Mr. Kevin R. Mays
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October 23rd, 2016

Attention.:
HON. KATHLEEN KILEY
Counsel to the Board of Parole
New York State Department of Corrections
& Community Supervision
1220 Washington Avenue - Building # 2
Harriman Office Campus
Albany, New York 12226-2050

Re: PUBLIC COMMENT ON PROPOSED RULE MAKING

Dear Mrs. Kiley:

I am one amongst thousands of New York State Offender(s) who will be subject to the propensity of arbitrary denial of Discretionary Parole release based solely upon the seriousness of the offense and/or prior criminal history, after the enactment of Chapter 62 of the Laws of 2011, which repealed Section 259-i(1) of N.Y. Executive Law and changed the provisions of Section 259-i(2)(c) which was enacted under Chapter 904 of the Laws of 1977.

I object to the September 28, 2016 proposed rule making published in the N.Y.S. Register regarding "Parole Board Decision Making" on the ground that <retroactive application> will result in a longer period of incarceration than under the eariler rule, in violation of the **Ex Post Facto Clause of Article I, Section § 10 of the United States Constitution.** The proposed change in 9 NYCRR § 8002.2 violates the Ex Post Facto Clause, because it creates a "sufficient" or substantial risk that the class of New York State Offender(s) serving Indeterminate sentences whose **minimum period of imprisonment ("MPI")** has been fixed by a Court will serve longer sentences as a result of this change.

Section § 8002.2(b)(7),(8) provides for the Board of Parole to consider as factors in making a release determination the **"seriousness of the Offense and [p]rior Criminal record."** These factors are derived from the **<original>** legislative intent, and are used when the Parole Board determines the ("MPI") that was "n[o]t fixed by the Court."

The **original** legislative intent was enacted under Chapter 904 of the Laws of 1977 to enable the fixing of minimum sentences which take into account the gravity of the offense, and the offender's past criminal history, among [o]ther factors. See, **Governor Hugh L. Carey's August 11, 1977 Memorandum** ("it permits a reasonable

expectation of Parole when a minimum sentence, fixed in accordance with the guidelines, has been served, provided the offender fulfills the requirements of the Statute.")

However, on July 1, 1980 Governor Carey rejected his previous logic and approved Senate Bill 8527-A for the purpose of returning sentencing responsibility back to the Courts, and to require the Courts to fully perform that function, and to eliminate an irrational waste of taxpayers money as well as criminal justice resources. Governor Carey stated in his Memorandum that "the Board is performing a role which could be performed by the Sentencing Court. In view of the fact that the Court has primary responsibility for sentencing, it is n[o]t appropriate to require the ("Board") to fix the minimum sentence."

Senator Christopher J. Mega stated in his Memorandum in Support of Bill 8527-A that "there is nothing on which the Board's decision can be based which was n[o]t before the Court at the time sentence was imposed (at least all of these factors should have been before the Court), and most of these factors consist of matters the Court is better able to ascertain and evaluate (e.g. seriousness of the offense, mitigating and aggravating factors, et cetera.")

Despite the Parole Board's loss of the responsibility for setting minimum sentences, the guidelines were <never> changed to reflect this shift in mission. The parole Board continues to act as if it is still responsible for sentencing decisions by re-examining the underlying crime and criminal history for purpose of increasing punishment.

However, prior to the enactment of Chapter 62 of the Laws of 2011, Offender(s) of the State of New York had a reasonable expectation of being released on parole, provided they fulfilled the criteria set forth in Executive Law § 259-i(2)(c)(A) which did n[o]t include the seriousness of the offense and [p]rior criminal history. In fact, Section § 259-i(2)(c)(A) "only" authorized the Board to consider the <seriousness of the offense and [p]rior criminal history> in making the parole release decision for persons whose ("MPI") was n[o]t fixed by the Parole Board or a Court pursuant to the Laws of 1977 [Executive Law § 259-i(1)(a)].

In order to grasp the true intention of the Legislature enacting Chapter 62 of the Laws of 2011, and to give it force and meaning, the language of Section § 259-i(2)(c)(A) must be read with consideration of its origin, professed objects, and the necessity thereof along with the circumstances which occasioned it. Chapter 62 of the Laws of 2011 amended Executive Law § 259-c(4) to remove the reference to the establishment of written guidelines (i.e., the seriousness of the offense and [p]rior criminal history) for its use in "fixing of minimum periods of imprisonment" and to substitute Risk Assessment procedures for those outdated guidelines.

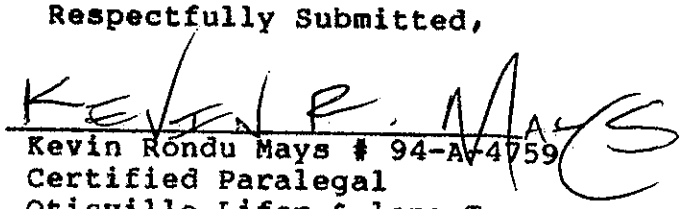
Emphatically, the Legislative act of <removing> those outdated guidelines, does n[o]t harmonize with Section § 259-i(2)(c)(A) which

authorizes the ("Board") to use the seriousness of the offense and [p]rior criminal history as factors to impermissibly increase the **term of imprisonment** for Offender(s) who experienced a change of circumstances, rendering them suitable for parole release [a]fter serving their ("MPI") fixed by a Court.

Indeed, the 2011 Amendment has the effect of repealing by implication those provisions of the original act of **Chapter 904 of the Laws of 1977** that cannot be reconciled with it, particularly where the enactment of the Laws of 2011, deals specifically with the matter in issue - **Ex Post Facto Clause** - aimed at laws that retroactively increase punishment for a crime [a]fter its commission. Moreover, it is well settled law that "an impermissible increase in the punishment for a crime may result n[o]t only from Statute(s) that govern initial sentencing, but also when it creates a **"sufficient," or substantial risk that the class affected by the change in Parole Policy, will serve longer sentences as a result.** See, California Dept. of Corrections v. Morales, 514 U.S. 499, 509, 115 S.Ct. 1597 (1995).

Questionable, is the Legislative intent which is the primary consideration in the construction of the 2011 Amendment of **Executive Law §§ 259-c(4) and 259-i(2)(c)(A).** The proposed rule-making should n[o]t include the **"Seriousness of the Offense and [p]rior Criminal History"** as factor(s) to be considered by the Parole ("Board") in making a parole release determination.

Respectfully Submitted,



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