred to in granting such commutation, the petitioner cannot now seek to repudiate that condition and ask to be discharged from imprisonment. The facts in this case are without dispute, and it is shown that the prisoner, under the name of James Randolph, was sentenced to Sing Sing Prison on the 30th of June, 1882, and was there received July 1st, 1882, having been sentenced to serve a term of seven years at hard labor by Judge Gildersleeve in the Court of General Sessions of the County of New York for the crime of robbery in the first degree. He was discharged from prison on the 31st of March, 1887, his term of imprisonment having been commuted by the Governor of the State for good behavior to four years and nine months, thereby making a reduction of his original sentence of two years and three months, such discharge, as already stated, having been granted upon the condition above recited. Prior to the expiration of the seven years of his original term of sentence, and on the 19th of December, 1888, he was again convicted and sentenced in the Court of General Sessions by Judge Cowing to serve a term of two years in the Sing Sing Prison for the crime of burglary in the third degree and was received at the prison December 21st, 1888. The two years' term under the latter sentence has expired, and thereupon, under the conditions of the pardon or commutation granted by the Governor, he became liable to serve the remaining two years and three months of the unexpired portion of the term for which he was sentenced under his original conviction. Without enlarging further upon the subject, I am therefore of the opinion that the return made by the warden and agent of Sing Sing Prison shows that the petitioner is now lawfully detained by him, under the judgment of a Court of competent jurisdiction, and that, therefore, the writs heretofore granted, should be dismissed and the prisoner remanded.

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①

In obedience to the writs of  
H. C. & C. writs annexed  
I hereby certify and return  
to this Supreme Court, that  
before the coming to me  
of the northern forest, the  
said James J. Whalen  
was, and at the date  
heretofore, is ~~now~~ my  
custody and is detained  
by me for cause  
as follows:

That pursuant to writ  
June 30. 1882 the petition  
under the alias of  
James Randolph was  
returned to the Sup. Sup.  
Date Pres. Mr. R.  
under and by virtue of  
an indictment found  
against him for robbery  
in the first degree, for  
a term of <sup>imprisonment</sup> ~~of~~ seven years,  
the said indictment  
bearing date the day  
of 1882 and now  
on file in the office of



the Clerk of the Court of  
 the annual session of the  
 Peace of the C. & County of  
 Murphy. ~~reference being~~  
~~made thereto~~ a copy of  
 which is annexed ~~thereto~~  
 hereto marked Exhibit A.  
 That the Prisoner was duly  
 received at Sing-Sing  
 Prison July 11, 1882. Under  
 the sentence aforesaid <sup>and</sup>  
 there remaining until he  
 was conditionally discharged  
 March 31, 1887. Having  
 received his commutation  
 for good conduct, and duly  
 passed his sentence, two  
 years and three months  
 of time.

To wit: Dec. 19, 1888.

That subsequently thereto,  
 under the name of James  
 J. Whelan, the Prisoner  
 was sentenced to the Sing  
 Sing State Prison for a term  
 under and by virtue of  
 an indictment found  
 against him for burglary  
 in the third degree, for a



imprisonment of  
 term of two years, the  
 said indictment bearing  
 date the day of  
 and now on file in the  
 office of the Clerk of the  
~~Court of~~ General Session  
 of the Peace of the City of  
 N.Y. a copy of which  
 is annexed hereto making  
 Exhibit "B."

That the Petitioner may  
 fully remain at Long. Sing.  
 Prisoner the sentence  
 last pronounced December 21,  
 1888.

That the authority for  
 his detention at the date of the  
 arrest and the cause of his imprisonment  
 by me are as follows

That under and by  
 virtue of the Statute  
 of Article IV. of the State  
 Constitution the Governor  
 of the State is empowered  
 "The Governor shall have  
 the power to grant  
 reprieves, commutations and  
 pardons, after conviction

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for all officers of the  
stream and areas of  
improvement, upon such  
conditions, and with such  
restrictions and limitations  
as he may think proper,  
subject to such regulation  
as may be provided by  
law relative to the manner  
of applying for patents.

That under and by  
virtue of the powers  
thus conferred, the Gov-  
ernor of the State ~~Sanitation~~  
~~to wit~~. March 31. 1887.

commuted the term  
of imprisonment of the prisoner  
to four years and ~~and~~  
months upon his  
original sentence of seven  
years from July 1. 1887.  
So that the term of  
prison March 31. 1887 upon  
the conditions mentioned; that  
if the Prisoner shall ~~should~~  
during the period of his  
~~discharge~~ between the date  
of his discharge on the

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day aforesaid, by reason  
 of such commutation, and  
 the date of the expiration  
 of the full term for which  
 he was sentenced, be  
 exonerated of any felony  
 he shall, in addition  
 to the penalty which  
 may be imposed for  
 such felony committed  
 in the interval as  
 aforesaid, be compelled  
 to serve in the prison  
 in which he may be  
 confined for the felony  
 for which he is so  
 convicted, the remainder  
 of the term without com-  
 mutation which he would  
 have been compelled to  
 serve but for the  
 commutation of his  
 sentence granted him.

That said conditional  
 discharge was accepted  
 by the prisoner and  
 read to him on the date  
 last aforesaid.

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That the petitioner <sup>was</sup> ~~restored~~ duly <sup>reinstated</sup> ~~reinstated~~ and <sup>returned</sup> ~~returned~~ to the <sup>Army</sup> ~~Army~~ - <sup>Service</sup> ~~Service~~ during the <sup>period</sup> ~~period~~ of his discharge <sup>March 31, 1887</sup> ~~March 31, 1887~~ and the remainder of the term without compensation which he would have been compelled to serve under the condition aforesaid thereby violating the conditional discharge granted to him by the <sup>Army</sup> ~~Army~~ <sup>whereby</sup> ~~whereby~~ his committed term of two years and three months became forfeited.

\* That in addition to the <sup>provisions</sup> ~~provisions~~ stated in the <sup>Law</sup> ~~Law~~ <sup>of the State</sup> ~~of the State~~ as aforesaid, with reference to the ~~discharge~~ conditional discharge of the petitioner <sup>March 31, 1887</sup> ~~March 31, 1887~~, under and by virtue of the <sup>several</sup> ~~several~~ <sup>provisions</sup> ~~provisions~~ of the <sup>Legislature</sup> ~~Legislature~~ Laws of 1862 Chapter 415-417 of the Laws of 1863 <sup>415</sup> ~~415~~.



0123

7  
and subsequent enactments  
conceding with the Laws  
of 1886. Chapter 21. The  
Governor of the S. of S. Y.  
now giving concurrent  
power to those granted  
him under Article IV  
Section I of the Constitution  
with reference to the commu-  
tation of ~~prisoners~~ the  
terms of the sentence  
of prisoners - and that  
the statutes referred to  
having and the condi-  
tions imposed upon  
the prisoner, <sup>the time of his discharge</sup> under the  
Statutes aforesaid having  
been violated by him, <sup>and</sup>  
as he has been out of parts  
the commutation of term of  
two years and three months  
became forfeited and  
which under the discharge  
aforesaid the prisoner  
is compelled to serve  
prior to the commencement  
of his term of imprisonment  
under the sentence of Dec 19. 1888.

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8.

That such an actual  
discharge of the ~~prisoner~~  
prisoner is further regu-  
lated and governed by  
Section 92. of the Code  
of civil Procedure enacted  
September 1. 1881.

For the reasons herein  
assigned, ~~and by notice~~  
the prisoner is by me  
detained and supported  
by due process of law.

Furthermore I have the  
body of the said James  
J. Mahan before me &c;  
do do.

0125

Draft

Return

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*ited to sustain*  
Authorities ~~sustaining~~ the position of the People.

POINT I.

As to the constitutional right of the Governor to commute and to impose conditions thereto, ~~Article IV~~

Article IV, Section V of the State Constitution, it has been observed, empowers the Governor of the State to grant "commutations" upon such conditions and with such restrictions and limitations as he may think proper.

~~of this there can be no dispute.~~

~~Granting this~~, the question <sup>now</sup> arises; what ~~condition~~ <sup>if any</sup> can the Governor <sup>impose</sup> make so as to be valid and binding in law?

X  
That the Governor has the right to attach a condition to a commutation is, we think, fully determined by the case of The People vs. Potter, Parker's Criminal Reports, Vol. 1, p. 47.

In that case the Governor had granted a <sup>conditional</sup> pardon ~~upon~~ <sup>in his learned treatise of the law</sup> a condition, and the learned Judge Edmonds held, that he had a valid right to do so. Certainly, if the Governor had the right to pardon ~~upon~~ a condition, <sup>ally</sup> there is no reason why he has not the right to commute ~~upon~~ a condition <sup>ally</sup>.

In ~~this~~ <sup>the</sup> case <sup>ited</sup>, the learned Judge, after citing several English authorities to sustain his position, states:

"In our country the same doctrine prevails. Smith's Case (1 Bailey, 283), the Court say, that the offender has a right to accept or reject the terms proposed."



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// He may prefer to make the reparation demanded by the law,  
// on the atonement substituted, at his election. The condi-  
// tion is in effect a contract, and to entitle the party to  
// the benefit he must perform the condition, for that is the  
// only conclusive evidence of assent to the grant, and from  
// the very nature the thing must be done of his own accord."

XXXXXXXXXX

(State)

X "Mr. Vint, when Attorney-General of the United  
States, gave it as his opinion that the power to pardon,  
as given by the Constitution, is the power of absolute and  
entire pardon. On the principle that the greater power  
contained the less, he was of opinion that the power of  
pardon absolutely includes the power of pardoning condi-  
tionally."

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Continuing the Court say:

// Our own statutes through all the revisions from  
// 1781 to the present time, a period of more than sixty years,  
// have been equally guarded in the use of the same terms, and  
// have been explicit in conferring upon the Governor the power  
// to attach conditions to his pardons. //

3 Greenleaf's L. of N.Y. 113;  
1 Rev. L. of 1843 126.

The decisions in the Courts of our State, in several  
of the States of the Union, in the Courts of the United  
States, and in the Courts of the British Empire have all  
regarded those words as conveying the right to attach con-  
ditions to the grant of a pardon. *(single space)*

B Chief Justice Marshall, in the case of the United  
States vs. Wilson, 7 Peters, 156, says, in speaking of the  
pardoning power, "that it may be absolute or conditional."

// "Mr. Wirt, when Attorney-General of the United  
// States, gave it as his opinion that the power to pardon, as  
// given by the Constitution, is the power of absolute and  
// entire pardon."

// "On the principle that the greater power contained  
// the less, he was of the opinion that the power of pardoning  
// absolutely includes the power of pardoning conditionally."

(See Opinions of Attorney-General, 250).

The principle here laid down was fully concurred in  
by Attorney-Generals Butler, 18. 1034, and Gilpin 18. 1382.

The United States Supreme Court has invariably *held*  
~~cluded~~ that the President has the right of granting condi-  
tional pardons, and in respect to the language giving the

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~~the~~ President that right, it may be well here to add; that the State Constitution is substantially the same as that of the Federal Constitution, with reference to Reprieves, Pardons, etc., etc; ~~do~~ that the United States, as well as the State Courts, concur in the settled condition and the principles of ~~the~~ law upon the point now under discussion.

This doctrine of conditional pardons has been further re-affirmed in Ex-parte William Wells, 18 Howard, U. S. Supreme, 310. Id. 314; Id. 320; where <sup>in the latter</sup> it is re-cited:

"And the same thing may be done in regard to all  
officers, <sup>where</sup> ~~when~~, in this country, the law authorized the  
pardoning power to modify the punishment and give effect to  
the commutation."

Reference is also made to the case of "The Laura," 114 U.S., 416.

The subject of Conditional Pardons and <sup>Commutations</sup> ~~Commuting~~ is most ably and thoroughly discussed in the case of Lee vs. Murphy (22 Grattan), Virginia Reports, 789, wherein the doctrine as hereinbefore alluded to is re-affirmed with with <sup>Much</sup> clearness, force and brilliancy.

Counsel could well consume the valued time of the Court with a repetition of adjudications upon the subject now in review, but it appears useless to do so, as we are confirmed in the belief that the principle involved in the question of conditional commutation is so thoroughly and firmly settled in our <sup>jurisprudence</sup> as to become an ele-

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mentary and fundamental part of our judicial structure:

We will, therefore, divert our attention to other important subjects *requiring our attention.*

POINT II.

The prisoner upon his discharge, -March 31, 1887 - it is contended, understood that he was conditionally discharged as aforesaid. That the condition was read to and by him accepted prior to his departure from the State Prison.

He could have disregarded the condition by refusing to accept his pardon thereunder and stood upon his rights under the law for legal protection.

Mr. Justice Wayne, in Ex-parte William *Wells* ~~Wells~~, 18 How. U.S.Court Reports, 315, recites the law as follows:

"As to the suggestion that conditional pardons cannot be considered as being voluntarily accepted by convicts so as to be binding upon them, because they are made whilst under duress *per minas* and duress of imprisonment, it is only necessary to remark, that neither applies to this case as the petitioner was legally in prison; - Continuing the Court says:

"If a man be legally imprisoned, and either to pro-



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11  
11  
cure his discharge, or on any other fair account, seal a bond or deed, this is not duress or imprisonment, and he is not at liberty to avoid it."

In the case at bar the prisoner was discharged and accepted his discharge with full knowledge of what he could expect were he returned.

And it is well, here, to remark, that in ascertaining how much time the prisoner should receive in commutation, the computation is made under the Law of 1836, which was more liberal to him than the immediately preceding law - 1879, and still it is that law which gave him his liberty some months earlier than he could otherwise have received it, that he now claims to be of no force *without legal effect* and not binding upon him.

H  
The time of two <sup>2</sup> years and three <sup>3</sup> months he received on his sentence of seven <sup>7</sup> years, was computed on the basis of two <sup>2</sup> months for the first year, two <sup>2</sup> months for the second year, four <sup>4</sup> months each for the third and fourth years, and five <sup>5</sup> months for each succeeding year.

See Section I, Chapter 21, Laws 1836.

Had the prisoner accepted his discharge under any of the other acts relating to commutation he would not have been so liberally considered as the Statutes heretofore referred to would have prevented.

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*of the Executive*  
Discretionary Power under the Statutes.

*Part III*  
*Discretionary Power*

The prisoner's counsel contends that the Acts of the Legislature passed after 1863, took from the Governor his discretionary power, and that it was not again vested in him until the passage of the Act of 1886. Such a theory to us seems absurd. That part of the Act of 1863 leaving the discretionary power with the Governor, was never repealed by any subsequent Act of the Legislature, either directly, by implication or by inference, as a careful, not critical, reading of that, and the subsequent Acts will show.

And if it were not that the importance of the subject requires the greatest care on the part of the representative of the People, we would hesitate before reminding the Court of the few following well settled principles of law affecting the issue.

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*Davis*

(19)

11 A statute may be repealed by necessary implication, and without any express words; the leaning of the Courts is against the doctrine, if it <sup>be</sup> possible, to reconcile the two acts of the Legislature, together. Note 9, p. 113 Potter's *Dwarris* on Statutes.

A statute can be repealed only by an express provision of a subsequent law, or by necessary implication. To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and the old, that they cannot stand together, or be consistently reconciled.

*XJ*

Potter's *Dwarrison* Statutes, note 4, p. 154, citing Cool vs. Smith, 1 Black. 459; Wood vs. U.S., 16 Pet. 342; 10 Ban. R. 448; Hartford vs. U.S. 7 Cranch, 109; Brown vs. County Commissioners, 21 Penn., 37, etc. \* \* \* \*

The more natural, if not necessary inference in all such cases is, that the legislature intended the new law to be auxiliary to ~~the~~ and in aid of the purposes of the old law. There should be, therefore, a manifest and total repugnancy in the provisions of a new law to lead to the conclusion that the latter law ~~altogether~~ abrogated and was designated to abrogate the former. *V*



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An important element of the issues involved in the case at bar, bears a very strong relation to the principles so concisely and ably propounded by the learned Justice Allen in the case of The People vs. Albertson, reported 55 N. Y. p. 50.

In the argument at Chambers before the learned Court, it was frankly asserted and now again without ~~justi-~~ <sup>modification</sup> fication repeated, that the Act of 1863, wherein it was given to the Governor the discretion to commute, by express language to that effect, has not been repealed ~~for~~ modified by any subsequent enactment excepting by the Act of 1886.

Every Act leading up to the one of 1886, that of 1864, 1874 and 1879 only and solely referred to commutations of convicts ~~only~~ as to the time they could earn by good behavior, etc., etc.

We may readily conclude then that the law makers of 1864, 1874 and 1879, did not intend to ~~completely~~ repeal the entire enactment of 1863, but only in so far as the same related to the time prisoners could earn for good behavior, etc. All the rest of the Act of 1863 remained inviolate, as if no additional legislation on the subject had been had ~~on the present day.~~

*down to the passage of the Act of 1886.*

The rule is well settled in this State, ~~to be~~ <sup>in construing</sup> Statutory enactments <sup>to be</sup> as follows:

"A repeal of Statutes by implication is not favored in the law, and when both the latter and former Statute can stand together, both will stand unless the former is express

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ly repealed, or the legislature's intent to repeal is very manifest.

People vs. Palmer, 52 N.Y.82.

What is there in the language of the Act of 1863, giving the Governor "discretionary power", etc., as the same relates to the Acts of 1864, 1874 and 1879, to take the point now raised from out the rules here laid down.

There is no inconsistency between them in the language used. No new *matter* has been introduced in the latter three acts to conflict with that of 1863, in so far as it related to the discretionary power of the Executive.

For all intents and purposes they can be construed as one and the same Act, the only exception being "earned time" by convicts"

*by any Statutory enactment*  
To have divested the Governor of his power to commute ~~by statutory enactment~~, would have been in direct ~~con~~  
*violation*  
~~tradition~~, if not of the letter, at least of the spirit of the State Constitution as it has stood since 1846.

The Legislature knew in 1862 and in 1863 what the organic law was at that time with reference to the prerogatives of the Executive thereunder, because those enactments did not conflict with the Constitution.

And presuming it had conflicted with that *solemn* instrument, what would have been the result? We revert now to the case hereinbefore alluded to in the 55 N.Y.

Say the *Court* :

(~~How many pages 55~~)

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*Stote*

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*21*

11 A written Constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the Legislature as upon any other departments of government and individual citizens, according to its spirit and the intent of its framers, as indicated by its terms. An act violating the true intent and meaning of the instrument, although not within the letter, is as much within the purview and effect of a prohibition as if within the strict letter; and an act in evasion of the terms of the Constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in express terms forbidden. A thing within the intent of a Constitution or statutory enactment is, for all purposes, to be regarded as within the words and terms of the law. A written Constitution would be of little avail as a practical and useful restraint upon the different departments of government, if a literal reading only was to be given, it, to the exclusion of all necessary implication, and the clear intent ignored, and slight evasions or acts, palpably in evasion of its spirit, should be sustained as not repugnant to it. The restraints of the Constitution upon the several departments, among which the various powers of government are distributed, cannot be lessened or diminished by inference and implication; and usurpations of power, or the exercise of power in disregard of the express provision or plain intent of the instrument, as necessarily implied from all its terms, cannot be sustained under the



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pretence of a liberal or enlightened interpretation or in  
deference to the judgment of the Legislature, or some sup-  
posed necessity, the result of a changed condition of af-  
fairs. (1 Kent's Com., 162; Barto v. Himrod, 4 Seld., 438;  
Taylor v. Porter, 4 Hill, 144; Warner v. People, 2 Dec., 272;  
People v. N.Y.R.R.Co., 24 N.Y., 485; Schenectady Observatory  
v. Allen, 42 id., 404.) //

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Further the rule is *stated to be upon the same subject.*

That a statute only operates as a repeal of a former one to the extent that the two are repugnant; if both can stand and to the extent that they can stand and have effect, they will both have effect.

52 N.Y. 83; 47 Id., 216;  
55 Id., 613;  
Hawkins vs. The Mayor, etc., 64 Id. 18.

*(A subtle effect)*

23

We may here conclude the discussion of the law in relation to the construction to be given to Statutory enactments, ~~likewise~~ *following* as we do, that in the recital of the above cases that the subject matter of the People's position affecting the status of the Act of 1863 *1874 and 1879 has* been sufficiently elucidated to aid the Court in reaching a satisfactory solution of the problem.

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The case Exparte Clawson, 15 Pacific Reporter, p.328 cited on the argument by Counsel for the prisoner, does not help his case. It was held in <sup>there</sup> ~~this case~~, that the law governing the discharge of a prisoner was the law in effect at the time of his sentence. ~~the prisoner's counsel was~~

(25)

*The prisoner's Counsel in the case at bar contends*

~~that~~ that as the law of 1886, in which the Governor is directed to attach a condition to the commutation, was passed and went into effect after the prisoner had already served part of his term, <sup>and prior to his conviction</sup> therefore, under the authority of Clawson's case, it could not apply to him; but that he was governed by the law of 1879, and those previous to it, and which annexes no condition.

We concede the soundness of the law in Clawson's case, but call <sup>the Court's</sup> ~~your Honor's~~ attention to the fact that the Governor had a right at all times, regardless of the law of 1886, <sup>or any other law</sup> to attach a condition, as was decided in the case of the People vs. Potter, before cited; and to quote from the opinion of the Attorney-General: "On the principle that the greater power contained the less, he was of opinion that the power of pardoning absolutely includes the power of pardoning conditionally". People vs. Potter was decided in 1845, some years prior to the statute of 1886.

~~Indeed it is doubtful if that part of the statute of 1886 imposing on the Governor a condition to be attached to his absolute discretionary power given him by the legislature is constitutional.~~

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#### CONCLUSION.

A review of the history of the proceedings at bar gives us the following information :

Here, we have a criminal, an acknowledged enemy of the State, after a fair and impartial trial by a jury of his peers, is convicted of the heinous crime of robbery in the first degree.

The clemency of the laws of his State with praiseworthy liberality, in its endeavor to teach him discipline and make of him a respectable and decent member of the community, allows him by the discretion of the Executive officer of the State, commutation of his term of imprisonment for good behavior, and for properly attending to the duties assigned him.

The Governor, acting under the authority given him by the constitution, and, as we claim, ~~it~~, one of his fundamental prerogatives, fortified and strengthened, if such be possible, by the enactments of the Legislature, virtually says to the prisoner upon the termination of his sentence, in just so many words: "Go and sin no more"; but I warn you, and do now attach this condition to your release, if you commit another crime against the State and ~~are~~<sup>be</sup> brought back to prison, the commuted time given you shall be forfeited, and it is upon this express condition that I, having the right in my judgment to release you, do now consent to your discharge.

The prisoner having assented to such condition, de-



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(2) <sup>and</sup> parted from the prison with all the misery that surrounded him, <sup>in the gladness of his heart</sup> muttered his thanks for the Executive clemency bestowed upon him, and in less than a twelve month, is again a prisoner within its walls, after having been duly tried, convicted and sentenced for the crime of burglary.

The prisoner, the petitioner herein, is in bad odor with the Court, the State and all law-abiding peaceably inclined citizens thereof; and the law in either its legal or equitable application should not be invoked to show him mercy, for he deserves none, having failed to profit by the clemency already bestowed upon him.

On the contrary, however, in the judicial administration of the criminal law, not so much for vengeance to be executed upon the accused as for an example to be made manifest to others lawlessly inclined, the powers vested in the Court should be directed in the keeping of such <sup>a</sup> dangerously criminally inclined person from doing further wrong and mischief to society, of which he is no longer worthy of being deemed a member.

In the humane exercise of the law, with malice toward none, with charity for all, the policy of the government would best be subserved in the proceedings at bar by the withholding of additional clemency to the prisoner, who has on the former occasion <sup>accorded to</sup> wantonly abused it.

We respectfully submit that the writs of habeas

0142

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(3)

corpus and certiorari be dismissed, and the prisoner be  
remanded.

DeLancey Nicoll,

District Attorney.

*Welch*  
David, ~~Welch~~

of Counsel.

0143

*Copy to Mr. [unclear]  
Dist. Ct. [unclear]*

*1952*

*1*  
*Two with title*

NEW YORK SUPREME COURT.

County of New York.

-----X  
In the Matter of [the application

of

Frank J. Keller, as Counsel for  
one James J. Whalen. For Writs  
of Habeas Corpus and Certiorari  
Petitioner.

And

Hon. A.A. Brush, Warden and Agent  
Sing Sing Prison, New York State,  
Respondent.

-----X

*Brief and Writs  
for Respondents*

0144

*New York Supreme Court*  
*County of New York*  
The People  
vs.  
W. H. A. L. E. N.  
*for the purpose of*  
*obtaining a writ of*  
*habeas corpus*

Brief submitted on the law and facts by the People  
opposing the discharge of the <sup>prisoner</sup> petitioner herein, James J.  
Whalen from Sing Sing State Prison where he is at present  
confined under due process of law for crimes committed  
against the State, the recital of which will hereafter ap-  
pear at full length in the <sup>pages</sup> of this brief.

*(double sheet)*  
THE FACTS.

*prisoner*  
The ~~defendant~~ James J. Whalen, sued out writs of  
Habeas Corpus and Certiorari, for the purpose of having the  
Supreme Court pass upon, what is charged as his unlawful  
detention at Sing Sing State Prison by the Warden and Agent  
thereof, A. A. Brush, inasmuch as he claims for <sup>the</sup> reasons  
<sup>following</sup> ~~as follows~~, that he is justly entitled to his immediate dis-  
charge.

*(single sheet)*  
*record*  
The history of the <sup>prisoner's</sup> reveals the fact, that  
under the name of James Randolph he was sentenced to Sing  
Sing Prison, June 30, 1882, and was there received July 1,  
1882, having been sentenced to serve a term of seven <sup>(7)</sup> years  
at hard labor, by Judge Gildersleeve in the General Sessions  
Court, N. Y. County, for <sup>the crime of</sup> robbery in the first degree.

His discharge from prison followed March 31, 1887,  
his term of imprisonment having been commuted by the Govern-



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of the State  
or for good behavior to four years and nine months, thereby making a reduction of his original sentence of two years and three months.

Under the alias of James J. Whalen he was, - December 19, 1888, sentenced to serve a term of two years in Sing Sing Prison, by Judge Cowing, in the Court of General Sessions, for <sup>the crime of</sup> burglary in the third degree, and was received at the Prison December 21, 1888.

It is now maintained in behalf of the prisoner, by <sup>Frank J. Keller</sup> Mr. Keller, his Counsel, that having served the last sentence of two years in full, <sup>imposed upon him,</sup> dating from December 19, 1888, that he is justly entitled to his discharge.

*This substantially covers the contention of the prisoner.*

2  
~~This substantially covers the contention of the~~  
prisoner, his Counsel holds that under the several statutes of the State bearing upon the issues involved in this proceeding, that the freedom of the prisoner should not now be denied him, and that under the law, his term of imprisonment has expired, and that he is entitled to an immediate and unconditional discharge.

*(should be)*  
It is contended upon behalf of Mr. A. A. Brush, the Warden and Agent of Sing Sing Prison, who now detains the prisoner, <sup>that he is</sup> ~~that the prisoner~~ is not entitled to his discharge from his custody, upon the ground <sup>under</sup> that upon his construction of the law, the prisoner is bound to serve out the full time of his original sentence of seven years, the first sentence imposed upon him, inasmuch as the prisoner

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was returned to ~~the~~ Sing Sing Prison under a conviction had prior to the time of the expiration of the original sentence of seven <sup>7</sup> years, as if no commutation had been granted him.

The law bearing out this contention of the Warden is recited hereafter at full length.

To further emphasize the position of the Warden, <sup>acting</sup> ~~in his position~~ as a quasi judicial officer of the State, it is maintained, as has been the rule from time immemorial, in similar <sup>instances</sup> that the prisoner was conditionally discharged by the Governor ~~of the State~~, March 31, 1887, when his time was commuted by the <sup>grace</sup> of the Executive, for the <sup>period</sup> ~~space~~ of two years, and three <sup>3</sup> months, the certificate of discharge containing a condition to the effect, in substance reciting; that if the prisoner were <sup>to State Prison</sup> ~~ever~~ returned under a conviction as hereinbefore set forth, that the time given in commutation shall be declared void, which condition, at the time of his discharge, March 31, 1887, the prisoner, upon his leaving the State Prison, with full knowledge <sup>thereof</sup> ~~of the condition~~, the same having been read to him, ~~he~~ duly accepted. <sup>He will speak</sup>

General Review of the Constitutional Provisions  
Regulating Pardons, Reprieves and Commutations.

It may be of some importance at this period, owing to the issues involved herein being for the first time brought <sup>before the court</sup> ~~for~~ judicial review, that a cursory statement of the subject of <sup>Pardons, Reprieves and</sup> ~~Commutations~~ and the matters arising there-

\* A copy of the con. document referred to is attached hereto for your information.

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*Scott*

(5)

from be called to <sup>its attention</sup> ~~the attention of the Court~~  
(single sheet)  
organic

An examination of the law will reveal the following:

It was the Common Law of the land, prior to the adoption of the first State Const. <sup>17th</sup> 20th April, 1777, that the Executive had the power to grant Reprieves and Pardons.

And that when a subject made his amends in such manner as to the Crown were deemed satisfactory, and a pardon issued, a condition in many instances was annexed thereto, and thus the same became a conditional pardon.

To use the language as contained in Chapter ~~29~~ <sup>XXIX</sup>

4  
Third Edition, Chase's Blackstone: "The King may extend his mercy upon what terms he pleases, and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend, and this by common law."

*all the writers on criminal law concur in this doctrine: and the English books are full of authorities in support of it. See Chitties' Law 714. 2 Novington*

Counsel for the People comments upon this subject of "conditional pardon," at this period, for the purpose of bringing the Court's attention to the fact that from the earliest period of our time, and prior to the formation of the State Government, in the case of "Pardons and Reprieves" the most important, as well as the most solemn of all the prerogatives vested in the Executive, was clothed with the right if sought to be exercised, of annexing to the pardoning power a condition, which upon all occasions and at all times, whenever the condition was <sup>attached</sup> ~~attached~~, was upheld as an

*P. L. Parlane 1 Paed. Criminal Law 223-393*

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undisputed part of the Executive prerogatives, as fundamental ~~part~~ of the Sovereign *control* as any of the other and varied powers, upon such officer in *any manner* <sup>by the Constitution</sup> conferred.

*that of* Those conditions assumed various phases, as for instance, — being confined to hard labor for a stated time, or of transportation to some foreign part for life, or for term of years, etc., etc.

By the adoption of the *State* Constitution of 1777, the Common Law ~~of this State~~ *relating* to the subject of Reprieves and Pardons became merged in to the 17th Section thereof, wherein it is stated:

*of* "That the Governor shall have the power, at his discretion to grant Reprieves and Pardons to persons convicted of crimes, etc., etc., and under which section, from the cases hereinafter reported, conditional pardons granted were held to be valid and binding in law, whenever the same were <sup>made</sup> subject of judicial review in <sup>any of</sup> the Courts of this State.

Thereafter, under Art. <sup>IV</sup> ~~IV~~, Section V of the *Constitution* of 1821, the same powers and privileges conferred upon the Executive were continued in force and effect, in language substantially the same as that contained in the 17th Section of the earlier State *Constitution*, carrying with them the same prerogative rights, with reference to "Conditional Discharges" as heretofore at length <sup>was fully</sup> alluded to.

*adoption of the* But it was not until the Constitution of 1846 ~~was~~



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adopted that in addition to the power conferred upon the Governor to grant reprieves and pardons there was also embodied the power to commute, and to better express the language of the organic law upon the subject, it is deemed best here to recite the same in full.

Article 4, Section 5.  
The Governor shall have the power to grant reprieves, commutations, and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations as he may think proper, subject to such regulation as may be provided by law relative to the manner of applying for pardons.

Thus we have chronologically arranged a statement of the organic law of the State, vesting in its Executive powers and privileges in the legal application of which to the ~~exercises of~~ proceedings at bar, full reference will be made <sup>hereafter</sup> under the proper appellation.

(double space)  
General Review of the Statutory Enactments  
upon the Subject of Commutations only.

An examination of the Statutes referred to under the above heading, reveals the law <sup>to be</sup> as follows:

(See page 1) (single space)  
The first statute upon the subject of commutation is that contained in the Laws of 1862, Chapter 417.

(Here insert substance only.)

(See Ryan's memo.)

We thus observe that under the provisions of, etc.

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~~The first Act~~ The first Act of the Legislature of this State, ~~with~~ reference to the commutation of time affecting prisoners' sentence for good conduct and the strict observance of prison rules, was Chapter 417, Laws 1862.

Section 2 thereof recites: "That every convict confined in any penitentiary of the State, under sentence on conviction of a felony, may earn for himself a commutation or a diminution of the term of his sentence, subject to the provisions of section four hereof."

Then follows the time he can earn upon certain conditions - such as the working of a certain number of hours per day; - ~~obeying~~ the prison rules, etc., etc.

" Section 4 of the Act provides, that each keeper of a prison shall not, more than thirty days before the term of each convict expires, as diminished by said record" (referring to the record of his commuted time) - transmit a copy of such record to the Governor, which shall give the name of such convict, the date of his reception, the term of his sentence; and the Governor of the State of New York may thereupon, in his discretion, direct the abatement or deduction of the term of the sentence of said convict of the number of days of commutation or diminution thereof, which said convict shall have earned."

It can be thus observed that discretionary power is vested in the ~~Governor~~ <sup>Governor</sup> to commute sentences after conviction, as has been the case in relation to the Executive prerogatives in the matter of Pardons and Reprieves since the adoption of the first State Constitution.

These provisions will

It is not the purpose of this report

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The next Act in reference to commutations of the sentence of <sup>R</sup>prisoners will be found in Chapter 415, Laws of 1863, which was substantially a re-enactment of the Act of 1862, the main exception being that the time <sup>R</sup>prisoners could earn for good conduct, etc., etc., was extended, the law in that respect increasing its liberality to the <sup>convict</sup>prisoners upon <sup>the</sup>~~some~~ observance of the rules formulated for their discipline and conduct.

Section 4 of the Act concludes as follows:

11 " And the Governor of the State of New York may there-  
11 upon, in his discretion, direct the abatement or deduction of  
11 the term of the sentence of said convict of the number of  
11 days of commutation or diminution thereof, which said con-  
11 vict shall have earned. ~~the convict shall have earned~~

It can thus be recognized that the discretionary power still remained with the Executive to commute, precisely the same as was his prerogative, granted by the Laws of 1862, not losing sight of the fact, however, that the constitutional authority invested him with a similar power in the manner hereinbefore recited.

Following the law of 1863 will be found the Act of 1864, Chapter 321, which merely amends Section 2 of the preceding Act, (that of 1863, by making still more liberal provision for prisoners for good conduct; still leaving un-  
-and in this <sup>restricted</sup> restricted the discretionary power in the Governor to com-  
mute, as was conferred upon him by the Act of 1863.



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(10)

Thereafter follows Chapter 451, Laws of 1874; Section 12 thereof contains the regulations as to the time each prisoner shall earn for labor performed and obedience to the rules of the prison; but said Section, or any part of the entire Act, does not repeal the discretionary power vested in the Governor under the Acts of 1862-1863.

Chapter 373, Laws 1879, merely amends Section 12 of Chapter 451 of the Laws of ~~1874~~ <sup>1874 with</sup> in reference to the commuted time prisoners could earn, and does not repeal the discretionary power vested in the Governor under the preceding Acts hereinbefore referred to.

The next and last Act of the Legislature in reference to the subject, is contained in Chapter 21, Laws 1886.

X This enactment is not amendatory of any previous Act or Acts, or parts thereof, but is an entirely new and original Act regulating the whole subject of commutations. Section 1 regulates the time convicts could earn by way of commutation on their sentences.

Section 13 recites that the Governor, upon the receipt of the report recommending the allowance of commutation of sentences of convicts for good conduct, as provided for in this Act, may in his discretion allow the same.

This Act added a new feature to what was contained in the previous Acts, as will be observed from the reading of Section 14 thereof, reciting as follows:

ll " " " The Governor shall in commuting the sentences of convicts, as provided for in this Act, annex a condition to the effect that if any convict so commuted shall, during



(11)

// the period between the date of his or her discharge, by  
 // reason of such commutation, and the date of the expiration  
 // of the full term for which he or she was sentenced, be con-  
 // victed of any felony, he or she shall, in addition to the  
 // penalty which may be imposed for such felony committed in  
 // the interval as aforesaid, be compelled to serve in the  
 // prison or penitentiary in which he or she may be confined  
 // for the felony for which he or she is so convicted, the re-  
 // mainder of the term without commutation, which he or she  
 // would have been compelled to serve but for the commutation  
 // of his or her sentence, as provided for in this Act. //

Xo Thus we find, chronologically arranged, from the  
 earliest to the latest periods, *of our history* a statement of the statu-  
 tory Law vesting in the Executive powers and privileges in  
 the legal application of which to the ~~original~~ *proceeding* at bar full reference will be made hereafter in  
 proper order.

*might be that prisoner*  
 That such conditional discharge of the ~~prisoner~~  
 is further regulated and *defined* by Section 692 of the  
 Code of Criminal Procedure, enacted September 1, 1881, which  
 reads as follows:

// The governor has power to grant reprieves, commuta-  
 // tions and pardons, after conviction, for all offenses, ex-  
 // cept treason and cases of impeachment, upon such conditions,  
 // and with such restrictions and limitations, as he may think  
 // proper, subject to the regulations provided in this chapter. //

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Commutation Earned to July 23. 1886.

Date of passage of 7200/100. 107100. 17 day

Commutation Earned from after passage

of law to date of discharge. March 31/87. 167100. 13 day

0155

TORN PAGE

the application to the defendant or his attorney. This rule is adopted for experimental litigation at the expense of defendants, and to secure to the city the payment of the fees to which it is by law entitled from litigants able to pay them. Adopted in Convention June 6, 1889.

MICHAEL T. DALY, Clerk.

# CITY COURT—CHANGE OF ROOM.

Special Term and Chambers of the City Court will on and after September 9th, 1887, be held in Room 19 of the old City Hall.

Part 4 of the Court will be held on and after that day in Room 11 of the same building. By order of the Court,

MICHAEL T. DALY, Clerk.

## Calendars for Wednesday, September 25.

### UNITED STATES CIRCUIT COURT.

Before LACOMBE, J.—Court opens in Room 123 at 11 A. M.

#### MOTION CALENDAR.

##### ADJOURNED.

1. Hubback et al v. Longman et al
2. Smith et al v. Bernstein
3. Lillenthal v. Wallach et al
4. Lillenthal v. Wallach et al
5. Pirie et al v. Whiting P. Co. et al
7. Brush E. Co. v. Electrical Accu. Co.

##### NOTICED.

8. Hilton v. Gyt.
9. Case, trus., v. Mass. Benefit Ass'n.
10. Electrical Accu. Co. v. Thayer et al
11. Electrical Accu. Co. v. Citizen E. I. Co.
12. Will et al v. Magone

### COURT OF APPEALS—FIRST AND SECOND DIVISIONS.

Adjourned until Monday, October 7.

### SUPREME COURT—CHAMBERS.

Before BARRETT, J.—Court opens at 10:30 A. M.—Calendar called at 11 A. M.

29. Hillebrand v. Hillebrand
32. The People ex rel Hauselt v. Board of Emigration

#### FOURTH CLASS.

1. Kendall v. Mellen
2. Riker v. Martin et al

#### SIXTH CLASS.

3. Cockefair v. Cockefair

#### SEVENTH CLASS.

4. Leshur et al v. Klotz et al

#### EIGHTH CLASS.

5. Weeners' et al v. Welde, as rec'r

#### NINTH CLASS.

6. Geary v. Melvin et al
7. Morrison v. Johnson
8. Fromer v. Neethe et al
- 8½. Spero v. The West Side Bank
9. Klee et al v. Rosenthal

10. Lochner v. Mass et al
11. Donavan v. Donavan
12. Dr. Jaeger's Sanitary Woolen System Co. v. Le Bouteleer

13. Same v. Loesser
14. Same v. Conover
15. Schwab v. Kaughbran
16. Hadden v. Cooney
17. Taziede v. Jumel et al
18. Rankin v. Roy et al
20. Hofele v. Allen
21. Hubbard v. Hay, Jr.
22. Webb v. Frank et al
23. Burr v. Brown et al
24. Ruddick v. Transmitting Dynamometer Co.

### CALENDAR OF PROCEEDINGS FOR ENFORCEMENT OF COLLECTION OF PERSONAL TAXES.

1. McLean, rec'r, &c., upon The Music Pub. Co.
2. Same upon Harpending
3. Same upon Young
4. Same upon Crow
5. Same upon Greenbaum
6. Same upon Strauss
7. Same upon Noble
8. Same upon Bender (1886)
9. Same upon Bender (1887)
10. Same upon Blum
11. Same upon Houston (1886)
12. Same upon Houston (1887)
13. Same upon Lowery
14. Same upon Fille
15. Same upon Inmen
16. Same upon Canfield
17. Same upon Danenberg
18. Same upon Herstein (1883)
19. Same upon Herstein (1884)

20. McLean, rec'r, &c., upon Martin
21. Same upon Springarn
22. Same upon Springarn, adm'r
23. Same upon Shaw
24. Same upon Mayer
25. Same upon Hennessey & Co.
26. Same upon Joralemon
27. Same upon Demorest
28. Same upon Smith
29. Same upon Wall
30. Same upon Levy
31. Same upon Ball Electric Mfg. Co.
32. Same upon Briggs
33. Same upon Gibbs
34. Same upon Wolff
35. Same upon Conover
36. Same upon O'Connor
37. Same upon Hoexter
38. Same upon Cory

### SUPREME COURT—GENERAL TERM.

Recess.

### SUPREME COURT—SPECIAL TERM, PARTS I AND II.

Adjourned for the Term.

### SUPREME COURT—CIRCUIT, PARTS I, II, III AND IV.

Adjourned sine die.

### SUPERIOR COURT—GENERAL TERM.

Adjourned sine die.

### SUPERIOR COURT—SPECIAL TERM.

Before TRUAX, J.—Court opens at 12 M.

Motions.

### SUPERIOR COURT—EQUITY TERM.

the Term.

### RM, PARTS I, II AND III.

the Term.

### GENERAL TERM.

the Term.

### SPECIAL TERM.

opens at 10:30 A. M.

ns.

### EQUITY TERM.

the Term.

### RM, PARTS I AND II.

the Term.

### ECIAL TERM.

City Hall—Court opens at 10 A. M.

ns.

### S COURT.

NSOM, S.

Losa Gillespie, 10 A. M.

Probate of the will of

Erastus Lyman, 10 A. M.

Ellen Burns, 10:30 A. M.

John J. Lawrence

James Dovovan

John J. Hyde

### L TERM, PART I.

City Hall—Court opens at 10 A. M.

115. Currier v. Ramsey et al—H. Y. Stillman for

plff; Thornhill, S. & C. for def.

178. Hollman v. Gellis et al—E. Bittner for plff;

F. Solinger for def.

179. Finkelstein v. Levy—A. Levy for plff; T. J.

McKee for def.

181. Kelly v. Mulligan—Kohn & E. for plff; E. R.

Dodge for def.

182. Am. Loan & T. Co. v. Am. Ex. in Europe, Ltd.

Crane, L. & S. for plff; H. L. Landon for def.

183. Boullange v. Lafon—L. Mathot for plff; Solo-

mon, L. & E. for def.

184. Clayburgh v. Jacobs—J. C. Shaw for plff; An-

draws & E. for def.

Decisions, see page 442.



TORN PAGE

## PARDON AND SECOND OFFENSE.

NEW YORK SUPREME COURT.

Sept. 1889  
 GENERAL TERM  
 Third Department  
 THE PEOPLE OF THE STATE OF NEW YORK, respondents, against JOHN PRICE, appellant.

Appeal from conviction and sentence of defendant at the Albany County Oyer and Terminer for the crime of grand larceny in the first degree, charged as a second offense, under section 688 of the Penal Code.

Peter Mitchell for appellant; Hugh Reilly for The People.

The defendant was indicted for the crime of grand larceny in the first degree, charged as a second offense, under the Penal Code, section 688. The crime was committed July 30, 1888. The indictment further charged that, in 1884, the defendant was duly convicted of a felony in the State of Georgia, namely, larceny. The people read in evidence the record of defendant's conviction in Georgia; the defendant read his full pardon granted by the Governor of that State. Held, that the fact of the defendant's conviction for a felony under the laws of Georgia, was properly alleged and proved, and that the pardon did not exempt him from the increased punishment prescribed for a second offense.

A party is not obliged to challenge peremptorily a manifestly disqualified juror, but if he chooses to exercise his right of peremptory challenge, and yet have enough peremptory challenges left to exclude other more objectionable jurors, he is not injured.

LONDON, J.—The trial Court refused to hold that the pardon granted the defendant by the Governor of the State of Georgia exempted him from liability to conviction here as for a second offense. The Court held that the pardon did not disprove the fact of conviction in the State of Georgia, but was consistent with it, and hence the defendant might be lawfully convicted under section 688 of our Penal Code, notwithstanding the pardon.

The question does not appear to have been decided in this State.

The defendant relies upon the principles announced in *ex parte Garland* (4 Wall., 380). The Court there held that "a pardon reaches both the punishment prescribed for the offense and the guilt of the offender, and when the pardon is full it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." This broad doctrine is reiterated in subsequent cases (U. S. v. Padelford, 9 Wall., 531; Carlisle v. U. S., 16 id., 147; Osborn v. U. S., 91 U. S., 478).

Of course, past acts cannot be obliterated; but the legal effects of them can be. It remains true that the defendant was convicted in the State of Georgia, although subsequently pardoned, and hence it is urged that the defendant still remains in the class described in section 688 of our Penal Code, as one "having been convicted under the laws of another State."

Section 682 of the Penal Code provides that a pardon which shall relieve from judgment of habitual criminality, shall not prevent a subsequent judgment of habitual criminality upon subsequent conviction for felony. This at first seems to be an exception and to imply that only with respect to habitual criminals is previous pardon made inoperative; but it is obviously inserted, because needed with respect to habitual criminals, but not needed in the cases mentioned in section 688, because there the fact of previous conviction is made descriptive of the renewed offense irrespective of the fact of pardon.

The cases cited from the Supreme Court of the United States hold that since the pardoning power is conferred upon the executive by the Constitution, it is not within legislative control or restriction, and hence the Legislature cannot diminish the full absolution which the pardon imparts. Assuming this to be true, the result would be that the Legislature of the State of Georgia could not impair the force of the pardon, which under the constitution of that State her governor grants. The same reasoning would apply to the Legislature of the State of New York with respect to a pardon granted by the Governor of New York, but does not touch the phase of the case here presented. The police power of every State is complete, except as restrained by her own or the Federal Constitution. No constitutional provision restrains the legislative power of New York from prescribing that where persons have been convicted for felony in another State, whether subsequently pardoned or not, they shall, upon subsequent conviction of a felony in this State, be more severely punished. That the power exists is clearly inferable from the extent of the police power as defined by the Supreme Court of the United States (Hall-

road Co. v. Husen, 95 U. S., 405, 471, and cases there cited; *Bowman v. Chicago, &c. R'y Co.*, 125 U. S., 465, 492). Our own Courts recognize the fact that a moral stigma rests upon a convict notwithstanding his pardon (*Matter of Attorney*, 86 N. Y., 568; *People v. Elghmy*, 78 id., 333). The fact of conviction is a part of his past history (*People v. Raymond*, 96 id., 41).

In none of the cases in the Supreme Court of the United States was the pardoned person on trial for a second offense. His pardon proved effectual to exempt him from the penalty incurred, either under a prior or subsequent law. Here no penalty is incurred for the offense committed in Georgia, but a double penalty is inflicted upon the repetition here of the like offense.

We conclude, therefore, that the fact of the defendant's conviction for a felony under the laws of the State of Georgia was properly alleged and proved, and that the pardon did not exempt him from the increased punishment prescribed for a second offense. The defendant excepted to the ruling of the Court that one Cochran was not disqualified as a juror. The defendant then peremptorily challenged him. The defendant did not exhaust his peremptory challenges. Thus the defendant who did not want this person as a juror was permitted to exclude him, without the least embarrassment to his liberty of choice and challenge with respect to the other persons called as jurors. Assuming, but not deciding, that Cochran was disqualified, the defendant was not obliged to challenge him peremptorily; and if he had not, his exception would have been good, within the *McQuade* case (110 N. Y., 284), for he could not know that if he challenged him he might not have to exhaust all his peremptory challenges in setting aside jurors more objectionable than Cochran, and yet not have enough to exclude them and Cochran. But he chose to exercise his peremptory challenge, and the result proved that he did have enough peremptory challenges to exclude all the objectionable jurors and Cochran. He therefore was not injured. (*People v. Carpenter*, 102 N. Y., 243; 1 N. Y. State Rep., 648.)

We have examined the exceptions to the admission of various portions of the testimony and to the denial of motions to strike out, and find none that we regard as well taken. We have read the entire evidence, and we think it was sufficient to warrant the verdict rendered by the jury. The case against the defendant was one of circumstantial evidence; but we have read the evidence and are satisfied that, although the defendant did not take the package of bonds, he purposely diverted Dederick's attention enough to enable a confederate to take them.

Judgment affirmed.

LEARNED, P.J., and INGALLS, J., concurred.



0157

James J. Whaley  
James J. Whaley James Randolph J. Smith Dec 19/88  
2 years 18 months & 20 days - Recd - " 21/88  
Commenced to serve prison March 21/91  
Under the name James Randolph he  
was sentenced to S.S. State Prison June 30th 1882 - (Recd July/82)  
7 years 6 months & 15 days - S.S. State Prison  
Discharged March 31.87. having served  
accumulation of 2 years & 8 months

0158

OFFICE OF A. A. BRUSH,  
AGENT AND WARDEN OF SING SING PRISON.  
SING SING, N. Y.



Hon. David Welch,  
District Attorney's Office,  
N. Y. City.

District Attorney  
City of New York  
New York  
World

WORLD  
SDAY, JANUARY 8, 1891.

## TO TEST A CONVICT LAW.

### HABEAS CORPUS PROCEEDINGS ON

Lawyer Koller Agrees with Them—Can the State Give a Commutation to a Prisoner and Then Add the Time to the Term of a Future Sentence Imposed on the Same Convict?

A novel and interesting question will be presented to the Supreme Court this week, which affects nearly seven hundred convicts who are now serving out sentences in Sing Sing. A few weeks ago a committee of the convicts wrote to Frank J. Koller, a lawyer in this city, asking his advice as to whether they could legally be made to serve out commutation earned by them on sentences imposed prior to Feb. 23, 1886, and which they have fully served out. The question is important to the convicts, as it will make a difference of from one year and five months to eight years in the time which they will have to serve.

The men who are particularly affected are those who have been sent to Sing Sing since 1863, but who had previously served terms in other State prisons.

Under a law which went into effect on Feb. 23, 1886, a provision is attached to the discharge of every convict to the effect that if he shall again be sentenced to State prison, before the term of his new imprisonment shall commence he must serve out the time that he earned by good conduct on his previous sentence. The effect of this new law has gradually dawned upon the convicts in Sing Sing, and in the last few months there has been a good deal of grumbling. It finally took the form of a letter to the lawyer signed on behalf of about twenty of the men.

The first general law in regard to commutations for good conduct was passed in 1863. It provided that for good conduct a convict would receive a deduction from his sentence of a day in every month and afterwards a month in every six. In 1874, by an amendment to this law, the commutation was made the same as that now in force—two months off the first and second years, four months off the third and fourth years and five months off the fifth and every succeeding year.

Mr. Koller carefully looked up the law on the subject and sent a letter to Sing Sing in which he advised that if a convict had served a term in Sing Sing or in any other State prison, and then been sentenced to Sing Sing or any other State prison, he would be compelled to serve out the time so earned in addition to their new sentence, provided they are sentenced within the time so commuted. I am of opinion that such imprisonment is illegal and that you would be discharged on writ of habeas corpus.

I have given the matter my most careful attention, knowing the importance of the question involved, the number of prisoners that would be affected, and the sweeping results that would follow, and unhesitatingly say, after a full examination of all the statutes of the State relative to the commutation law, that convicts cannot, under any circumstances, be held for the term granted to them prior to the law of 1886.

One of the elementary fundamental principles of criminal law is that no criminal or penal statute is retroactive in its effects. In other words, that the law of 1886, in which is first found this extraordinary provision, must stand by itself and cannot be applied to persons convicted prior to its passage.

Under the law of 1879, chapter 383, of 1872, chapter 451, section 12, of 1881, chapter 415, were absolutely discharged and, as against their full freedom in the same manner as if they had served out their full sentence, and had no commutation for good conduct.

This being the case, it is impossible to subject men to serve the term which they had unconditionally earned, and would in reality be a forfeiture of inalienable rights which they had acquired under the laws existing at the time of their discharge.

This covers the cases submitted in your letter. Relative to the law of 1886 itself, I have grave doubts if the provisions of section 14 are constitutional. I do not believe conditional discharges can be made where a specified sentence relative to time is imposed, and is of course always done where defendants are sentenced to State prison.

Under the Reformatory laws the rule would be different, as there no time is mentioned in the sentence, and the discharge of a defendant is granted by the Board of Governors in their discretion, the defendant being subject, under special provisions of the act, to report at specified times, &c.

In other words, while he is not actually confined in the Reformatory, he is technically still under the control and supervision of the Board. Admitting the law of 1886, however, to be constitutional, section 14, the act provides for the purpose of this act, the term of imprisonment of a convict shall be the term of his sentence.

Under the new law, the term of imprisonment shall be the term of his sentence, and the term of his sentence shall be the term of his sentence.

Even if I am in error as to the laws of 1886 I have no doubt whatever on the first question under the laws of 1863, 1874 and 1879, under which, of course, your cases fall, as well as those of the vast majority of prisoners throughout the State.

I will, if possible, call at Sing Sing during the week and see you to make a test case.

I shall go up to Sing Sing in the latter part of this week," said Mr. Koller, "and select one case of a prisoner confined there under this section of the commutation law and sue out a writ of habeas corpus, and have him brought before the Supreme Court to decide the question. I am thoroughly convinced that I am right and that this law cannot be made retroactive. I am also convinced that the law in itself is unconstitutional."

Deputy Sheriff Burke, who has charge of all the prisoners after they are convicted and escorts them to Sing Sing, gave an illustration of how the law works.

A few weeks ago," said Burke, "I took a man to Sing Sing. He had been previously sentenced to four years. Do you know how long he will serve? He will serve just about as long as he had served before. He had served seven years for good conduct. He was now sentenced to four years, and he will serve seven years for good conduct. Now, according to this new rule, he will have to serve the seven years he got for good conduct then before his new term commences. It doesn't seem quite right and the convicts up at the jail are kicking like everything about it."

This is the first time that any question in relation to the commutation laws has been raised.



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NEW YORK SUPREME COURT

-----X  
The People, on the relation of A. A. ::  
Brush, Warden, etc., ::

against

JAMES J. WHALEN.  
-----X

IT IS HEREBY CONSENTED that the arguments on the writs of Habeas Corpus and Certiorari herein be and the same are hereby adjourned to the 24th inst., at 10.30 A.M., with all rights reserved to the parties herein as contained in the order previously entered.

Done, New York, 9th, 1891.

*For the People*  
*Frank J. Keller*  
*att for Whalen*



0161

N.Y. Supreme Court

The People ex rel

C. A. Brewster

Warden etc

-vs-

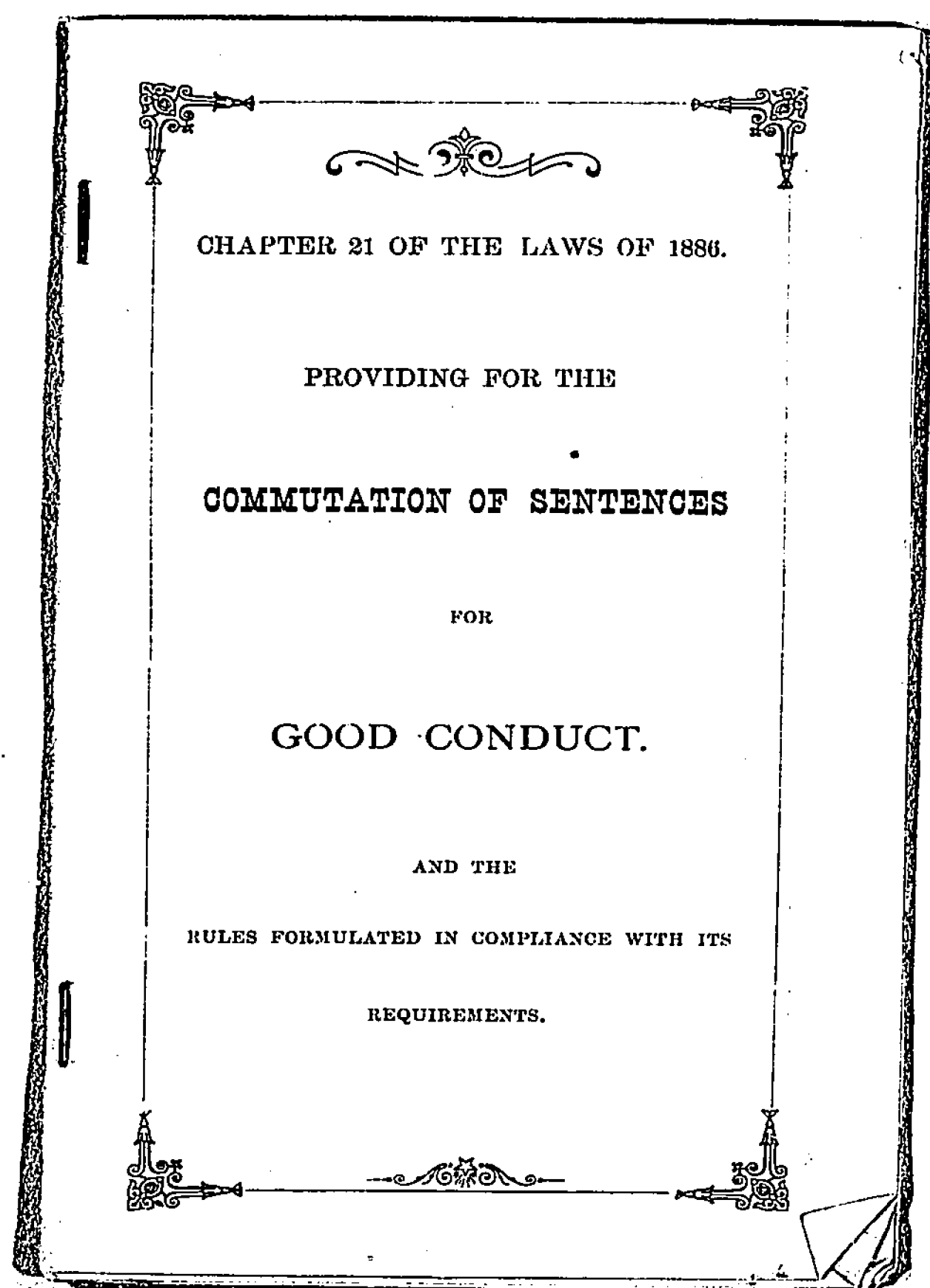
James J. Whalen

Consent

267 New York

NEW YORK SUPREME COURT

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0163

CHAPTER 21 OF THE LAWS OF 1886:  
PROVIDING FOR THE  
COMMUTATION OF SENTENCES  
FOR  
GOOD CONDUCT.

AND THE  
RULES FORMULATED IN COMPLIANCE WITH ITS  
REQUIREMENTS.

CHAPTER 21.

AN Act providing for commutation of sentences for good behavior of convicts, in the prisons and penitentiaries in this State.

PASSED FEBRUARY 23, 1886.

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

SECTION 1. Every convict confined in any State prison or penitentiary in this State on a conviction of a felony or misdemeanor, whether male or female where the terms or term equal or equals one year, or who has a term the maximum of which is fixed by law, exclusive of any term which may be im-

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LAWS RELATING TO

posed by the court or by statute as an alternative to the payment of a fine, or a term of life imprisonment, may earn for himself or herself a commutation or diminution of his or her sentence or sentences as follows, namely, two months for the first year two months for the second year, four months each for the third and fourth years, and five months for each subsequent year.

§ 2. Where any convict in any State prison or penitentiary in this State is held under more than one conviction, the several terms of imprisonment imposed thereunder shall be construed as one continuing term for the purpose of estimating the amount of commutation which he or she may be entitled to under the provisions of this act.

§ 3. For the purposes of this act the term of imprisonment of each convict shall begin on the date of his or her actual incarceration in a State Prison or Penitentiary.

§ 4. On any day not later than the twentieth day of each month, the agent and warden of each of the State prisons in this State, and the warden or superintendent of each of the penitentiaries in this State, shall forward to the Governor a report, directed to him, of any convict or convicts who may be discharged the following month by reason of the commutation of his or her sentence or their sentences in the manner hereinafter provided, which may be written or printed, or partly written and partly printed, which shall be uniform as to size and arrangement, which size and arrangement shall be fixed by the Governor, and shall contain the following information distinctly written, namely; the full name of the convict, together with any alias which he or

COMMUTATION.

3.

she may be known to have, the name of the county where the conviction was had, a brief description of the crime of which the convict was convicted, the name of the court in which the conviction was had, the name of the presiding judge, the date of sentence, the date of reception in the prison, or penitentiary, the term and fine, the amount of commutation recommended, and the date for discharge from the prison or penitentiary, if allowed.

§ 5. In the cases of all convicts where the date of discharge from a State prison or penitentiary, as determined after the allowance of commutation for good conduct, falls on Sunday, or any legal holiday, it shall fall on the day following.

§ 6. As soon as practicable after the passage of this act, the Superintendent of State prisons shall formulate rules governing the allowance or disallowance of commutation to convicts for good conduct in prison or penitentiary, which shall in all cases be strictly adhered to in all the prisons and penitentiaries in this State.

These rules may be changed from time to time, if necessary, in the discretion of the superintendent of State prisons, and he shall immediately on their adoption, or of any changes in the same thereafter, cause copies of the same to be forwarded to the agents and wardens of all the prisons, and the wardens or superintendents of all the penitentiaries in this State. A copy of these rules shall be furnished to every convict entitled to the benefits of this act.

§ 7. For the purpose of applying the rules mentioned in the last section for the allowance or disallowance of commutation for the good conduct of any convict, a board shall be constituted in each of



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the prisons and penitentiaries of this State, to consist of the agent and warden in each of the state prisons and the principal keeper and the physician therein, and the warden or superintendent in each of the penitentiaries of this State, the deputy or principal keeper and the physician therein, or of the persons acting in their stead. This board shall meet once in each month before the date fixed for the transmission of their report to the Governor, as hereinbefore provided, and proceed to determine the amount of commutation which they shall recommend to be allowed to any convict, which shall not in any case exceed the amount fixed by this act. They shall have full discretion to recommend the withholding the allowance of commutation for good conduct, or of a part thereof as a punishment for offences against the discipline of the prison or penitentiary, in accordance with the rules hereinbefore mentioned.

§ 8. In all cases, however, where the board shall recommend the withholding of the allowance of the whole or any part of commutation for good conduct they shall forward with their report to the Governor their reasons in writing, for such disallowance, and the Governor may, in his discretion, decrease or increase the amount of commutation as recommended by the said board, but he shall not increase the same beyond the amount fixed by this act.

§ 9. In case any convict in any of the State prisons or penitentiaries of this State having a sentence or sentences which equals or equal four years, escapes or attempts to escape, he or she shall, for the first escape or attempt to escape, forfeit one half the amount of commutation fixed by this act. For the

COMMUTATION.

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second escape or attempt to escape, he or she shall forfeit all commutation for good conduct as provided for in this act. Any convict, however, having a sentence or sentences which equals or equal less than four years, who escapes or attempts to escape, shall forfeit all commutation for good conduct as provided for in this act. But where a convict has more than one term, the provisions of this section shall only apply to the term during which the escape or attempt to escape was made.

§ 10. The board hereinbefore provided for to fix the amount of commutation for good conduct shall, immediately on the escape or attempt to escape of any convict, meet and proceed to investigate the said escape or attempt to escape, reduce the testimony of all persons having knowledge on the subject to writing, cause the same persons to affix their signatures thereto and make oath to the same before any one of the members of said board, who is hereby authorized and empowered to administer such oath, and false swearing on such examination or in such statement shall be perjury.

The said board shall thereupon make a full report in writing, and immediately forward the same to the superintendent of State prisons, who shall thereupon determine whether an escape or attempt to escape was committed, make an endorsement in writing, of his decision, and return the same to the agent and warden of the State prison, or the warden or superintendent of the penitentiary where the escape or attempt to escape shall have occurred, where the same shall be recorded in a book to be kept for that purpose. But, if from newly discovered evidence, or other just cause, there is reasonable ground to be-

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## LAWS RELATING TO

lieve that an injustice has been done to any convict in his or her having been adjudged to have escaped or attempted to have escaped, the Superintendent of State prisons may, in his discretion, make an order in writing directed to the agent and warden of the State prison or the warden or superintendent of the penitentiary from which such convict was adjudged to have escaped or attempted to have escaped, requiring that a reexamination of the former adjudication be had, and upon a report to him of such reexamination he shall proceed to render a decision upon the same. And the proceedings of such reexamination, the decision and the proceedings had thereunder, shall in all respects be conducted in the manner above set forth in this section as upon a first hearing in the matter of an escape or attempt to escape. But the provisions of this section shall not apply to the case of any convict, the length of whose term or terms is less than one year.

§ 11. The provisions of section nine shall apply to all convicts who are now, or may hereafter be confined in any prison or penitentiary of this State.

§ 12. The reports of the various boards for the determination of the amount of commutation for good conduct of convicts in the prisons and penitentiaries of this State to the Governor, shall be personally signed by the members thereof.

§ 13. The Governor, upon the receipt of the report recommending the allowance of commutation of sentences of convicts for good conduct, as provided for in this act, may, in his discretion allow the same and place the names of all those convicts whom he may determine to commute upon one warrant, and

## COMMUTATION.

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direct the same to the agent and warden of the State prison, or the warden or superintendent of the penitentiary wherein such convicts may be confined, who shall thereupon proceed to execute such warrant by discharging the convicts mentioned therein on the date fixed for their discharge.

§ 14. The Governor shall, in commuting the sentences of convicts as provided for in this act, annex a condition to the effect that if any convict so commuted shall, during the period between the date of his or her discharge, by reason of such commutation and the date of the expiration of the full term for which he or she was sentenced, be convicted of any felony, he or she shall, in addition to the penalty which may be imposed for such felony committed in the interval as aforesaid, be compelled to serve in the prison or penitentiary in which he or she may be confined for the felony for which he or she is so convicted, the remainder of the term without commutation which he or she would have been compelled to serve but for the commutation of his or her sentence as provided for in this act.

§ 15. The certificate of the agent and warden of a State prison, or the warden or superintendent of a penitentiary, that the period of imprisonment of a convict was commuted under the provisions of this act, and of the crime and the length of term for which such commutation was granted, shall be received in evidence as proof for the purposes mentioned and described in section fourteen.

§ 16. Upon the receipt of any convict in any prison or penitentiary in this State who shall be entitled to the benefits of this act, the provisions of the

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LAWS RELATING TO

same shall be read to him or her, and the meaning of same shall be fully explained to him or her by the clerk of the prison or penitentiary.

§ 17. Upon the discharge of any convict by reason of commutation of sentence for good conduct, the provisions of sections fourteen and fifteen of this act shall be read to, and their nature fully explained to him or her by the clerk of the prison or penitentiary.

§ 18. The provisions of this act shall apply to any convict who may have been transferred to the State asylum for insane criminals from either of the prisons or penitentiaries, or from any reformatory of this State, to which he or she may have been transferred from any of the prisons or penitentiaries of this State, whose sentence or sentences aggregates or aggregate not less than one year. And the medical superintendent of the State asylum for insane criminals may and shall perform any of the acts which may or shall be done by any board mentioned in this act.

§ 19. The provisions of this act shall apply to any convict who may have been transferred from either of the prisons or penitentiaries to any reformatory of this State whose sentence or sentences equals or equal not less than one year. And the superintendent or chief officer of any reformatory in this State in which any convict may be transferred as aforesaid, may and shall perform any of the acts which may or shall be done by any board mentioned in this act.

§ 20. In all cases where it is herein provided that any board shall or may do any act, a majority there-

COMMUTATION.

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of may and shall perform the same.

§ 21. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

§ 22. This act shall take effect immediately.



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RULES RELATING TO

### RULES.

RULE 1, § 9. In case any convict in any of the State Prisons or penitentiaries in this State having a sentence or sentences which equals or equal four years, escapes or attempts to escape he or she shall, for the first escape or attempt to escape, forfeit one half the amount of commutation fixed by the above act. For the second escape or attempt to escape, he or she shall forfeit all commutation for good conduct provided for in the above act. Any convict, however, having a sentence or sentences which equals or equal less than four years, who escapes or attempts to escape, shall forfeit all commutation for good conduct, provided for in the above act.

RULE 2. Any convict who shall assault an officer with a dangerous weapon shall forfeit not less than one half of the commutation fixed by the above act for good conduct.

RULE 3. Any convict who shall assault another convict with a dangerous weapon shall forfeit not less than one quarter of the commutation fixed by the above act for good conduct.

RULE 4. For assaulting or attempting to assault an officer or assaulting another convict, not with a dangerous weapon; for disobeying orders; for resisting an officer; for insubordination; for feigning insanity; for smuggling or attempting to smuggle letters or other articles in or out of prison or penitenti-

COMMUTATION.

11.

ary, the convict offending shall forfeit not less than ten days of the allowance of commutation fixed by the above act for good conduct.

RULE 5. Any convict who shall destroy or secrete property shall forfeit not less than five days of the allowance of commutation fixed by the above act for good conduct.

RULE 6. For offences not enumerated in the foregoing rules but which in the judgment of the board constituted by section 7 of the above act require a penalty; the convict offending shall forfeit not less than three days of the allowance of commutation fixed by the above act for good conduct.

RULE 7. If while serving the remainder of a term as provided by section 14 of the above act a convict shall commit any of the offences enumerated in the foregoing rules, the forfeiture therefor shall apply on the term of the last sentence.

RULE 8. The board constituted by section 7 of the above act may take into consideration the general average conduct of a convict, and recommend the withholding of such part of the commutation for good conduct as in its judgment may be just in accordance with the foregoing rules.

AUSTIN LATHROP,

Superintendent of State Prisons.

*Albany, March 15th. 1888.*



0169

New York, May 1890.

Mr. Welch

To Miss M. Moore, Dr.

STENOGRAPHER and TYPEWRITER,

Room 58, Morse Building, 140 NASSAU STREET.

To bill rendered

1 65

Recd Payt

M. Moore

called down to  
pay this Saturday  
but you were  
out.  
A. P.

0170

m/  
+ see heading  
on original

*New York Supreme Court*  
*People vs. Heller*

In obedience to the writs of Habeas Corpus and Certiorari, hereto annexed, I hereby certify and return to the Supreme Court, that before the coming to me of the within writs, the said James J. Whalen was, and at the date hereof is in my custody and is detained by me for cause as follows:

*(double space)*

That heretofore, to wit; June 30, 1882, the <sup>name</sup> Petitioner, under the ~~alias~~ of James Randolph, was sentenced to the Sing Sing State Prison, New York, under and by virtue of an indictment found against him for robbery in the first degree, for a term of imprisonment of seven years, the said indictment bearing date the *12* day of *June* 1882, and now on file in the office of the Clerk of the Court of the General Sessions of the Peace, of the City and County of New York, ~~a copy of which is annexed hereto, marked Exhibit~~

~~under the~~ That the Petitioner was duly received at Sing Sing Prison <sup>on</sup> July 1, 1882, under the sentence aforesaid, and there remained until he was ~~conditionally~~ discharged March 31, 1887, having received by commutation for good conduct, deducted from his sentence, two years and three months of time.

That subsequently thereto, to wit; December 19, 1888, under the name of James J. Whalen, the Petitioner was sentenced to the Sing Sing State Prison, New York, under and by virtue of an indictment found against him for burglary in the third degree, for a term of imprisonment of

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~~(Title)~~.

two years, the said indictments bearing date the <sup>4</sup> day of *X Dec* 1888, and now on file in the office of the Clerk of the Court of General Sessions of the Peace for the City and County of New York, which is the sentence referred to in the Petition herein.

That the *P*etitioner was duly received at Sing Sing Prison under the sentence last aforesaid, December 21st, 1888, *And* the authority for his detention at the date hereof, and the true cause of his imprisonment by me arises as follows:

That under and by virtue of Section V, of Article IV, of the State Constitution, "The Governor is given the power to grant Reprieves, Commutations and Pardons, after conviction, for all offences except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to the manner of applying for pardons."

That in addition to the power vested in the Governor of the State as aforesaid, ~~with reference to the commutation and discharge of the Petitioner, March 31, 1887,~~ under and by virtue of the Laws of 1862, Chapter 417, of the Laws of 1863, Chapter 415, and subsequent enactments concluding with the Laws of 1886, Chapter 21, the Governor of the State of New York was given concurrent powers <sup>such as were</sup> to ~~those~~ granted him under Article IV, Section V of the Constitution, with reference to the commutation of the sentences of prisoners, ~~the conditions and restrictions provided for in the case of the~~

*out*



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That under and by virtue of the Laws aforesaid, the Respondent alleges, that when the Petitioner was discharged, March 31st, 1887, he was discharged upon the condition, nevertheless, that if the Petitioner should during the period between the date of his discharge on the date last aforesaid, by reason of such commutation, and the date of the expiration of the full term for which he was sentenced, be convicted of any felony, he shall, in addition to the penalty which may be imposed for such felony committed in the interval, as aforesaid, be compelled to serve in the prison in which he may be confined for the felony for which he is so convicted, the remainder of the term, without commutation which he would have been compelled to serve but for the commutation of his sentence granted him.

That said conditional ~~discharge~~ *(single discharge)* was read to the Petitioner on the date last aforesaid, to wit, March 31st, 1887, at the time of his discharge.

That the Petitioner was thereafter duly convicted and returned to Sing Sing Prison, December 21st, 1888, during the interval of his discharge, March 31st, 1887.

That such discharge of the Petitioner as aforesaid, is further regulated and defined by Section 692 of the Code of Criminal Procedure, enacted September 1st, 1881.

For the reasons *(single discharge)* herebefore assigned, and under the Constitution and the Laws, as hereinbefore recited, the Petitioner is by me detained and confined by due process of law.

Never theless I have the body of the said James J.



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Whalen before you at the day and place within mentioned,  
pursuant to adjournment had herein, as I am within command-  
ed.

WHEREFORE I pray that the writs of Habeas Corpus  
and Certiorari herein be dismissed.

STATE OF NEW YORK,  
County of Westchester.

A. A. Brush, being duly sworn, deposes and says,  
that he is the person mentioned in and who executed the  
foregoing petition; that he has read the same and knows  
the contents thereof, and that the same is true of his own  
knowledge, except as to the matters therein stated to be al-  
leged on information and belief, and that as to those mat-  
ters he believes it to be true.

Sworn to before me, this :  
:  
day of February, 1891.:

0174

Police Court— District.

City and County } ss.:  
of New York,Peter A. Muller  
of No. 578 9th Avenue Street, aged 34 years,

occupation Notion Store being duly sworn

deposes and says, that the premises No 578 9th Avenue Street,  
in the City and County aforesaid, the said being a five story brick  
dwelling and storeand which was occupied by deponent as a store on the ground floor  
and in which there was at the time a human being, by name Peter A. Mullerwere BURGLARIOUSLY entered by means of forcibly smashing  
a window pane and taking goods  
through the same from the show  
window of said storeon the 26 day of November 1888 in the night time, and the  
following property feloniously taken, stolen, and carried away, viz:a quantity  
of pen knives, tips, sleeve buttons  
and other articles of the value  
over one hundred dollars

(\$100)

the property of Deponent

and deponent further says, that he has great cause to believe, and does believe, that the aforesaid  
BURGLARY was committed and the aforesaid property taken, stolen, and carried away by

James J. Whalen (now here)

for the reasons following, to wit: Deponent securely locked  
and closed said premises on the night  
of November 25/88. Deponent was  
awakened about 1 o'clock A.M. on  
the following morning <sup>and informed</sup> by Edward J. Barrett  
(now here) that some men were stealing  
from Deponent's store, and Deponent  
is informed by Precinct John J. Deini  
(now here) he arrested defendant about

0175

3.45 A.M. on Nov 26 188 with a portion  
of said property in his possession, and  
the defendant is recognized here in  
court by the said Barrett that the  
said Barrett was near the said store when the  
said window was broken as afore-  
said and that he saw the defendant  
with his hand in the said window  
and in the act of feloniously taking  
the said property from said place

SWORN TO BEFORE ME

THIS 26 DAY OF November 188

POLICE JUSTICE,

Peter A. Miller

Police Court District.

THE PEOPLE, &c.,  
ON THE COMPLAINT OF

vs.

Dated

188

Magistrate.

Officer.

Clerk.

Witnesses:

Committed in default of \$

Bail.

Bailed by

No.

Street.

0176

CITY AND COUNTY }  
OF NEW YORK, } ss.

aged 22 years, occupation Packer of No.

330 West 42<sup>nd</sup> Street, being duly sworn deposes and

says, that he has heard read the foregoing affidavit of Peter A. Muller

and that the facts stated therein on information of deponent are true of deponents' own knowledge.

Sworn to before me, this 26 day of March 1888 } Edward J. Barrett

John J. Herman  
Police Justice.



0177

CORRECTION

0178

Police Court— District.

City and County } ss.:  
of New York,Peter A. Muller  
of No. 578 9th Avenue Street, aged 34 years,  
occupation Notion Store being duly sworndeposes and says, that the premises No 578 9th Avenue Street,  
in the City and County aforesaid, the said being a five story brick  
dwelling and storeand which was occupied by deponent as a store on the ground floor  
and in which there was at the time a human being, by name Peter A. Mullerwere BURGLARIOUSLY entered by means of forcibly smacking  
a window pane and taking goods  
through the same from the show  
window of said storeon the 26 day of November 1888 in the night time, and the  
following property feloniously taken, stolen, and carried away, viz:a quantity  
of pen knives, tips, sleeve buttons  
and other articles of the value  
over one hundred dollars

(\$100)

the property of Deponent

and deponent further says, that he has great cause to believe, and does believe, that the aforesaid  
BURGLARY was committed and the aforesaid property taken, stolen, and carried away by

James J. Whalen (now here)

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of November 25/88. Deponent was  
awakened about 1 o'clock A.M. on  
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from Deponent's store, and Deponent  
is informed by Precinct John J. Deiri  
(now here) he arrested defendant about

0179

3.45 A.M. on Nov 26 1881 with a portion  
of said property in his possession, and  
the defendant is recognized here in  
court by the said Barrett that the  
said Barrett was near the said store when the  
said window was broken as afore-  
said and that he saw the defendant  
with his hand in the said window  
and in the act of feloniously taking  
the said property from said place

SWORN TO BEFORE ME

THIS 26 DAY OF November 1881

*John J. Lawrence*  
POLICE JUSTICE,

*Peter A. Muller*

Police Court District.

THE PEOPLE, &c.,

ON THE COMPLAINT OF

vs.

Degree

Burglary

Dated

188

Magistrate.

Officer.

Clerk.

Witnesses:

Committed in default of \$

Bail.

Bailed by

No.

Street.

0180

CITY AND COUNTY }  
OF NEW YORK, } ss.

aged 22 years, occupation Packer of No.

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says, that he has heard read the foregoing affidavit of Peter A. Muller

and that the facts stated therein on information of deponent are true of deponents' own knowledge.

Sworn to before me, this 26 day of March 1888 Edward J. Barrett

John J. Hoffman  
Police Justice.



0181

CITY AND COUNTY }  
OF NEW YORK, } ss.

John J. Deini  
aged 30 years, occupation Policeman of No.

20th Street Street, being duly sworn deposes and  
says, that he has heard read the foregoing affidavit of Peter A. Muller

and that the facts stated therein on information of deponent are true of deponents' own  
knowledge.

Sworn to before me, this 26  
day of March 1888 John J. Deini

John J. Deini  
Police Justice.

0182

Sec. 198-200.

CITY AND COUNTY } ss.  
OF NEW YORK,

District Police Court.

*James J. Whalen* being duly examined before the undersigned according to law, on the annexed charge; and being informed that it is his right to make a statement in relation to the charge against him; that the statement is designed to enable him if he see fit to answer the charge and explain the facts alleged against him; that he is at liberty to waive making a statement, and that his waiver cannot be used against him on the trial.

Question. What is your name?

Answer.

*James J. Whalen*

Question. How old are you?

Answer.

*26 years*

Question. Where were you born?

Answer.

*N.Y.*

Question. Where do you live, and how long have you resided there?

Answer.

*New York*

Question. What is your business or profession?

Answer.

*Driver*

Question. Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation?

Answer.

*I do not know anything about it*

*James J. Whalen*

Taken before me this

*26*

day of *March* 188*8*

Police Justice.

0183

It appearing to me by the within depositions and statements that the crime therein mentioned has been committed, and that there is sufficient cause to believe the within named.....

*defendant*

guilty thereof, I order that he be held to answer the same and he be admitted to bail in the sum of *Twenty* Hundred Dollars,.....and be committed to the Warden and Keeper of the City Prison, of the City of New York, until he give such bail.

Dated *Nov 26* 188*8*

*John J. Korman* Police Justice.

I have admitted the above-named.....

to bail to answer by the undertaking hereto annexed.

Dated.....188

.....Police Justice.

There being no sufficient cause to believe the within named.....

.....guilty of the offence within mentioned. I order h to be discharged.

Dated.....188

.....Police Justice.

0184

Police Court---

1855 District.

THE PEOPLE, &c.,  
ON THE COMPLAINT OF

Pete A. Muffer  
vs. James J. Whalen

Offence

BAILED,

No. 1, by \_\_\_\_\_

Residence \_\_\_\_\_ Street.

No. 2, by \_\_\_\_\_

Residence \_\_\_\_\_ Street.

No. 3, by \_\_\_\_\_

Residence \_\_\_\_\_ Street.

No. 4, by \_\_\_\_\_

Residence \_\_\_\_\_ Street.

Dated Nov 26 188

Gorman Magistrate.

Dein Officer.

20 Precinct.

Witnesses Edward J. Barrett

No. 330 West 42 Street.

No. \_\_\_\_\_ Street.

No. \_\_\_\_\_ Street.

\$ 2000 to answer 9.5

Call



**NEW YORK SUPREME COURT,**  
County of New York.

-----X

In the matter of the application  
of James J. Whalen for Writs of  
Habeas Corpus and Certiorari  
Petitioner

and

Hon. A. A. Brush, Warden and Agent of  
Sing Sing Prison, New York State,  
Respondent.

-----X

**PETITIONER'S BRIEF.**

The question arising in this case is, whether the imprisonment of the petitioner under the commutation laws of the 23rd of February 1886, under which it is claimed he is detained, is legal. Petitioner submits

Ist. That said act is unconstitutional.

II That if constitutional it cannot apply to the present case, or in other words, to that of any convict, sentenced prior to the passage of said act.

Petitioner respectfully contends he is right in both these contentions.

On the question fact, both Respondent and Petitioner agree. Sec. 14 of the laws of 1886, chap. 21, on which the respondent rests his case, and under which a condition was attached at the time of the discharge of the petitioner, is quoted in full in the return herein. Petitioner was sentenced on the 30th of June, 1882, on a conviction of felony to seven years State Prison, earning two years

0186

2.

and three months commutation for good conduct, and was consequently discharged on the 31st of March, 1887. At the time of his discharge, as is admitted, and appears by the return herein, a condition was attached by the Governor of the State to the effect mentioned in Section 14, and which condition was expressly attached under the provision of said section 14. (See printed form annexed to return).

It is perfectly clear if sec. 5 of art. 4 of the State Constitution ~~be~~ constitutional as well as sec. 692 of the Code of Criminal Procedure (which is merely a repetition of the constitution itself), both referred to in the return herein; and the pretension of the respondent be correct that under the Constitution the Governor had a right to impose the condition herein and that this commutation for good conduct is an ordinary commutation which could be granted by the Governor under his general powers. Then sec. 14 of the Laws of 1886, under which this condition is made imperative on the Governor before he can commute, is unconstitutional. The Court must therefore set aside sec. 5 of art. 4 of the constitution itself, before it can declare sec. 14 of the laws of 1886, constitutional; as they are diametrically opposed. The constitution gives full power to the Governor in cases of commutation, the same as in cases of pardon; but the law of 1886 says, "The Governor shall in commuting the sentence of convicts, annex a condition" etc. It appears distinctly by the return, that this condition is not attached by the Governor, under his general powers, but

3.

under the compulsory law of 1886, and in fact is positively set up as the law under which said condition was attached. The only answer urged by the respondent is, that under the constitution, and the inherent powers of the Governor as Chief Magistrate of the State, he might without this statute have annexed such a condition. The reply is manifold:

I. If he might, he as a matter of fact did not; but under compulsion of an unconstitutional statute, attached the condition, without which condition is power to commute for good conduct was absolutely taken away.

The Governor specifically based or annexed the condition under the act of 1886, itself.

"Now therefore in pursuance of the provision of the above entitled act, I do hereby commute the sentence etc."

II. No such condition had ever been annexed to any commutation granted prior to the passing of said act of 1886. Prisoners were discharged under the laws of 1862, 1874 and 1879, and all acts preceeding chapter 21 of 1886 were absolutely discharged without condition of any kind.

III. Petitioner contends that the commutation granted to a prisoner for his good conduct, is entirely different from an ordinary commutation of sentence. Under sec. I of this law of 1886, it will be noticed that "Each convict may earn for himself a commutation or diminution of his sentence as follows:" Then follow specific times, according to the term of his conviction.

0188

4.

Under sec. 12 chap. 45 I of the laws of 1874, and in fact under all the commutation laws prior to that of 1886, each convict earned his time etc. (See also laws of 1886, chap. 68, and 1888, chap. 492 referred to at end of brief)

b The second question is:

Does the law of 1886 apply to the present case?

The petitioner was sentenced on the 30th of June 1882, and discharged on the 31st of March 1887. He was returned to Sing Sing on the 21st of December, 1888 under a sentence of two years under another charge, within the commuted time, which sentence he has more than served. The contention made by the respondent is, because the petitioner was discharged after the passage of the act of 1886, therefore he falls within its provisions. If this be so, then the law is an ex post facto one, and retroactive; or at least made so, in its application to the present issue. The petitioner fails to see, why he is not entitled to the benefit of the commutation law of 1874, which was in force at the time he was originally convicted and sentenced. The proposition is so clear, it hardly admits of discussion. It has been decided under the Territorial Statute of Utah "an act to lessen the terms of sentence of convicts for good conduct", that "the right of a prisoner to discharge was controlled by the Statutes in force at the time of his sentence." (See American Digest, November 1887, p 49, ex parte Clawson) Suppose for example, after the commission of a crime, the punishment of that crime is increased or lessened. Does the defendant suffer the



greater punishment imposed under the statute, or reaps the benefit if reduced? - Clearly not. He is sentenced under the law as it existed at the time of the commission of the offense. So exactly in like manner, he suffers or benefits under the law as it existed at the time of his sentence. He cannot claim the benefit of the new act neither can he be deprived of his rights gained under the old one; when discharged therefore, on the 31 of March 1887, he should have been discharged absolutely under the provisions of the previous existing statutes.

Again: referring to the question of the distinction of a commutation by the Governor generally under his powers and rights as Governor of the state, and the special commutation of specified time for good conduct earned, petitioner respectfully submits, that such commutation for good conduct being regulated by Statute, the Governor could not attach a condition unwarranted by the Statute.

It is true he might have in his discretion, refused the commutation, but granting it, he was bound by the law, as it existed at the time the petitioner was sentenced, and commenced to serve his time, and that law said he earned so much time.

It should be borne in mind that the commutation act of 1886 was passed at the time of the State Prison contract labor system, (now to the credit of the State abolished) and urged through the legislature by the contractors, who desired to retain skilled labor in the prisons

6.

to compete with the skilled labor of the honest mechanic in the outside world.

Why commutation laws at all? Because without them, a great body of criminals massed together, without hope of diminishing or reducing their sentence by good conduct, without the hope of reward, would never obey prison rules or prison discipline. These laws are essential to the maintenance of order and even safety within the prison walls.

Hence, each and every statute has without exception the wise provision that any prisoner who "intentionally violates any rule of the prison, attempts to escape or attacks or assaults his keeper or any officer of the prison shall not be reported by the Warden for commutation for good conduct, but shall forfeit all claim thereto."

This extraordinary provision of the law of 1886, is legislation against future crime. Can there be such a statute? It does not say "go and sin no more" but, sin not within a specified time or we will punish you .

It was stated by Mr. Welsh in his able argument on behalf of the respondent, that the decision would affect some three hundred prisoners. In one sense, that is true. But the Court must not therefore believe that there would be any general jail delivery. The question was suggested by the Court, that it was strange the act had never been called into question before. The answer to that is, that this is the very first case that has

7.

ever arisen, where the legality of the law could be tested. Whalen, to-day is the only prisoner in Sing Sing who was discharged since 1886, whose time on his second sentence has actually fully expired. A large number of others will be affected as when their terms on their last sentence shall have expired, they will be discharged in the regular course, without having to serve commutation time, the same as every prisoner up to the present hour in this State, has been discharged.

In this connection the petitioner respectfully draws the attention of the Court to sec. 3 of the act of 1886, "For the purpose of this act, the term of imprisonment of each convict shall begin on the date of his or her actual incarceration in a state prison or penitentiary."

This section is directly violated, as in the present instance though confined over two years, petitioner's time has no yet commenced to run.

If the commutation law of 1886 be enforced, it renders totally inoperative and null the humane and excellent provisions of chap. 68 of the laws of 1886, and chap. 492 of the laws of 1883 (8) (See Revised Statutes vol. 3 P. 2693).

These laws made it imperative on the Court to sentence prisoners to terms, "having reference to the probability of the convict earning a reduction of his term for good behavior, and assuming that such reduction will be earned, so that the sentence will expire during either of the following months: April, May, June, July, September and October."

0 192

8.

Can anything be clearer than that this commutation for good conduct to be earned and which must be considered by the Court in passing sentence; is not the commutation contemplated under the Constitution under which the Governor has full power.

Again; these laws go to the length that in case a sentence be rendered, which, allowing for the commutation, so to be earned, would not permit the discharge of the prisoner during the months mentioned, then the sentence is "illegal", and "the officers of the prison are expressly prohibited from taking into their custody the convict so sentenced" etc. but must return said convict so that the sentence may be imposed under which he shall be discharged in the Spring or Summer months as mentioned.

Now the effect of section I4 of the act of 1886 entirely vitiates these provisions. Take the present case for example. Whalen would have been discharged under the sentence of two years last imposed by Judge Cowing, on the 21st of August 1890, allowing for his commutation for good conduct. As it is, he has to serve two years and three months more without commutation, as there is no commutation off the commutation time, and will therefore if held, be discharged on the 21st of November 1892.

And so it will be in every case of a prisoner now in confinement, on a second sentence. They will be all discharged in mid-winter, exactly what the law of 1888 provided should not be. The reason of this statute is



0193

self-evident. It was to enable convicts during the summer months to gain employment in the country when living expenses would be at a minimum.

To sustain prison discipline and order, hope must be held out to the prisoner that in case of their good conduct they will earn absolutely a diminution of sentence, without any condition attached; and it certainly is to the interests of society and the community generally, that prisoners should not be discharged in the winter months when no work is obtainable, when a place to sleep in is an absolute necessity; and when unable to get the former, they are tempted to the commission of crime, to realize the bare necessities of life.

The above respectfully submitted.

New York, February, 1891.

Frank J. Keller,  
Counsel for Petitioner,  
James J. Whalen.

0194

THE PEOPLE OF THE STATE OF  
NEW YORK,

*People*

*against*

*Whalen*

*Dist. Brief.*

JOHN R. FELLOWS,

DISTRICT ATTORNEY,

No. 32 CHAMBERS STREET,  
NEW YORK CITY

0195

At a Special Term of the Supreme Court,  
held at Chambers thereof, at the County  
Court House in the City Hall, in the  
City of New York, on the 15 day of  
April 1891.

PRESENT:

Hon. Abraham R. Lawrence,  
Justice.

-----X

In the Matter

of

The application of James J. Whalen,  
for writs of habeas corpus and  
certiorari,

Petitioner

And

A. A. Brush, Warden and Agent Sing-  
Sing Prison, New York State,  
Respondent

-----X

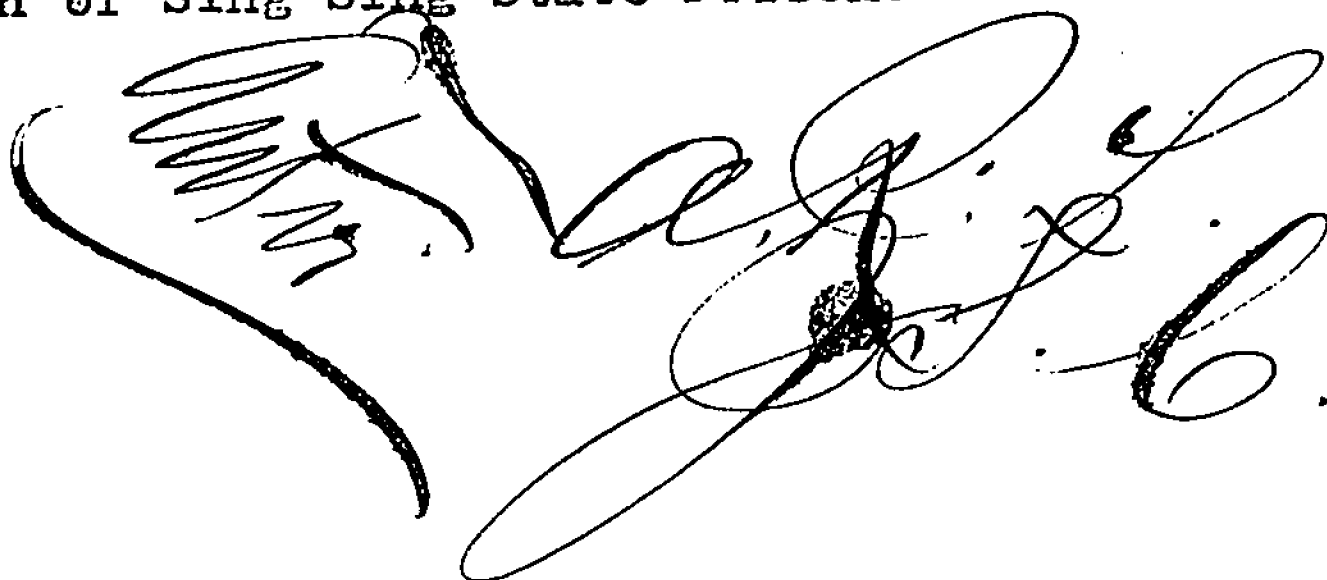
Upon all the proceedings heretofore had herein, and  
after reading and filing the petition herein, verified the  
10th day of January 1891, and the writs of habeas corpus  
and certiorari, and the return of A. A. Brush, the Warden and  
Agent of Sing Sing State Prison to the said writs afore-  
said and said petition, and argument having been had upon  
said writs, on the 24th day of February 1891, Frank J.  
Keller Esq., appearing on behalf of said James J. Whalen  
the petitioner, and David Welch Esq., appearing on behalf  
of DeLancey Nicoll, District Attorney, for the Agent and  
Warden, and the People of the State of New York impleaded,  
in opposition, due deliberation having been had, on motion  
of David Welch Esq., it is

ORDERED, that the writs of habeas corpus and certiorari heretofore issued in behalf of said petitioner be and

0 196

(2)

the same are hereby dismissed, and the said petitioner,  
James J. Whalen be remanded to the care and custody of the  
Agent and Warden of Sing Sing State Prison.

A handwritten signature in cursive script, appearing to read "W. J. L.", is written over the text. The signature is written in dark ink and is somewhat stylized.



0 197

THE PEOPLE OF THE STATE OF  
NEW YORK

For the Matter of the  
Application of James J.  
Whalen for writs of  
Habeas Corpus & Coram  
Petition

and  
A. A. Brush,  
Warden &c.

Respect

Order,

DE LANCEY NICOLL,

DISTRICT ATTORNEY,

No. 32 CHAMBERS STREET,

NEW YORK CITY.

Copy served in

Return April 15/91

Very much - Q. M.

0198

-----X  
The People

vs.

Whalen

*First term as  
James Whalen  
Jan 5th 1850.  
2 years for B. & L.  
from N.Y. S. S.  
Disch. April 6. 1882*

-----X  
James J. Whalen sued out writs of habeas corpus and certiorari for the purpose of having the Supreme Court pass upon what is charged as illegal detention at Sing Sing State Prison, inasmuch as he claims for the reasons hereafter stated, he is entitled to his discharge.

The State opposes the application for the discharge of the prisoner upon the grounds hereinafter noted.

The first prisoner followed the name of James Randolph was sentenced to Sing Sing Prison June 30th, 1882, and was received at Sing Sing, July 1st 1882, having been sentenced to a term of seven years at hard labor for robbery in the first degree, by Judge Gildersleeve.

He was discharged March 31st 1887, having earned by commutation for good behavior of said term of seven years two years and three months.

Under the name of James J. Whalen he was sentenced to Sing Sing State Prison for two years by Judge Cowing, for burglary in the third degree, December 19th 1888, and was received at the State Prison, December 21st, 1888.

It is maintained on behalf of the prisoner by Mr. Keller, his counsel, that having served the two years imprisonment in full, commencing from December 19th, 1888, that he is entitled to his discharge, but the Warden of State Prison, Mr. Brush, detains him for the reason that he

0199

(2)

is bound to serve out the full time of his original sentence of seven years as if no commutation of time had been earned, on the ground that the prisoner was returned to Sing Sing Prison upon conviction prior to the time of the expiration of the original term of seven years, as if no commutation had been earned. *under the law of N.Y.*

The Warden holds, as has been the case from time immemorial, in similar instances, that the prisoner was conditionally discharged by the Governor of the State, March 31st 1887, when his time was commuted for good behavior for the space of two years and three months, the commitment of discharge containing a condition to the effect that if the prisoner were returned under a conviction, as has heretofore been set forth, that the time given in commutation shall be declared void and of no effect, which condition, of course, the prisoner accepted and was made binding upon him by his acceptance of his discharge, March 31st 1887.

By Chapter 21 of the Laws of 1886, passed February 23d 1886, prisoners confined under convictions in the State of New York for a period over one year, were entitled to commutation for good behavior, which statute is now in force and effect, as by reference thereto will more fully appear.

It appears from the reading of the statute of 1886, which went into force and effect prior to the discharge of the prisoner, March 31st 1887, that discretionary power is vested in the Governor to commute sentences after con-

0200

(3)

viction, as has been the case in relation to the executive prerogatives in similar instances since the adoption of the earliest state constitutions.

By Section 692 of the Code of Criminal Procedure, the Governor was given power by statute to commute the sentence of prisoners after conviction, but, prior to the adoption of the provision of the Code referred to the power of commuting the sentence of prisoners was vested in the executive officer of the State by common law, as the same is also inherent with the right of the legislature as being the sovereign power of the state.

But irrespective of the right delegated under the common law of the land the state constitution as the same was in force and effect on the day of 1846, confers expressly in terms upon the executive officer of the state to commute the sentence of convicts, as reference to article 4, section 5 of the State Constitution, will more fully appear.

And it has been from the very earliest times an undisputed principle growing out of the right thus vested in the governor under this provision of the Constitution, that prisoners can be commuted conditionally as was the case in this instance, as heretofore stated.

Under the common law the right of the executive officer of the state, which, of course, means the King, the power of reprieve and pardon was a prerogative which could be exercised by the sovereign upon such conditions as was best deemed wise to attach to the commutation or



0201

(4)

pardon issued in any particular case.

See Chase's Blackstone, on Reprieve and pardon,  
Chap. 29, page 1041.

Prior to the passage of the Act of 1886, Feby. 23rd,  
the prisoner Whalen, by commutation had earned on his  
sentence of seven years, ten months and seventeen days,  
and subsequent to the passage of the Act, March 31, 1887,  
he had earned sixteen months and thirteen days .



0202

THE PEOPLE OF THE STATE OF  
NEW YORK

*Ex. no. 100*

*against*

*James J. Whelan*

*Verdict on law of fact*

JOHN R. HENNINGSONS,

DISTRICT ATTORNEY

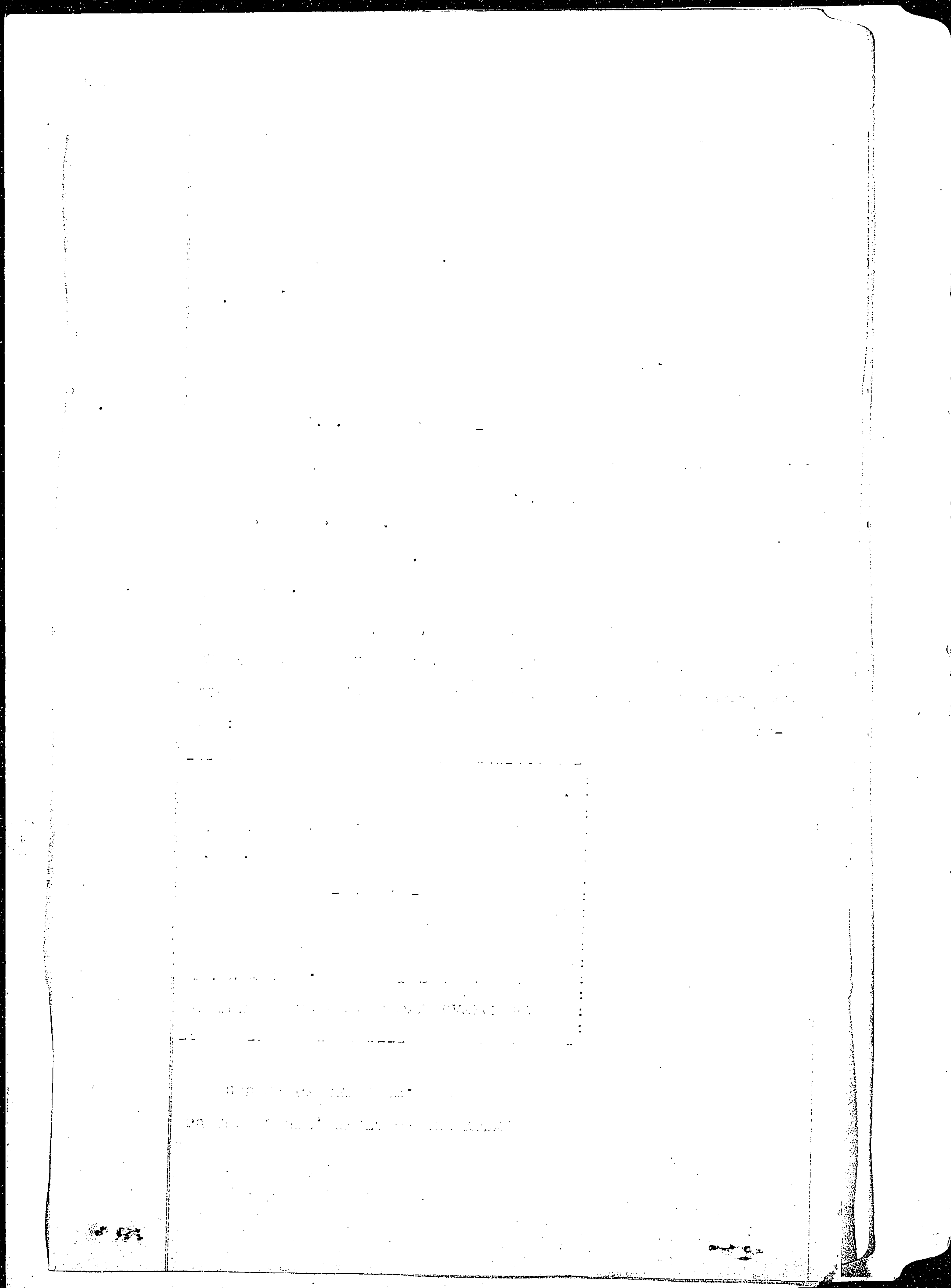
No. 32 CHAMBERS STREET

NEW YORK CITY

*Returned to*  
*David Whelan*  
*Quaker Alley*



0203



0204

SUPREME COURT, STATE OF NEW YORK,  
COUNTY OF NEW YORK.

-----  
IN THE MATTER of the APPLICATION of  
J A M E S J. W H A L E N for the  
WRITS of HABEAS CORPUS and CERTIORARI,  
Petitioner,  
- a n d -  
A. A. B R U S H, Warden and Agent  
Sing Sing Prison, New York State, :  
Respondent.  
-----

SIR: PLEASE TAKE NOTICE that the above named Petitioner hereby appeals to the General Term of this Court from the Order and Judgment rendered in the above entitled action on the Fifteenth (15th) day of April, 1891, by the Honorable Abraham R. Lawrence, dismissing the WRITS of HABEAS CORPUS and CERTIORARI herein.  
Dated, May 5, 1891.

FRANK J. KELMER,

Attorney for Petitioner Appellant,

Office & P.O. Address, #51 - 65 Park Row,

New York City,

New York.

To

Hon. De Lancey Nicoll,

District Attorney.



0205

SUPREME COURT, STATE OF NEW YORK,  
COUNTY OF NEW YORK.

IN THE MATTER of the APPLICATION of  
JAMES J. WHELAN for the WRITS of  
HABEAS CORPUS & CERTIORARI,

PETITIONER,

-AND-

A. A. BRUSH, Warden & Agent of  
SING SING PRISON, NEW YORK STATE,  
RESPONDENT.

NOTICE OF APPEAL.

FRANK J. KELLER,

ATT'Y FOR PETITIONER & AP'LL'NT,

#51 - 65 PARK ROW,

NEW YORK CITY.

TO

HON. De Lancey Nicoll,

District Attorney.

*Recd 9/27/41*

*John DeLancey Nicoll  
20802 3rd Avenue  
10 Ave 7. 3*

0206

New York, March 7 1897

Mr. Welch

To Miss M. Moore, Dr.

STENOGRAPHER and TYPEWRITER,

Room 58, Morse Building, 140 NASSAU STREET.

40 Typewriting Brief to Perfection  
Whelan }

414

Reid Payt  
M. Moore

0207

FRANK J. KELLER,  
COUNSELLOR AT LAW,  
287 BROADWAY,

New York, 11 Feb. 1891

David Welch Esq.  
Dear Mr. Welch

I enclose copy  
of return. Please change  
caption, leaving my  
name out. I think it  
best form. Please fill  
up blanks & let me have  
copy of printed con-  
dition, as part of the  
return. I will have  
my brief finished to-  
day. Kindly have  
yours

Yours truly  
Frank J. Keller

0200

March 7th, 1891.

Delancey Nicoll, Esq.,  
District Attorney, etc.,

To

M.M.Kennedy, Dr.

To typewriting in the preparation of  
return and brief in the case of  
The People vs. Whalen, . . . \$7.76

Received payment,

*M. M. Kennedy.*



0209

At a Special Term of the Supreme Court held at Chambers thereof at the Court House in the City of New York on the 14th day of January, 1891.

PRESENT,

HON. EDWARD PATTERSON,

JUSTICE.

----- x  
In the matter of the petition  
of Frank J. Keller, for a writ:  
of certiorari to produce the  
body of James J. Whalen, a :  
prisoner confined in the State  
Prison, Sing Sing, New York. :  
----- x

The writ of certiorari being duly served on Hon. A. A. Brush, Warden of the State Prison at Sing Sing, New York, requiring him to show the cause and reason of the detention of a prisoner at said Prison, and said prisoner being produced in Court, but no other return being made to said writ, on motion of Frank J. Keller, petitioner and Counsel for said prisoner:

ORDERED that the hearing of said writ and petition be and same hereby is adjourned to January 22, 1891; and said prisoner is remanded for further hearing in the premises and said Hon. A. A. Brush, Warden of said Prison at Sing Sing hereby is ordered to make a proper return to said writ on said date or take such proceedings in relation to the matter as he may be advised.

N. Y. SUPREME COURT.

In re petition of

F. J. Keller to produce the body of

James J. Whalen etc.

ORDER adjourning

hearing and remanding prisoner etc.

Frank J. Keller,

Atty for Prisoner

287 Broadway.

02 10

02 11

## Sing Sing State Prison.

Sing Sing, N.Y., \_\_\_\_\_ 189

### This Certifies that

age, \_\_\_\_\_, convicted and sentenced in the County of New  
York, at New York city, at a term of the Court of General  
Sessions, Judge \_\_\_\_\_ presiding, on the  
\_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_\_, and  
received in this Prison on the \_\_\_\_\_ day of  
\_\_\_\_\_ 18\_\_\_\_\_ for the term of \_\_\_\_\_  
years and \_\_\_\_\_ months, has this day been dis-  
charged by Commutation for good behavior, pursuant to Chap-  
ter 21 of the Laws of 1886, having thereby earned a full de-  
duction of \_\_\_\_\_ years, \_\_\_\_\_ months  
and \_\_\_\_\_ days.

\_\_\_\_\_  
AGENT AND WARDEN.

\_\_\_\_\_  
CLERK.



02 12

POOR QUALITY  
ORIGINAL

Get a coroner's  
to get sheet  
from parsons  
clerk

Get Babcock  
clerk. Whelan

John E. Clark  
now absent -

Edmund M. Deane

Henry C. Heston

108 prisoners.  
want for same  
place affected by  
this law.

By Gordon Brown  
and of Lowe.  
about. discuss  
and law in the  
culprit.

Get the affidavit  
of the three clerks.

John. Sam.  
draw off ~~the~~  
for the Babcock  
now.

discharge Whelan

What shall be the  
name of the return.

Call attention of  
Baker to #17 of 186

act - to be read



0213

STATE OF NEW YORK --- EXECUTIVE CHAMBER.

-----o:-----

The Governor of the State of New York,

To the Agent and Warden of Sing Sing Prison:

WHEREAS, a report has been made to me by the Board, provided for in Chapter 21 of the Laws of 1886, entitled "An Act providing for commutation of sentences, for good behavior of convicts in the State Prisons and the Penitentiaries in this State," dated the ..... day of ..... 18 , of the convicts whose names and records are hereinafter given, recommending that the amount of commutation which each has earned under the provisions of said act, be allowed:

NOW, THEREFORE, in pursuance of the provisions of the above entitled act, I do hereby commute the sentence of each of the said convicts, as recommended by the said Board, under the condition that if any convict so commuted shall, during the period between the date of his or her discharge by reason of such commutation and the date of the expiration of the full term for which he or she was sentenced, be convicted of any felony, he or <sup>she</sup> shall, in addition to the penalty which may be imposed for such felony committed in the interval aforesaid, be compelled to serve in the Prison or Penetentiary in which he or she may be confined, for the

02 14

felony for which he or she is so convicted, the remainder of the term, without commutation, which he or she would have been compelled to serve but for this commutation of his or her sentence.

Name of Convict.	County.	Crime.	Court.	Judge.
------------------	---------	--------	--------	--------

Date of Sentence.	Received at Prison.
-------------------	---------------------

Term. Years, Months, Days, Fine.	Commutation Earned. Years, Months, Days.	Date of Discharge.
-------------------------------------	---	-----------------------

02 15

GIVEN UNDER MY HAND and the Privy Seal of the State,  
at the City of Albany, this .....  
day of ..... one thousand eight hun-  
dred and .....

By the Governor:

Private Secretary.

02 16

*Exoneration Certificate  
of  
Discharge*

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D. C. 20535

TO: SAC, NEW YORK (100-100000)

FROM: SAC, NEW YORK (100-100000)

SUBJECT: [Illegible]

RE: [Illegible]

DATE: [Illegible]

BY: [Illegible]

APPROVED: [Illegible]

SPECIAL AGENT IN CHARGE



02 17

New York, January 7th, 1891.

David Higgins, Peter Gorman, John Hommel and others,

Prisoners, Sing Sing.

In answer to your question submitted to me last week, as to the legality of prisoners, who have earned a commutation of sentence for good conduct, prior to the 23rd of February, 1886, being compelled to serve out the time so earned in addition to their new sentence, provided they are sentenced within the time so commuted, I am of opinion that such imprisonment is illegal, and that you would be discharged on writ of habeas corpus.

I have given the matter my most careful attention knowing the great importance of the question involved, the number of prisoners that would be affected, and the sweeping results that would follow, and unhesitatingly say after a full examination of all the statutes of the State relative to the Commutation Laws, that convicts cannot under any circumstances be held for the term granted to them prior to the law of 1886.

One of the elementary, fundamental principles of criminal law is, that no criminal or penal statute is retroactive in its effects; in other words that the law of 1886 in which is first found this extraordinary provision, must stand by itself, and cannot in any way affect persons convicted prior to its passage. Prisoners discharged prior to that year by the Governor, under the commutation act of 1879 Chapter 373, or

1874	--	"	451, section 12, or
1863		"	415, <u>were absolutely discharged.</u>

02 18

(2)

and regained their full freedom in the same manner as if they had served out their full sentence and had no commutation for good conduct.

This being the case, it is impossible to subject men to serve the term, which they had unconditionally earned, and would in reality be a forfeiture of inalienable rights which they had acquired under the laws existing at the time of their discharge.

This covers the case submitted in your letter.

Relative to the law of 1836 itself, I have grave doubts if the provisions of section 14 are constitutional. I do not believe conditional discharges can be made where a specified sentence relative to time is imposed, as is of course always done where defendants are sentenced to State Prison.

Under the Reformatory Laws, the rule would be different, as there no time is mentioned in the sentences, and the discharge of the defendant is granted by the Board of Governors in their discretion, the defendant being subject under special provisions of the act to report at specified times etc. In other words, while he is not actually confined in the Reformatory, he is technically still under the control and supervision of the Board.

Admitting the laws of 1836 however, to be constitutional section 3 of the act provides: "For the purposes of this act, the term of imprisonment of each convict, shall begin on the date of his or her actual incarceration in a State Prison or Penitentiary."

Under the rules as now made at Sing Sing, under section

02 19

(3)

14 of this act, the "term of imprisonment" does not commence until after the expiration of all the commutation time has been first served by the prisoner. Even if I am in error as to the law of 1886, I have no doubt whatever on the first question, under the laws of 1863, 1874, and 1879, under which, of course, your cases fall, as well as those of the vast majorities of parties now under sentence in the different prisons throughout the State.

I will if possible call at Sing Sing during the week, and see you to make a test case.

Yours etc.

0220

Prahl

7/10

W. Halen

Opinion

Hallen -  
Cotton



0221

New York, January 7th, 1891.

David Higgins, Peter Gorman, John Hommel and others,

Prisoners, Sing Sing.

In answer to your question submitted to me last week, as to the legality of prisoners, who have earned a commutation of sentence for good conduct, prior to the 23rd of February, 1886, being compelled to serve out the time so earned in addition to their new sentence, provided they are sentenced within the time so commuted, I am of opinion that such imprisonment is illegal, and that you would be discharged on writ of habeas corpus.

I have given the matter my most careful attention knowing the great importance of the question involved, the number of prisoners that would be affected, and the sweeping results that would follow, and unhesitatingly say after a full examination of all the statutes of the State relative to the Commutation Laws, that convicts cannot under any circumstances be held for the term granted to them prior to the law of 1886.

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1874 -- " 451, section 12, or

1863 " 415, were absolutely discharged.

0222

(2)

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they had served out their full sentence and had no com -  
mutation for good conduct.

This being the case, it is impossible to subject men to serve the term, which they had undconditionally earned, and would in relaity be a forfeiture of inalienable rights which they had acquired under the laws exisiting at the time of their discharge.

This covers the case submitted in your letter.

Relative to the law of 1886 itself, I have grave doubts if the provisions of section 14 are constitutional. I do not believe conditional discharges can be made where a specified sentence relative to time is imposed, as is of course always done where defendants are sentenced to State Prison.

Under the Reformatory Laws, the rule would be different, as there no time is mentioned in the sentences, and the discharge of the defendant is granted by the Board of Governors in their discretion, the defendant being subject under special provisions of the act to report at specified times etc. In other words, while he is not actually confined in the Reformatory, he is technically still under the control and supervision of the Board.

Admitting the laws of 1886 however, to be constitutional section 3 of the act provides: "For the purposes of this act, the term of imprisonment of each convict, shall begin on the date of his or her actual incarceration in a State Prison or Penitentiary."

Under the rules as now made at Sing Sing, under sect inn

0223

(3)

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I will if possible call at Sing Sing during the week, and see you to make a test case.

Yours etc.

0224

NEW YORK SUPREME COURT.

-----X  
: In the Matter of the Petition of Frank:  
: J. Keller for a writ of Certiorari and:  
: a writ of Habeas Corpus, to produce :  
: the body of James J. Whalen, a prison-:  
: er confined in the State Prison, Sing :  
: Sing, New York. :  
: -----X

The return of A. A. Brush, Warden and Agent of Sing Sing Prison, State of New York, to the writs of Habeas Corpus and Certiorari hereto annexed.

In obedience to the writs of Habeas Corpus and Certiorari hereto annexed, I hereby certify and return to the Supreme Court, that before the coming to me of the within writs, the said J. J. Whalen was committed to my custody and detained by me by virtue of ~~a~~ certain commitment of imprisonment issuing out of the Court of General Sessions of the Peace, of the City and County of New York, to me directed, *being of date Dec 19, 1888, as mentioned in the Petition*  
For a further return, and in answer to the petition herein, I certify as follows:

That all of the allegations of the petition herein of date January 10th, 1891, verified by Frank J. Keller, on behalf of James J. Whalen, are true, excepting the Fifth paragraph thereof.

Nevertheless, I have the body of the said J. J. Whalen, before you at the day and place within mentioned and pursuant to adjournment had herein, as I am within commanded.



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Wherefore, I pray that the writs of Habeas Corpus  
and Certiorari herein be dismissed.

*A. A. Brush*  
*Agent & Guardian*

City and County of New York, ss.:

A. A. Brush, being duly sworn, deposes and says,  
that he is the person mentioned in and who executed the  
foregoing petition; that he has read the same and knows  
the contents thereof, and that the same is true of his own  
knowledge except as to the matters therein stated to be al-  
leged on information and belief, and that as to those mat-  
ters he believes it to be true.

Sworn to before me, this , :

24th day of January, 1891.

*Charles E. Simmons Jr*  
*Notary Public*  
*N.Y. Co*

*A. A. Brush*

0226

*Return to write*

0227

At a Special Term of  
the Supreme Court held at  
Chambers thereof at the  
Court House in the city  
of New York on the 14.  
day of January 1891.

Present

Hon. Mr. Edward Patterson  
Justice

In the matter of the  
petition of Frank J.  
Keller for a writ of  
certiorari requesting  
Hon. Mr. A. A. Brush  
Warden of the State  
Prison at Sing Sing  
N. Y. to show cause and  
reason of the detention  
of one James J. Whalen  
a prisoner confined in the  
State Prison Sing Sing  
N. Y.

On reading and filing the petition dated 10.  
January 1891. The writ of certiorari being duly  
served on Hon. Mr. A. A. Brush Warden



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of the State Prison at Sing Sing New York requesting him to show the cause and reasons of the detention of one James J. W. Valer a prisoner at said Prison, and said prisoner being produced in court, but no other return being made to said writ, on motion of Frank J. Keller petitioner and counsel for said prisoner

Ordered that the hearing of said writ and petition be and <sup>inst.</sup> ~~be~~ <sup>is</sup> adjourned to January 22<sup>nd</sup> 1894 and said prisoner is remanded for further hearing in the premises, and said Hon. A. A. Brush Warden of said Prison at Sing Sing hereby is ordered to make a proper return to said writ ~~on said date.~~ <sup>action in relation to the</sup> or take such proceedings ~~in relation to the~~ <sup>as he may be advised</sup> matter as he may be advised.

Ex

A Copy

Enter

Leonard A. Giegerich  
Clerk



Sir

I have noted that  
the within is a ser-  
tified copy of an  
order entered herein  
in the office of the  
clerk of this Court  
on the 14. day of  
January 1891.

Dated M. 4. } Yours &  
Jan. 15/91 }

To  
Frank J. Keller,  
Atty. Gen.

Hon. A. A. Brush  
Warden State  
Prison Long Beach

N. Y. Supreme Ct.

In re petition of  
F. J. Keller requesting  
Warden of State  
Prison to show cause  
for detention of  
prisoner.

Certified  
to copy order ad-  
journng hearing, and  
recommending prisoner

F. J. Keller  
Atty. General  
287 Broadway

0230

NEW YORK SUPREME COURT,  
County of New York.

-----X  
In the Matter of the Application of  
FRANK J. KELLER, as Counsel for one  
James J. Whalen, for writs of Habeas  
Corpus and Certiorari,

Petitioner,

And

A. A. BRUSH, Warden and Agent of  
Sing Sing Prison, New York State,  
Respondent.

RETURN.

-----X  
In obedience to the writs of Habeas Corpus and Cer-  
tiorari, hereto annexed, I hereby certify and return to the  
Supreme Court, that before the coming to me of the within  
writs, the said James J. Whalen was, and at the date hereof  
is in my custody and is detained by me for cause as fol-  
lows:

That heretofore, to wit, June 30th, 1882, the  
petitioner, under the name of James Randolph, was sentenced  
to the Sing Sing State Prison, New York, under and by virtue  
of an indictment found against him for robbery in the first  
degree, for a term of imprisonment of seven years, the said  
indictment bearing date the 12th day of June, 1882, and now  
on file in the office of the Clerk of the Court of General  
Sessions of the Peace, of the City and County of New York;

0231

That the petitioner was duly received at Sing Sing Prison July 1st, 1882, under the sentence aforesaid, and there remained until he was discharged - March 31, 1887 - having received by commutation for good conduct, deducted from his sentence, two years and three months of time.

That subsequently thereof, to wit, December 19, 1888, under the name of James J. Whalen, the petitioner was sentenced to the Sing Sing State Prison, New York, under and by virtue of an indictment found against him for burglary in the third degree, for a term of imprisonment of two years, the said indictment bearing date the 4th day of December, 1888, and now on file in the office of the Clerk of the Court of General Sessions of the Peace for the City and County of New York, which is the sentence referred to in the petition herein.

That the petitioner was duly received at Sing Sing Prison under the sentence last aforesaid, December 21st, 1888, and the authority for his detention at the date hereof, and the true cause of his imprisonment by me, arises as follows:

That under and by virtue of Section V, of Article IV, of the State Constitution, "The Governor is given the power to grant Reprieves, Commutations and Pardons, after conviction, for all offenses except treason and impeachment, upon such conditions and with such restrictions and limit-



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ations as he may think proper, subject to the manner of applying for pardons."

That in addition to the power vested in the Governor of the State, as aforesaid, under and by virtue of the laws of 1862, Chapter 417; of the Laws of 1863, Chapter 415, and subsequent enactments concluding with the laws of 1886, Chapter 21, the Governor of the State of New York was given concurrent powers to such as were granted him under Article IV, Section V of the Constitution, with reference to the commutation of sentences of prisoners.

That under and by virtue of the laws aforesaid, and under the powers vested in the Governor by the Constitution, the respondent alleges, that when the petitioner was discharged, March 31st, 1887, he was discharged upon the condition, nevertheless, that if the petitioner should, during the period between the date of his discharge on the date last aforesaid, by reason of such commutation, and the date of the expiration of the full term for which he was sentenced, be convicted of any felony, he shall, in addition to the penalty, which may be imposed for such felony committed in the interval, as aforesaid, be compelled to serve in the prison in which he may be confined for the felony for which he is so convicted, the remainder of the term, without commutation, which he would have been compelled to serve but for the commutation of his sentence granted him.

That such condition was read to the petitioner on the date last aforesaid, to wit: March 31, 1887, at the



0233

time of his discharge.

That the petitioner was thereafter duly convicted and returned to Sing Sing Prison, December 21, 1888, during the period that was granted him by commutation.

That such discharge of the petitioner, as aforesaid, is further regulated and defined by Section 692 of the Code of Criminal Procedure, enacted September 1st, 1831.

For the reasons heretofore assigned, and under the Constitution and the laws, as hereinbefore recited, the petitioner is by me detained and confined by due process of law.

Nevertheless, I have the body of the said James J. Whalen before you at the day and place within mentioned, pursuant to adjournment had herein, as I am within commanded.

WHEREFORE, I pray that the writs of Habeas Corpus and Certiorari herein be dismissed.

STATE OF NEW YORK, :  
County of Westchester, : ss.

A. A. BRUSH, being duly sworn, deposes and says; that he is the person mentioned in and who executed the foregoing petition; that he has read the same and knows

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*State of New York*  
*Office of the Agent and Warden of Sing Sing Prison*  
*A. A. Brush*  
*Agent & Warden.* Dictated. *Sing Sing,* Jan. 16, '91.

Hon. Delancey Nicoll,

District Attorney,

Dear Sir:-

Enclosed please find papers that have been served  
on me in the case of James J. Whalen.

I have written Mr. Keller  
that I have referred all papers to you and that you will appear  
for me in the case.

Yours most truly,



Agent & Warden.

Four enclosures.

0235

The first Act of the Legislature  
of this State in reference to  
the commutation of time  
afflicting a prisoner  
sentenced for good conduct  
and the strict observance  
of prison rules was  
Chapter 417. Laws 1862.

Section 4 of the Act  
enacts: - that every convict  
confined in any penitentiary  
of the State under sentence  
in commutation of a felony  
for himself a commutation  
of <sup>the</sup> term of his sentence  
of his sentence, subject  
to the provisions of section  
four hereof -

It then follows the time  
he can earn upon the  
certain conditions - such as the  
worth of a certain number  
of hours per day - abiding  
the prison rules - etc. etc.  
Section 4 of the Act provides  
that each keeper of a prison  
shall not more than thirty  
days before the term of  
each convict expires,

0236

27

so diminished by said  
record (referring to the  
record of his appointed  
term) - transmit a copy  
of such record to the  
Governor, which shall  
give the name of such  
convict, the date of his  
reception, the term of  
his sentence; and the  
Governor of the S. of N.Y.  
may thereupon in his  
discretion, direct the abate-  
ment or deduction of the  
term of the sentence of said  
convict of the number of  
days of commutation or  
diminution thereof which  
said convict shall have  
earned.

It can be thus  
observed that discretionary  
power is vested in the  
Governor to commute  
sentences after conviction  
as has been the case  
in relation to the Executive  
Privilege in the matter.



0237

3

of Pardons and Reprieves  
since the adoption of the  
present State Constitution.

The next Act in reference  
to the commutations of the  
sentences of prisoners was  
that will be found in  
Chapter 415 Laws of 1863.  
which was substantially a  
re-enactment of the Act  
of 1862, the main exception  
being that the term  
prisoners could earn for  
good conduct - etc - etc  
was extended - the law  
in that respect increasing  
its liberality to the prisoners  
& upon strict observance  
of the rules formulated  
for their discipline and  
conduct.

Section 4. of the Act  
includes as follows:  
And the Governor of the State  
of this State may therefore,  
in his discretion, direct the  
abatement or reduction of

0238

4

the term of the sentence of  
said convict of the number  
of days of commutation or  
amnesty thereof, which  
said convict shall have  
earned.

It can thus  
be recognized that the  
discretionary power  
still remained with the  
executive to commute,  
precisely the same as  
was the his prerogative  
granted by the law of 1862,  
not losing sight of the  
fact however, that the  
constitutional authority  
invested him with a  
similar power in the  
manner hereinbefore  
set forth.

Following the law of 1863  
will be found the Act of  
1864. Chapter 321. which  
merely amends Section 2  
of the preceding Act. - that  
of 1863 - by inserting still

0239

5

more liberal provision  
for prisoners for good  
conduct; still leaving  
unretracted, the discretionary  
power in the Governor <sup>to commute</sup>  
was conferred by the Act  
of 1863.

Chapter follows  
Chapter 451. of the Laws of 1874  
Section 12. thereof contains  
the regulations as to the  
time each prisoner shall  
earn for labor performed  
and obedience to the rules  
of the prison; but said  
Section ~~is not~~ <sup>is only</sup> part of  
the entire Act ~~is not~~  
repeal ~~Section 4 of the~~  
~~Act of 1862~~. The discretionary  
power vested in the Governor  
under the Acts of 1862-1863.

Chapter 373 of the  
Laws of 1879 <sup>merely</sup> ~~amends~~ Section 12.  
~~of the~~ of Chapter 451. of  
the Laws of 1879. in reference  
to the commuted time  
prisoners could earn and  
does not repeal the dis-

0240

6

extraordinary power vested  
in the Governor under the  
preceding Acts heretofore  
referred to.

The next and last  
Act of the Legislature in ref:  
erence to the subject is  
contained in Chapter 21 Laws  
1886.

This enactment <sup>is</sup> ~~was~~  
not amendatory of any  
previous Act or Acts or  
parts thereof - but ~~was~~ <sup>is</sup>  
~~and~~ an entirely <sup>and original</sup> new Act  
regulating the whole  
subject of commitments.  
Section 1. ~~for~~ regulated  
the time ~~commitments~~ could  
earn by way of commitment  
on their ~~commitments~~ -

Section 13 recites that the  
Governor upon the receipt  
of the report recommending  
the allowance of commit-  
tation of purchases of com-  
mittees for good conduct  
as provided for in this  
Act, may in his discretion  
allow the same



0241

7.  
This Act added a new feature  
to what was contained in  
the previous Acts and will  
be observed from the reading  
of Section 14. thereof - reciting  
as follows.

The Governor shall in con-  
sulting the sentences of  
~~prisoners~~ convicts, as  
provided for in this Act,  
annex a condition to the  
effect, that if any convict  
so committed shall, during  
the period ~~between~~ the  
date of his or her discharge  
by reason of such commu-  
tation and the date of  
the expiration of the

0242

J

full term for which he or she was sentenced, he convicted of any felony he or she shall, in addition to the penalty which may be imposed for such felony committed in the interval <sup>as</sup> aforesaid, be compelled to serve in the prison or penitentiary in which he or she may be confined for the felony for which he or she is so convicted, the remainder of the term without commutation which he or she would have been compelled to serve but for the commutation of his or her sentence as provided for in this act.

(do not  
omit  
this part)

~~See Webster's Unabridged Dictionary  
as to "discretion" - "without condition  
or stipulation."~~

0243

9.

Thus we find, chronologically  
arranged from the earliest  
to the latest periods a  
Statement of the Statutory  
Law, meeting in the Executive  
powers and privileges  
in the legal application of  
which to the exigencies  
of the procedure, it has  
full reference will be  
made hereafter in proper  
order.

(single space)

That such conditional  
discharge of the Detention  
is further regulated and  
defined by Section 692  
of the Code of Criminal  
Procedure enacted Sept. 1. 1881  
which reads as follows.

(Here insert entire Section).  
see Codes, Code 1890.  
(double space)

Authorities for sustaining  
the position of the People.  
(single space)

0244

10

Point I. <sup>of the Governor.</sup>  
As to the constitutional rights  
to ~~impose~~ <sup>impose</sup> commutations and  
to impose conditions thereto.  
~~It has been stated that~~  
Article IV Section IV of the  
State Constitution, it has been  
observed, empowers the Governor  
of the State to "commute"  
grant "commutations" upon  
such conditions and with  
such restrictions and limitations  
as he may think proper.  
Of this there can be no  
dispute.

Granting this - the question  
then arises - what form  
of commutation can the Governor  
make so as to be valid  
and binding in law.

~~The following authorities  
amply justify the  
constitution of the People  
that the condition imposed  
upon the Governor. It holds  
at the time of his discharge  
was binding and binding  
under the law.~~



to make the reparation demanded  
by the law, or the attornment substituted,  
as his election. The condition is in  
effect a contract, and to entitle  
the party to the benefit he must  
perform the condition, for that is the  
only conclusive evidence of assent  
to the grant, and from the signature  
the thing must be done of his own  
accord. x x x x x

Mr. Wat, when Attorney General of  
the United States, gave it as his  
opinion that the power to pardon  
as given by the Constitution is the  
power of absolute and entire  
pardon. On the principle that the  
greater power contained the less,  
he was of opinion that the power of  
pardoning absolutely included  
the power of pardoning conditionally.  
(Opinion of Attorney General, 250)

Stop -

(X)

See also. Lee, argument to Murphy,

Vol. 22, Virginia Reports, p. 789.

(X)

(X)

11

0246

*District Attorneys Office,  
City & County of  
New York.*

January 17th, 1891.

Hon. Charles F. Tabor,  
Attorney-General,  
Albany, New York.

Dear Sir, -

In the matter of the writs of Habeas Corpus and Certiorari recently obtained on behalf of one James J. Whalen, a prisoner now confined in Sing Sing prison, permit me to inform you, that the argument founded upon the writs referred to will occur at Supreme Court Chambers, in the City of New York, the 22nd inst., 10.30 A.M.

I have been informed by Mr. Brush, the warden of the prison, that he had a conference with you upon the issues raised by the counsel for the prisoner, and that you expressed yourself as being perfectly satisfied to have my office attend to the matter.

Inasmuch as the subject is of some importance, it may be well to have a representative from your office present at the argument and to participate therein if it be deemed necessary; however, I am content to attend to the matter on my own responsibility.

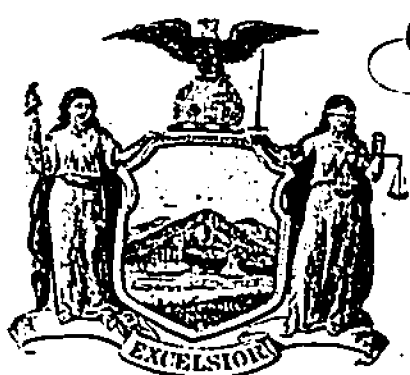
The matter is in the hands of Mr. David Welch, of my staff, and I would be pleased if you would communicate directly with him.

I have the honor to be,

Yours very truly,

*De Laurey Nicoll  
for D.A.*

0247



State of New York.

Attorney General's Office.

Albany, January 17<sup>th</sup> 1891

My Dear Lorden

Enclosed you will find a letter  
from Edw. A. Nichols. You are  
herely authorized to appear for  
the Atty Gen. You had better  
see the Dist Atty and find  
out at once what the point  
is. I assume that it is  
some question growing out  
of Chap 21. Laws of 1886.  
Yr. wife finds no objection

0248

of mine. a page 386 366  
of <sup>the</sup> Report (of which you have  
a copy) which will throw  
some light on the question

Yours  
O. A. Jacobson  
Att. Gen.



0249

State of New York

Office of the Agent and Warden of Sing Sing Prison

A. A. Brush,

Agent & Warden.

Sing Sing, Feb. 12'91.

David Welch Esq.,

Assistant District Attorney,

My Dear Sir:-

Yours of the 10th inst just received on my return from Elmira. I hasten to swear to the return and forward it to you by next mail.

As soon as you know the result, please let me hear from you.

Yours most truly,

*A. A. Brush*

Agent & Warden.

0250

WILLIAM J. LARDNER,  
ATTORNEY AND COUNSELLOR AT LAW,  
100 & 102 BROADWAY,

NEW YORK, Jan'y 24 1891

Dear Mr. Welch:

Your favor of 22<sup>d</sup> inst saying you would be pleased to meet me on Saturday Jan'y 24<sup>th</sup> inst did not arrive through the P.O. at my office until this morning 26<sup>th</sup> inst. Your messenger must have placed your letter in his pocket & failed to mail it, as you directed him, for it appears to bear on the envelope the postal stamp that it was mailed on 24<sup>th</sup> inst at 5 p.m. This of course was some few hours after <sup>after</sup> ~~the~~ matter had been submitted. Of course this damage occurred in a rush

0251

as remembered my engagement  
made with you early last week  
(Monday) to meet you on Saturday.  
As I know you are desirous  
of having your engagements  
promptly attended to, although  
it might be a good idea for  
you to suggest to your messenger  
the propriety of mailing your  
letters when you hand them  
to him. In conclusion permit  
me to congratulate you in the  
very able manner <sup>in which</sup> you presented  
your case on Saturday to Justice  
Lawrence.

I am very sincerely yours  
William J. Gardner

Hon David Walsh  
Asst Dist Atty

0252

State of New York, Sing Sing Prison  
Office of the Agent & Warden

A. A. Brush  
Agent & Warden Dictated.

Sing Sing,

Feb. 16, '91.

Hon. David Welch,

My Dear Sir:-

I received this morning your letter relative to the Whalen case. I also received your Argument for which I thank you. I shall read it with great interest. I understand that Keller has been here, trying to get two or three hundred dollars out of the boys here, to pay him for his work. Most of the boys have little earnings but they cannot expend it except through the Superintendent of Prisons and Mr. Jackson has written him to that effect.

Shall be glad to see you and your friends here at any time and hope you will make up your evening party soon.

Yours most truly,

A. A. Brush

Agent & Warden.



0253

Form No. 1.

# THE WESTERN UNION TELEGRAPH COMPANY.

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THOS. T. ECKERT, General Manager.

NORVIN GREEN, President.

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B39 A	md	Cor	36pd 3-3

RECEIVED at the WESTERN UNION BUILDING, 195 Broadway, N. Y. Jan 13 1891

Dated Albany ny 13

To Hon Delaney Nichol

Dist. Atty New York. 114 East 27<sup>th</sup> St.

Please appear before Judge Daniels tomorrow wednesday  
ten thirty and answer for me in  
habeas corpus case of Jas J Whelan  
I leave here seven fifteen delay until  
I reach there if possible

A. A. Brush Garden, Sing Sing

Prison

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FRANK J. KELLER,  
COUNSELLOR AT LAW,  
287 BROADWAY,

New York, 2 Feb 1891

David Welch Esq.

My dear Sir

Re Whalen

I will grant until  
next Saturday with  
pleasure, for you to  
prepare brief, but  
must like to know  
if possible, to see the  
return

Yours Truly  
Frank J. Keller



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John J. Bloomfield, Law Stationer, 72 Chambers St., N. Y.

The People of the State of New York, TO

Hon A. A. Brush, Warden  
of Sing Sing Prison, of the  
State of New York

GREETING:

CERTIORARI  
TO CERTIFY CAUSE OF  
DETENTION.

We Command you, That you certify fully and at large to *our*  
*Supreme Court*, at *chambers thereof*,

at *the County Court-house, city of New York*  
on

the day and cause of the imprisonment of

*James J. Whalen*

by you detained, as is said, by whatsoever name the said

shall be called or charged; and have you then this writ.

Witness, *Hon*

the

day of

18

*Frank J. Keller* Attorney for *pet*-  
*287 Broadway*  
*N.Y. City*

Clerk.

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FRANK J. KELLER,  
COUNSELLOR AT LAW,  
287 BROADWAY,

New York, 13 Jan'y 1891

Hon. A. A. Bruce

Warden Sing Sing

Dear Sir

I enclose writ  
of certiorari, granted  
by Judge Sanick.

Of course if you  
cannot have the  
proper return made  
in time for tomorrow,  
I will have writ-  
adjourned. Will you have  
the kindness to let  
bearer know, what day  
will suit you to make  
return, and oblige

Yours truly  
Frank J. Keller



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FRANK J. KELLER,  
COUNSELLOR AT LAW,  
287 BROADWAY,

New York, 13 January 1891  
Hon. De Lancey Nicol  
District Atty re

Dear Sir

I enclose copy of  
petition in the Whalen  
case, on which Judge  
Daniels granted the writ  
of certiorari to test the  
commutation laws of  
1885. Whalen was pre-  
viously convicted, and  
sentenced 30 June 1882 to  
7 years by Judge Fildersleeve.  
He earned 2 years & 3 mos.  
commutation for good  
conduct, which he is  
now serving, in addition  
to his <sup>entire</sup> sentence of 2 years.

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FRANK J. KELLER,  
COUNSELLOR AT LAW,  
287 BROADWAY,

2  
New York, \_\_\_\_\_ 189

Should you desire I shall  
be very happy to call and  
see you about the matter,  
and arrange any day, most  
convenient to yourself  
for argument. I suppose  
in any case the question  
will have to go to the  
General Term.

The writ is  
returnable tomorrow  
morning in chambers

Yours respectfully  
Frank J. Keller

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FRANK J. KELLER,  
COUNSELLOR AT LAW,  
287 BROADWAY,

<sup>2</sup>  
New York, \_\_\_\_\_ 189

Should you desire I shall  
be very happy to call and  
see you about the matter,  
and arrange any day, most  
convenient to yourself  
for argument. I suppose  
in any case the question  
will have to go to the  
General Term.

The writ is  
returnable tomorrow  
morning in chambers

Yours respectfully  
Frank J. Keller

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FRANK J. KELLER,  
COUNSELLOR AT LAW,  
287 BROADWAY,

New York, 19 January 1891

David Welch Esq.

Assistant District Atty  
New York City

I enclose  
copy of order & opinion  
as requested by you -  
It is the last copy I  
have of the opinion.  
Please hold for me.  
I cannot see you,  
but am engaged  
in a continued case  
in Part-3, before Judge  
Fitzgerald, where I  
shall be all after  
noon.

Yours truly  
Frank J. Keller



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FRANK J. KELLER,  
COUNSELLOR AT LAW,  
287 BROADWAY,

New York, 15 Jan'y 1891

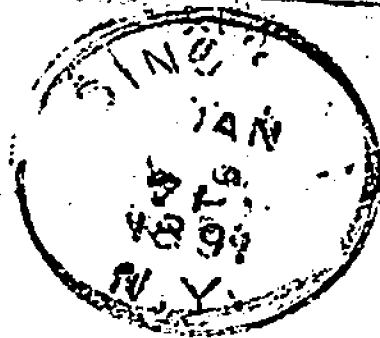
Hon. A. A. Bruce  
Warden Sing Sing

Dear Sir I enclose a cer-  
tified copy of the order  
in the case of the whale  
case. Will you please  
see that your return  
is ready for the 22<sup>nd</sup>.  
Yours truly

Frank J. Keller

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OFFICE OF A. A. BRUSH,  
AGENT AND WARDEN OF SING SING PRISON.  
SING SING, N. Y.



Mr. Welch,  
Asst. District Attorney,  
City Hall,  
N. Y.

0264

*State of New York*  
*Office of the Agent and Warden of Sing Sing Prison*  
*A. A. Bush*  
*Agent & Warden.* Dictated. *Sing Sing,* Jan. 26, '91.

My Dear Welch:-

Yours of the 24th inst. just received.

I was very sorry not to see you before I left but I had an engagement that I barely had time to keep.

I think the case is in good shape and whether we win or lose we have done all we could.

Many thanks for the article from the "Evening Post".  
Hoping to see you soon,

I am-

Yours sincerely,

*A. A. Bush*

Agent & Warden.

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In conclusion.

Here is a criminal, an enemy of the State, given a fair trial, and convicted of the grave crime of highway robbery.

The clemency of the laws of his state, in its endeavors to teach him discipline, and make of him a decent member of the community, allows him, in the discretion of the Governor, a commutation of his term of imprisonment for good behavior and for properly attending to the duties assigned him.

The Governor, acting under the authority given him by the Constitution, fortified, if such a thing is possible, by the Acts of the Legislature, virtually says to the prisoner "Go and sin no more"; but I warn you, and attach this condition to your release, if you commit another crime and are brought back to prison, you shall not be entitled to the commuted time I now give you, and it is in this condition that I, having the right to refuse you this commuted time now discharge you.

The prisoner after having



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assented to such condition, leave the prison, and in less than months is again a prisoner within its walls, after having been tried, convicted and sentenced for the crime of burglary.

The prisoner is in bad odor with the Court, the State, and all law abiding citizens of the County, and the law should be invoked not to show him mercy, for he deserves none; having failed to profit by the mercy already shown him, but to keep such a dangerous ~~man~~ person from doing mischief to that society of which he is no longer worthy of being a member.

We respectfully submit that that the Writs of Habeas and Habeas Corpus should be dismissed, and the prisoner be remanded to the ~~the~~ ~~warden of~~

0267

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may be well said to add.  
that the ~~United~~ <sup>State</sup> Constitution  
is ~~identical~~ <sup>substantially</sup> the same  
as that of ~~the~~ <sup>the</sup> ~~United~~ <sup>United</sup> States  
Constitution, with reference  
to Pardon, Pardon is ~~not~~  
it - etc. So that the  
~~United~~ <sup>United</sup> States  
as well as the  
State Courts concur in  
the settled constitution and  
the principles of the law  
upon the point now under  
discussion.

This doctrine of  
Conditional Pardon ~~has been~~  
further re-affirmed in  
Ex - parte. William's Will  
18 Howard. U. S. Supreme 310.  
Id - 314 Id - 320. where  
it is noted

"And the same thing may  
be done in regard to all  
offences, where, in this  
country, the law authorizes  
the pardoning power to  
modify the punishment and  
give effect to the commutation."

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4.  
Reference is also made to  
the case of "The Laura 114 U.S.  
416.

The subject of Conditional  
Pardon and Commutation  
is most fully and  
thoroughly discussed  
in the case of Lee vs. Murphy  
(22. Grattan) Virginia Reports  
789. wherein the doctrine  
so heretofore alluded to  
is re-affirmed with clearness  
force and brilliancy.

Learned counsel will con-  
sider the value & true  
of the Court with a reputation  
of adjudication upon the  
subject now in review, but  
it appears useless to do  
so, as we are confirmed  
in the belief that the  
principle involved in the  
question of Conditional  
Commutation is thoroughly  
and firmly settled in our  
jurisprudence as to be firmly



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an elementary and fundamental part of our judicial structure.

We will therefore divert our attention to other important subjects.

Part II.

Amelia Spaulding.

The prisoner upon his discharge March 3<sup>d</sup>. 1887 it is estimated, understood that he was conditionally discharged so far as said that the condition was made & known and by him accepted prior to his departure from the State Prison.

He could have disregarded the condition by refusing to accept his freedom thereunder and stood upon his rights under the law for legal protection.

In Justice Hayes, in



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6  
Ex. parts of William Wells. 18  
Horr. U. S. Circuit Reports 315  
meets the law as follows:

" As to the suggestion that  
conditional pardons cannot  
be considered as being  
voluntarily accepted they  
enure to as to be  
binding upon them, because  
they are made whilst  
under duress & perjuries  
and duress of imprisonment,  
it is only necessary to  
remark, that neither applies  
to this case as the  
petitioner was legally in  
prison - continuing the Court says

" If a man be legally  
imprisoned, and either  
to procure his discharge,  
or on any other fact  
account of seal a bond or  
pledge, this is not duress  
or imprisonment, and he  
is not at law liberty to  
avoid it."

0271

"A."

And it is well, here, to remark,  
that in ascertaining how much  
time the prisoner should receive  
in commutation, the computation  
is made under the Law of 1886,  
which was more liberal to him  
than the immediately preceding law-  
1879- and still it is that law, which  
gave him <sup>his</sup> liberty some ~~two or three~~ months  
earlier than he would otherwise have  
received it, that he now claims  
to be of no force, and not binding  
upon him.

0272

Great A. line  
 100

In the case at bar, the  
 prisoner was discharged  
 and accepted his discharge  
 with full knowledge of  
 what he could expect  
 were he returned.  
 And it is well known to  
 mankind - that in the  
 ascertaining of how much  
 time ~~the~~ <sup>the</sup> prisoner by  
 grace ~~received~~ <sup>shall receive</sup> in  
 punishment, the compilation  
 was made under the  
 very act of 1886. which  
 in ~~providing~~ <sup>providing</sup> ~~clauses~~ <sup>clauses</sup> ~~desires~~  
~~to~~ <sup>to</sup> ~~discrepancy~~ <sup>discrepancy</sup> ~~and to~~  
~~discrepancy~~  
 The time of two years  
 and three months he  
 received in ~~this~~ <sup>the</sup> ~~range~~ <sup>range</sup> of  
 seven years, was figured  
 computed on the basis of  
 two months for the first  
 year - two months for the  
 second year, four months  
 for each of each for the  
 third and fourth years



+ Continuing the Court says:  
Our very statutes through all  
the recesses from 1781 to  
the present time - a period  
of near sixty years, have  
been equally guarded in  
the use of the same terms  
and have been explicit in  
empowering upon the Governor  
the power to attach con-  
ditions to his pardons.

3 Greenleafs. L. of. N.Y. 113.  
1 Rev. L. of 1813. 126

The decisions in  
the courts of our State, in  
several of the States of the  
Union, in the Courts of the  
United States, and in the  
Courts of the British Empire  
have all regarded these  
words as preserving the  
right to attach conditions  
to the grant of a pardon.  
Chief Justice Marshall  
in the case of the United States  
vs. Wilson, 7 Peters 156 says:  
in speaking of the pardoning  
power, that it may be exercised



or conditional.

Mr. Wirt, when Attorney General of the United States gave it as his opinion that the power to pardon as given by the Constitution, is the power of absolute and entire pardon.

On the principle that the greater power contains the less, he was of the opinion that the power of pardoning absolutely includes the power of pardoning conditionally. (see Opinions of Attorney General 250)

The principle here laid down has <sup>been</sup> fully occurred in by Attorney General ~~Butler~~ <sup>Butler</sup>, ib 1034. And Gilpin ib 1382.

The United States Supreme Court has invariably followed the rule of considering that the President has the right of granting conditional pardon and in respect to the language giving the President that right, it

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and five months for  
each succeeding year  
See Section 1 Chapter 21.  
Laws 1886.

Had the prisoner accepted  
his discharge under any  
of the other acts relating to  
commutation he would  
not have been so liberally  
considered as the ~~Statute~~  
Statutes hereinafter referred  
to would have prevented.)

0276

Peddy  
vs  
Heller

(1)

A statute may be repealed by necessary implication, and without any express words; the leaning of the Courts is against the doctrine, if it is possible to reconcile the two acts of the Legislature together, though a statute may be repealed by Note 9, p. 113, Potter's *Dramas on Statutes*.

A statute can be repealed only by an express provision of a subsequent law, or by necessary implication.

To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and the old, that they cannot stand together, or be consistently reconciled.

Potter's *Dramas on Statutes*, Note 4, p. 154, citing *Cool vs Smith*, 1 Black 459; *Wood vs U.S.* 16 Pet. 342; 10 Bar. R. 448; *Hartford vs U.S.* 8 Cranch 109; *Brown vs County Commissioners*, 21 Mass. 37 etc. xxxxxxxxxx

The more natural, if not necessary



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NEW YORK SUPREME COURT.

-----X  
In the Matter of the Petition of Frank:  
J. Keller for a writ of Certiorari and:  
a writ of Habeas Corpus, to produce  
the body of James J. Whalen, a prison-  
er confined in the State Prison, Sing  
Sing, New York.  
-----X

The return of A. A. Brush, Warden and Agent of Sing Sing Prison, State of New York, to the writs of Habeas Corpus and Certiorari hereto annexed.

In obedience to the writs of Habeas Corpus and Certiorari hereto annexed, I hereby certify and return to the Supreme Court, that before the coming to me of the within writs, the said J. J. Whalen was committed to my custody and detained by me by virtue of a certain commitment of imprisonment issuing out of the Court of General Sessions of the Peace, of the City and County of New York, to me directed.

For a further return, and in answer to the petition herein, I certify as follows:

That all of the allegations of the petition herein of date January 10th, 1891, verified by Frank J. Keller, on behalf of James J. Whalen, are true, excepting the Fifth paragraph thereof.

Nevertheless, I have the body of the said J. J. Whalen, before you at the day and place within mentioned and pursuant to adjournment had herein, as I am within commanded.



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Wherefore, I pray that the writs of Habeas Corpus  
and Certiorari herein be dismissed.

*A. A. Brush*  
*Agent*

City and County of New York, ss.:

A. A. Brush, being duly sworn, deposes and says,  
that he is the person mentioned in and who executed the  
foregoing petition; that he has read the same and knows  
the contents thereof, and that the same is true of his own  
knowledge except as to the matters therein stated to be al-  
leged on information and belief, and that as to those mat-  
ters he believes it to be true.

*A. A. Brush*

Sworn to before me, this , :

24th day of January, 1891.

*Charles E. Smith Jr*

*Notary Public*

*N. Y. County*

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Graphs  
Copy  
Whalen  
Original  
F. J. Turner

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NEW YORK SUPREME COURT,  
County of New York.

-----X  
In the Matter of the application  
of Frank J. Keller, as Counsel for  
one James J. Whalen, For writs of  
Habeas corpus and Certiorari,  
Petitioner,

And

A. A. Brush, Warden and Agent of  
Sing Sing Prison, New York State,  
Respondent.

*Return*

-----X  
In obedience to the writs of Habeas Corpus and Cer-  
tiorari, hereto annexed, I hereby certify and return to  
the Supreme Court, that before the coming to me of the  
within writs, the said James J. Whalen was, and at the  
date hereof is in my custody and is detained by me for  
cause as follows:

That heretofore, to wit: June 30th, 1882, the petitioner,  
under the name of James Randolph, was sentenced to the  
Sing Sing State Prison, New York, under and by virtue of  
an indictment found against him for robbery in the  
first degree, for a term of imprisonment of seven years,  
the said indictment bearing date the 12th day of June  
1882, and now on file in the office of the Clerk of the  
Court of General Sessions of the Peace, of the City and



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2.

County of New York.

That the peitioner was duly received at Sing Sing Prison July 1st, 1882, under the sentence aforesaid, and there remained until he was discharged, March 31, 1887, having received by commutation for good conduct, deducted from his sentence, two years and three months of time.

That subsequently thereto, to wit: December 19, 1888, under the name of James J. Whalen, the petitioner was sentenced to the Sing Sing State Prison, New York, under and by virtue of an indictment found against him for burglary in the third degree, for a term of imprisonment of two years, the said indictment bearing date the 4th day of December 1888, and now on file in the office of the Clerk of the Court of General Sessions of the Peace for the City and County of New York, which is the sentence referred to in the petition herein.

That the petitioner was duly received at Sing Sing prison under the sentence last aforesaid, December 21st, 1888, and the authority for his detention at the date hereof, and the true cause of his imprisonment by me arises as follows :

That under and by virtue of Section V of Article IV of the State Constitution, "The Governor is given the power to grant Reprieves, Commutations and Pardons, after conviction, for all offenses except treason and



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3.

impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to the manner of applying for pardons."

That in addition to the power vested in the Governor of the State, as aforesaid, under and by virtue of the laws of 1862, Chapter 417, of the Laws of 1863, Chapter 415, and subsequent enactments concluding with the laws of 1886, Chapter 21, the Governor of the State of New York was given concurrent powers to such as were granted him under article IV Section V of the Constitution, with reference to the commutation of sentences of prisoners

*and under the power vested in the Governor under the Constitution*  
That under and by virtue of the laws aforesaid, the respondent alleges, that when the petitioner was discharged, March 31st 1887, he was discharged upon the condition, nevertheless, that if the petitioner should, during the period between the date of his discharge on the date last aforesaid, by reason of such commutation, and the date of the expiration of the full term for which he was sentenced, be convicted of any felony, he shall, in addition to the penalty, which may be imposed for such felony committed in the interval, as aforesaid, be compelled to serve in the prison in which he may be confined for the felony for which he is so convicted, the remainder of the term, without commutation which he would have been compelled to serve but for the commutation of ~~the~~ his sentence granted him.

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That such condition was read to the petitioner on the date last aforesaid, to wit: March 31, 1887, at the time of his discharge.

That the petitioner was thereafter duly convicted and returned to Sing Sing Prison, <sup>December</sup> December 21, 1888, during the ~~interval of his discharge, March 31, 1887.~~ <sup>period that was granted him</sup>

That such discharge of the petitioner, as aforesaid, is further regulated and defined by Section 692 of the Code of Criminal Procedure, enacted September 1st, 1881.

For the reasons heretofore assigned, and under the Constitution and the laws, as hereinbefore recited, the petitioner is by me detained and confined by due process of law.

Nevertheless, I have the body of the said James J. Whalen before you at the day and place within mentioned, pursuant to adjournment had herein, as I am within commanded.

WHEREFORE, I pray that the writs of Habeas Corpus and Certiorari herein be dismissed.

STATE OF NEW YORK,

County of Westchester:SS.

A.A. Brush, being duly sworn, deposes and says; that he is the person mentioned in and who executed the foregoing petition; that he has read the same and knows the contents thereof, and that the same is true of his own

by own motion

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5.

knowledge, except as to the matters therein stated to  
be alleged on information and belief and that as to  
those matters he believes it to be true.

Sworn to before me this

day of February, 1891.

0285

The People  
vs:  
James J. Whalen -

Brief submitted on the law  
and facts by the People  
of Maine the people of  
the State of Maine James J. Whalen  
being - being State Prison  
where he is at present  
imprisoned under great  
numbers of laws for crimes  
committed against the  
State, the recital of which  
will hereafter appear at  
full length in the pages  
of this brief.

- The Facts.

The defendant James J.  
Whalen once but writs of  
H.C. & C. for the purpose of  
having the Supreme Court  
pass upon what is  
charged as his miserable  
conduct at being being State



0286

2.

by the Warden and Agent thereof, A. H. Burch. Inasmuch as he claims for reasons as follows <sup>that</sup> he is justly entitled to his immediate discharge.

The State ~~appears~~ <sup>the application for his</sup>.

The history of the ~~case~~ <sup>prisoner</sup> reveals the fact:— that under the name of James Randall he was sentenced to Sing Sing Prison June 30. 1852. and was there received July 1. 1852. having been sentenced to serve a term of seven years at hard labor by Judge Eldred Allen in the General Sessions Court N. Y. County, for robbery in the first degree. His discharge from Prison followed March 31. 1857 having been commuted by the Governor for good behavior to four years of more.

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months - thereby making  
a reduction in his original  
sentence of two years and  
three months.

Under the alias of James  
J. Whalen he was - Dec. 19. 1888  
sentenced to serve a  
term of two years in  
Sing - Sing Prison, by Judge  
Coffey finding the guilt of  
himself as being for  
burglary in the third degree  
and was received at the  
Prison Dec. 21. 1888.

It is now maintained  
on behalf of the prisoner  
by Mr. Teller his Counsel  
that having served the  
last sentence of two years  
in full at Sing Sing  
December 29. 1888. that he  
is justly entitled to his  
discharge and that freedom  
should be given him.

This substantially covers  
the contention of the prisoner,  
his counsel holding that

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under the several Statutes of  
the State ~~and~~ bearing upon  
the reasons involved in  
this proceeding, that  
the freedom of the prisoner  
should not ~~be~~ <sup>be</sup>  
denied him and that under  
the law his term of  
imprisonment has expired  
and that he is entitled to  
an immediate and un-  
conditional discharge.

It is contended upon  
behalf of the W. & A. B. Co.  
the W. & A. of S. S. P. who  
now detains the prisoner  
that the Prisoner is not  
entitled to his discharge  
from his custody upon  
the ground, that <sup>by the construction</sup> the prisoner  
is bound to serve out the  
full term of his original  
sentence of seven years,  
the first sentence imposed  
upon him, inasmuch  
as the prisoner was returned  
to the S. S. P. under a

0289

5

conviction had, and prior  
to the time of the expiration  
of the original sentence  
of seven years, so if  
no commutation had been  
granted ~~the petitioner~~ him.

The last hearing at  
this instance of the Warden  
is recited hereafter at full  
length. -

To further emphasize the  
position of the Warden, acting  
in his position as a quasi  
judicial officer of the State,  
it is maintained as has  
been the rule from time  
immemorial, in similar  
matters, that the prisoner  
was conditionally discharged  
by the Governor of the State  
March 31, 1887, when his term  
was commuted by the Senate  
of the Governor's Executive, for  
the space of two years  
and three months, the ~~com-~~  
~~mutation~~ of the cert. of  
discharge containing a certain



To the effect, in substance  
 reciting, that if the prisoner  
 were returned under a  
 conviction as heretofore;  
 set forth, that the true  
 given in court. I shall be  
 declared void, which con-  
 dition, at the time of his  
 discharge March 31. 1887.  
 the prisoner, upon his leaving  
 the S. P., with full knowledge  
 of the condition, the same  
 having been read to him,  
 was duly accepted.

General Agents of the Constitutional  
 Association of Lawyers, Editors & Journalists  
 It was at a period important  
 at this time, owing to the  
 issues involved herein  
 being for the great time  
 brought up for judicial  
 review, that a course  
 of action of the subject  
 of Communication and the  
 matter arising therefrom  
 be brought to the attention  
 of the Court.

An examination of the law.

0291

7  
revels the following information upon  
~~the subject.~~  
will reveal the following.

It was the Common Law of  
the Land prior to the adoption  
of the first State Const. 20<sup>th</sup>  
April 1777. - that the Executive  
had the power to grant  
Pardons and Pardons -

And that when a subject  
was made his pardon  
in such manner as to  
the Crown were deemed  
Satisfactorily and a pardon  
was made, a condition in  
many instances was  
imposed thereto - and thus  
the same became a con-  
ditional pardon -

So was the language of  
as contained in Chapter 29.  
Third Edition, Lewis's Blackstone

The King may extend his  
mercy upon what terms  
he pleases; and may  
attach to his bounty a  
condition other precedent or

0292

8.

Quibbent, in the performance  
 of the validity of the  
 pardon will depend; and  
 this by common law.

Command for the People  
 commends upon this  
 subject of conditional  
 pardon at this period,  
 for the purpose of bringing  
 the ~~Constitution~~ Courts attention  
 to the fact - that from  
 the earliest period of our  
 time, and prior to the  
 formation of the State  
 Government, in the case  
 of "Pardons and Reprieves"  
 the most important as  
 well as the most solemn  
 of all the prerogatives  
 vested in the Executive  
 was cladded with the  
 added right if sought to  
 exercised, of annexing to  
 the pardoning power a  
 condition which upon all  
 occasions and at all  
 times <sup>whenever</sup> the condition was

0293

attached, ~~also~~ <sup>are</sup> now  
upheld as an indispensable  
part of the Executive prop-  
erties as fundamental  
a part of the ~~Executive~~ <sup>Sovereign</sup>  
Critical as any of the  
others and varied <sup>in</sup> ~~in~~ <sup>any</sup> manner  
upon such ~~affairs~~ <sup>affairs</sup> ~~concerned~~  
Three conditions assumed  
various "phases" - as for  
instance - of being confined  
to hard labor for a stated  
term - or of transportation  
to some foreign port  
for life, or for  
terms of years etc. etc.

By the acception of the  
Constitution of 1777. The Common  
Law of the land relating to  
the subject of Reprieves and  
Pardons became merged  
in to the 17<sup>th</sup> section thereof  
wherein it is stated -  
That the Governor shall have  
the power at his discretion  
to grant reprieves and  
pardons to persons convicted



of crimes etc. etc. <sup>and</sup>  
 under which section from  
 the cases <sup>subsequently</sup> reported  
 continued powers granted  
 were held to be valid  
 and binding in law  
 whenever the same were  
 made subject of judicial  
 review in the Courts of  
 this State.

Thurapter, under Art. III. Sec  
 4 of the Const. of ~~February 1822~~  
 of 1821. the same powers  
 and privileges embodied  
 upon the <sup>present</sup> were  
 continued in force and  
 effect in language  
 substantially the same  
 as that contained in the  
 17<sup>th</sup> section of the earlier  
 State Constitution carrying  
 with it the same <sup>provisions</sup>  
~~not~~ <sup>not</sup> ~~state~~ rights with  
 reference to "judicial  
 discharges" as <sup>herebefore</sup>  
 at length ~~made~~ <sup>alluded</sup> to.

0295

11.

But it was not until the  
Constitution of 1846<sup>was adopted</sup> that  
in addition to the power  
conferred upon the Governor  
to grant R. & P. there was  
also conferred the power  
to commute, and to  
better express the language  
of the organic law upon  
this subject it is deemed  
best here to recite the  
same in full.

Article IV Section I  
(Here insert at length).

Thus we have a chronologically  
arranged statement of the  
organic law of the State  
standing in its execution.  
Powers and privileges in  
the legal application of which  
to the exigencies of the  
proceeding at bar, however,  
more will be a full  
reference will be made  
not under the proper  
appellations, of

0296

12.

General Review of the  
Statutory Enactments upon  
the subject of Commutations.

An examination of the  
Statutes referred to <sup>under the</sup> in the  
above heading reveals the  
law as follows -

The first Statute upon the subject  
of commutation is that  
contained in the Laws of 1862  
Chapter 47.

(Here insert authorities only)  
(See Ryans memo.)

It thus appears that under  
the provisions of &c,

0297

2.)

inference in all such cases is, that the legislature intended the <sup>new</sup> law to be auxiliary to, and in aid of the purposes of the old law. There should be therefore, a manifest and total repugnance in the provisions of a new law to lead to the conclusion that the latter law abrogated, and was designated to abrogate the former.

(+)

The case *Ex parte Clawson*, 15 Pacific Reporter, p. 328, cited on the argument by Counsel for the prisoner, does not help his case. It was held in that case, that the law governing the discharge of a prisoner was the law in effect at the time of his sentence. ~~He does not agree~~ He the prisoner's counsel contending that as the law of 1886, in which the Governor is directed to attach a condition to the commutation, was ~~not~~ <sup>was</sup> not ~~into~~ <sup>was</sup> passed and went into effect after the prisoner had already served part of his term, ~~there~~ therefore, under the authority of *Clawson's* case, ~~now~~ it could not apply to him; but that he was governed by



0298

3.

the law of 1879, and those previous to it, and which annexes no condition.

We concede the soundness of the law in Clauson's case, but call your Honor's attention to the fact that the Governor had a right at all times, regardless of the law of 1886 to attach a condition, as was decided in the case of the People vs Potter, before cited, and to quote from the opinion of the Attorney General, "On the principle that the greater power contained the less, he was of opinion that the power of pardoning absolutely includes the power of pardoning conditionally." People vs Potter was decided in 1845, a few <sup>some</sup> years prior to the statute of 1886.

Indeed it is doubtful if the statute of 1886, that part of the statute of 1886, imposing on the governor a condition to be attached to his absolute discretionary power given him by the Legislature is constitutional. (to be sure) etc.

0299

An important element of  
the issues involved in the  
case at bar bears a very  
strong relation to the principles  
so graciously and ably pre-  
sented by the learned  
Justice Allen in the People  
case of the People vs. Chertan  
reported 55. N.Y. h. 50.

In the argument at Chancery  
before the learned Court, it  
was <sup>frankly</sup> asserted and never again  
without qualification repeated  
that the act of 1863, which  
~~it was~~ it was given to the  
Governor the discretion to  
commute, by express language  
to that effect, has not  
been repealed nor modified  
by any subsequent act.  
Must excepting the by  
the Act of 1886.

Every act leading up to  
the one of 1886. That of 1864-1874-1879.  
only and solely referred to commu-  
tation of convicts only so to  
the think they could earn by  
good behavior etc etc.

0300

D

We may readily conclude  
then that the Legislature  
Law made of 1864-74 & 79  
did not intend to absolutely  
repeal the entire enactment  
of 1863. - but only in so far  
as the time the same  
related to the time prisoners  
could earn for good behavior etc.  
All the rest of the Act of  
1863 remained in <sup>absolute</sup> force addi-  
tional legislation on the  
subject had been had  
up to the present day.

The rule is well settled in  
this State to be  
Statutory enactments as  
follows.

" A repeal of Statutes by  
implication is not found  
in the law; and when both  
the letter and former Statute  
can stand together, both  
will stand unless the former



0301

is affirmed

is affirmably repealed, or  
the legislature intent to  
repeal is very manifest  
People vs. Palmer

52 N.Y. 83.

What is there in the language  
of the act of 1863. giving the  
Governor "discretionary power"  
as the same relates to  
the acts of 1864. 74. & 79. to  
take the point now raised  
from out the rule here  
laid down

There is no inconsistency  
between them in the  
language used. It  
now whether has been  
introduced in the latter  
three acts & conflict  
with that of 1863. in so far

For all intents and  
purposes they ~~can~~  
can be construed as  
one and the same. get  
the only distinction being  
"earned time" by equity.

Verdict

is affirmed  
discretionary power  
it is not so



0302

To have directed the fortune  
of his power & <sup>by statutory enactment</sup> ~~conscience~~ would  
have been in direct contravention  
if not <sup>of the</sup> ~~the~~ spirit letter & <sup>the</sup> ~~the~~  
heat <sup>of the</sup> spirit of the State  
Constitution as it has stood  
since 1846.

The Legislature knew in 1862 & in 1863 what the organic law was at that time with reference to the prerogatives of the Executive therefore - because - those enactments recorded there did not conflict with the Constitution.

And assuming it had  
conflicted with that solemn  
instrument what would  
have been the result?  
We revert now to the  
opinion of ~~the~~ <sup>some</sup>  
heretofore alluded to in  
the 55<sup>th</sup> Vol.  
Say the Court:  
(Here take in page 55.)

0303

Further the rule is ~~Q.~~ ~~Q.~~  
That a statute only  
operates as a repeal of a  
former one to the extent  
that the two are inconsistent;  
if both can stand and to  
the extent that they can  
stand and have effect,  
they will both have effect.  
52 N.Y. 83 - 47. Id. 216.  
55 Id. 613.

Henthorn vs The Mayor etc  
64 Id. 18.

It may here end and conclude  
the discussion of the law  
in relation to the construction  
to be given to Statutory  
instruments, believing as  
we do, that in the recital  
of the above case  
that the subject matter  
of the People's ~~constitution~~  
affecting the status of  
the act of 1863. has  
been sufficiently elucidated.

0304

detected to ~~lead~~ the Court  
to aid the Court  
aid the Court in reaching  
a satisfactory solution  
of the problem.

0305

### Discretionary Power under the Statutes.

The prisoner's counsel contends that the ~~Statute~~ Acts of the Legislature passed after 1863 took from the Governor his discretionary power, and that it was not again vested in him until the passage of the Act of 1886. Such a contention is a theory is absurd. The section. That part of the Act of 1863 giving ~~to~~ leaving the discretionary power in the hands of the Governor, was never repealed by any subsequent Act of the Legislature, either directly, by implication or by inference, as a careful, not critical reading of that, and the subsequent acts will show.

And if it were not that the importance of the subject requires the greatest care on the part of the representation of the People, we would hesitate before referring the Court of the few following well settled principles of law.



0306

General Sessions Court  
The People }  
vs }  
Whalen } Fact.

James J. Whalen - under  
the name of James Randolph,  
was sentenced to Sing Sing  
Prison June 30. 1887 - was  
received at Sing Sing July 1. 1887.  
for a term of seven (7) years  
for robbery - by Eldersburg.  
He was discharged  
March 31. 1887. having  
earned by commutation  
two (2) years & 3 months.

Under the name of James  
J. Whalen - he was sentenced  
to Sing Sing for (2)  
years, by leaving for  
burglary in the 2nd degree  
December 19. 1888. and received  
December 22. 1888.

0307

(2)

Under the law now in force  
and as it has been heretofore  
since the re-adoption of  
the State Const. in 1846  
the prisoner now is com-  
pelled to finish out his  
full term of seven (7) years  
by the first sentence  
inasmuch as he was  
again convicted and  
sentenced and returned to  
Sing Sing within the  
term of his first sentence  
of 7 years - less his  
commutation for  
good conduct.

Have inserted  
data received from Brush

0308

(3)

The People  
vs.  
Whalen The Law  
See Laws of 1886 Chap. 21.  
as to constitution of  
Courtney &c.

See State Const.  
including year 1859.  
published by Wm. Reed.  
Pamphlet form.  
See Article IX (4) Sec. V.

See case reported in  
Parker. p. 47  
The People vs. Potter.

As to the conditions which  
may be attached to a grant  
of the land -  
A parcel may be  
expediential  
See Chas. Blackstone  
Chapter 29. p. 1041.  
"Of Reversion and Forfeiture."

0309

(4)

See also <sup>original</sup> # 692. Code of Procedure  
§ 264. as to power of Gov.  
to grant commutations &  
also cases cited under  
that section.

See Ex Post Facto law.  
Retrospective Statutes &  
Barron's and Starns -  
"every law that changes the punishment  
and subjects a greater punishment than  
the law authorized at the time when committed."  
See Rev Statutes (Barron's).  
See also 8 How. Pr. 478.  
3 Johnsons cases 333

See  
Wade on Retrospective Laws  
Black " "  
People vs. Hartung  
22 Wf. R 95.

See Const. 1777. 1821 and  
1846. - the word commutation  
only contained in 1846 Const.



0310

Dr. P. L. C.

ms.  
W. 1. 1. 1.

1. The first of these is the fact that the  
 2. second of these is the fact that the  
 3. third of these is the fact that the  
 4. fourth of these is the fact that the  
 5. fifth of these is the fact that the  
 6. sixth of these is the fact that the  
 7. seventh of these is the fact that the  
 8. eighth of these is the fact that the  
 9. ninth of these is the fact that the  
 10. tenth of these is the fact that the

0311

People  
-W-  
Whalen

A.

1862

The first statute referring  
to commutation <sup>of sentence</sup> is that  
contained in Chap 417 L. 1862  
which says.

(here insert)  
# II Every convict &c  
subject however to the  
provisions of # 4. here of  
"which contains the fol:  
"" And the Governor of the State &c.  
may thereupon, in his  
discretion, direct the abate-  
ment or deduction of the  
term of the sentence &c. &c.  
# III. Reads

"And it shall be  
the duty of the prison  
authorities to acquaint  
the prisoner with # II  
here of.

Therefore, the Commune law  
governing, as referred to

0312

B.

Lehox's Blackstone. Chap 29. 1104  
will more fully appear, until  
the adoption of the State Const.  
when the Gov. was vested with  
that right.

Const.  
1846

The Const. of 1846. expressly  
gives him the right, to  
be increased by him  
upon such conditions as  
he may see fit to  
interpose.

It vests in him a  
discretion which to this  
day has never been  
taken from or  
denied him.  
See Article IV # 5. as  
to powers of the Governor.

1863

Thenceforth comes the  
Law of 1863 Chap. 415.  
slightly modifying the law  
of 1862. - but still containing  
the clause vesting in the  
Governor "discretionary powers"

03 13

C.

Precisely the same as in  
the act of 1862.  
(here insert).

1864  
Thereafter comes the Law  
of 1864. Chas. 321. again  
slightly modifying the  
law of 1863. but still  
vesting the Governor with  
the same power as was  
conferred upon him in  
the previous enactments.

1874  
Thereafter comes the Law  
of 1874. Chas 457 #12.  
which reads as fol-  
lowing insert.  
This amendment ~~however~~  
still further favors the  
convict greater than  
heretofore in commutations  
but it does not take  
away nevertheless the



0314

D.

"discretionary power" here.  
to have vested in the  
Governor - and that  
discretion still remains  
intact and inviolable.

1879

Therewith comes the act of  
1879. Chap. 373 which recites  
as follows -  
(here insert)

No amendment of state  
is made by this law  
as it particularly refers  
to the fact - that no  
prisoner who attempts  
to escape subsequent  
to May 12 - 1874. Shall be  
punished to any con-  
viction whatever.

It does not take  
away the discretionary  
"power vested in the  
Governor" - that remains  
undisturbed as before.

03 15

E.

Chapter covers the Law of  
1886. Chap. 21. which refers  
to the commutation of sentences  
at greater length than  
any of the previous Acts  
(This is principal).

The Code of Criminal Pro.  
Sec. 692. - which was  
adopted on Sept. 1. 1881.  
reads as follows.  
are inserted.

In case referred to them  
and themselves.

0316

Deafle  
Seafle

H. J. J. J.

Whalen

Arif for  
the Seafle

indichments

Dec 1888

Bowling in

Whalen on

#1-1180

Cmb-1180

03 17

Court of General Sessions of the Peace

OF THE CITY AND COUNTY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK

against

*James J. W. Wadsworth*

The Grand Jury of the City and County of New York, by this indictment, accuse

*James J. W. Wadsworth*

of the CRIME OF BURGLARY IN THE THIRD DEGREE, committed as follows:

The said *James J. W. Wadsworth*.

late of the *Twenty second* Ward of the City of New York, in the County of New York, aforesaid, on the *26th* day of *November*, in the year of our Lord one thousand eight hundred and eighty-*eight*, with force and arms, at the Ward, City and County aforesaid, a certain building there situate, to wit: the *Store* of one

*Peter A. Miller.*

feloniously and burglariously did break into and enter, with intent to commit some crime therein, to wit: with intent, the goods, chattels and personal property of the said

*Peter A. Miller.*

in the said *Store* then and there being, then and there feloniously and burglariously to steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.



0318

SECOND COUNT—

AND THE GRAND JURY AFORESAID, by this indictment further accuse the said

James J. Wadsworth  
of the CRIME OF ~~Grand~~ LARCENY in the second degree, committed as follows:

The said James J. Wadsworth.

late of the Ward, City and County aforesaid, afterwards, to wit: on the day and in the year aforesaid,  
at the Ward, City and County aforesaid, in the ~~night~~ time of the said day, with force and arms,

eighty knives of the value of twenty  
five cents each, twenty five pairs of  
plains buttons of the value of fifty  
cents each pair, a quantity of soap,  
as a number and description to the  
Grand Jury aforesaid unknown,  
of the value of twenty five dollars,  
and divers other goods, chattels and  
property, as a kind and description  
to the Grand Jury aforesaid unknown,  
of the value of twenty five dollars,

of the goods, chattels and personal property of one Peter A. Muller.

in the Store of the said. Peter A. Muller.

there situate, then and there being found, in the Store aforesaid, then and there  
'feloniously did steal, take and carry away, against the form of the statute in such case made and  
provided, and against the peace of the People of the State of New York and their dignity.

John R. Kellows  
Attorney