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Consel to the Board of Parole
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VIA EMAIL

Dear Chairwoman Stanford,

Please accept this comment on the new proposed parole regulations. I am an attorney in private practice in New York State. I was a Deputy Capital Defender with the New York State Capital Defender Office and a Staff Attorney at the Center for Capital Litigation in Columbia, South Carolina. In addition to litigating postconviction and appellate capital cases, I have served as a Visiting Fellow and Scholar with the Cornell Death Penalty Project and as an Adjunct Professor of Law and Director and Founder of the Wrongful Convictions Clinic at Cornell Law School. Most recently, I was one of two attorneys that represented New York juvenile life-sentenced prisoner Dempsey Hawkins before the Appellate Division, Third Department. The Appellate Division decision in that case, *Matter of Hawkins v. New York State Dept. of Corr. & Community Supervision*, 140 A.D.3d 34 (3d Dept. 2016), recognized that juveniles are different from adults for purposes of sentencing (*Miller v. Alabama*, 132 S. Ct. 2455, and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)) and are entitled under the Constitution to a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" *Graham v. Florida*, 560 U.S. 48, 75 (2010). The Appellate Division in *Hawkins* further held that the constitutional mandate of *Miller* and *Montgomery* applied with equal force to parole proceedings for a juvenile life sentenced prisoners.

I have coauthored a letter with Issa Kohler-Hausmann and Avery Gilbert commenting on the proposed amendments to sections 8002.1, 8002.2, and 8002.3 of Title 9 NYCRR. That letter has been submitted under separate cover. I write separately here to emphasize and elaborate upon the comments provided there concerning the first sentence of section 8002.2(c)(2) of the proposed amended regulations.

Section 8002.2 pertains to "Parole release decision-making: factors to be considered." As noted in the coauthored letter, the title of the section is problematic insofar it suggests that youth,

addressed in paragraph (c), is simply another factor to be considered alongside those the regulations have previously required, which are now enumerated in paragraph (b). If the provision were interpreted and applied as such, it would violate the Eighth Amendment per *Miller*. The reasons why this is so are set out in the coauthored letter.

Section 8002.2, paragraph (c) applies to parole "considerations" for life-sentenced prisoners whose crimes were committed before they were 18 years of age (referred to as "minor offenders" in the proposed rule). Paragraph (c)(1) seeks to bring parole board decision making in line with *Miller* and *Montgomery*, requiring the Board consider the diminished culpability of youth and growth and maturity since the time of the commitment offense. Paragraph (c)(2) adds the following:

> Evidence that the hallmark features of youth were causative of, or contributing factors to, a minor offender's commitment offense, should not, in itself, demonstrate a lack of insight or minimization of the minor offender's role in the commitment offense.

As noted in the coauthored letter, this language in paragraph (c)(2) is confusing. My understanding is that the language was intended to instruct the Board that youth must not be used in any way as an aggravating factor, and to emphasize in particular that a person seeking to vindicate the constitutional rights set out in *Miller* must not be seen as evading responsibility for the offense. Unfortunately, however, many people read the proposed language otherwise, interpreting it to say that the hallmark features of youth may *not* override the circumstances of the crime or be found to diminish the juvenile offender's responsibility for the offense. Interpreted as such, paragraph (c)(2) could actually result in the Board treating the hallmark features of youth as aggravating factors in its interviewing or decision-making processes. This is precisely the opposite of what I believe was intended, and it would plainly contravene *Miller*, *Montgomery*, and other relevant Eighth Amendment cases (*Graham v. Florida*, 560 U.S. 48 (2010)).

For this reason, the current language in the first sentence of 8002.2(c)(2) should be replaced. The letter I coauthored with Issa Kohler-Hausmann and Avery Gilberg recommends replacement language.

Respectfully submitted,

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