November 11, 2016

Sent Via E-Mail: rules@doccs.ny.gov and JKoury@NYSenate.gov

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John Koury, Director, ARRC
State Capitol
State St. and Washington Ave
Albany, New York 12224

Re: Public Comment, Notice of Proposed Rule Making, I.D. No. CCS-39-16-00004-P,
9 NYCRR, Sections 8002.1 to 8002.3

Dear Ms. Kiley, as well as Chairwoman Stanford and Members of the Board of Parole,

Please accept this public comment submitted pursuant to the State Administrative Procedure Act, in response to the Notice of Proposed Rule Making as published in the New York State Register on September 28, 2016.

I am writing to urge the Parole Board to further modify its regulations in a manner to more strongly direct the Board to base its decisions on evidence-based criteria and release people who have demonstrated low risk *or* rehabilitation and readiness for release. The Parole Board has historically denied, and continues to deny, release to far too many people in an arbitrary and inconsistent manner, often basing decisions on people's crime of conviction or past criminal history, rather than assessing people's low risk to society, rehabilitative efforts, many accomplishments, or personal growth or transformation. Rather than continuing to allow Board members to deny release primarily because of the nature of an applicants' crime of conviction or other static factors than can never change, Board decisions must be based on assessing the person currently in front of them today, and the regulations must fully reflect that approach.

The 2011 amendments to the Executive Law make clear that the Board must base its decisions on each individual's risk and rehabilitation. According to amended Executive Law § 259-c(4):

> "The Parole Board shall . . . establish written procedures for its use in making parole decisions. Such written procedures ***shall*** incorporate ***risk and needs principles*** to measure the ***rehabilitation*** of persons appearing before the board, the ***likelihood of success of such persons upon release***, and assist members of the state board of parole in determining which [incarcerated persons] may be released to parole supervision." (emphasis added).

Further, amended Correction Law § 71-A requires that:

> "the department shall develop a transitional accountability plan. Such plan shall be a comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the [incarcerated person]. ***The purpose of such plan shall be to promote the rehabilitation*** of the [incarcerated person] and their successful and productive reentry and reintegration into society upon release." (emphasis added).

The Board's regulations must reflect this strong directive in the law to base parole decisions on applicants' risk and rehabilitation. In looking at the current proposed rule changes, as an initial matter the use of a risk and needs assessment and evaluation of youthfulness must more clearly be delineated as "requirements", "mandatory determinant principles", or "methodologies" rather than "factors" in order to ensure that these provisions serve as the predominant overarching basis for Board decisions. Furthermore, similar to the provisions related to risk assessments scores, the regulations should include an additional mandatory or predominant requirement related to applicants' program accomplishments, rehabilitation, and preparedness for release. In other words, as required under the Executive Law amendments, a person's rehabilitation – like a person's risk assessment score – should be a predominant determinant for Board decision-making.

Moreover, for both the amendment related to risk assessments and this proposed additional mandatory requirement related to rehabilitation, there should be a presumption of release for applicants who have a low risk score or who have successfully achieved program accomplishments or otherwise demonstrated rehabilitation or readiness for release. In turn that would mean that an applicant who has a low risk score, *or* who has successfully demonstrated rehabilitation or readiness for release, shall be granted parole *unless* exceptional circumstances exist as to warrant a denial. The Board should be required to provide, in writing, substantial and compelling reasons why such exceptional circumstances warrant an override of a low risk score or program achievements/demonstrated rehabilitation. An applicant's crime of conviction or past criminal history, in and of themselves, shall not constitute the requisite exceptional circumstances, and shall not form the predominant basis for release denial. Further, a high risk assessment score or a lack of program achievements should not create a presumption of further incarceration. If an applicant presents with a high score or a lack of programs, the Board must still consider each enumerated factor from the Executive Law in their determination.

In addition, the amended rules should make clear that the Board should not be permitted to consider any factor or consideration twice. Because several of the eight factors currently listed in Section 8002.2(b) that come from the Executive Law are already taken into consideration through the risk assessment instrument – including the seriousness of the instant offense and prior criminal record – these factors should no longer be enumerated separately as separate factors to be considered in the Board's regulations and the Board should no longer consider them

in a manner separate from the risk assessment score, where they have already been taken into account.

Ultimately, justifications for any parole denials must be factually individualized (as positively required by the proposed rule), and also must be comprehensive and exhaustive and the amended regulations should include that language as well. In the same vein, the amended regulations should require the Board to inform any applicants denied parole of the specific steps that s/he can take to be released at future Board appearances, and require that applicants who successfully carry out those specific steps shall be granted release at the next parole appearance following completion.

As an additional change, the Board should adopt an amendment that requires the Board to review people who are elderly and have already served long prison sentences. Specifically, the amended regulations should require that any person who is aged 50 or older and has served at least 15 consecutive years of imprisonment should have their case reviewed by the Parole Board to assess the person's suitability for reduced security classification as well as recommended release on parole through the clemency process.

All of the above proposed additional changes to the Board's regulations are urgent and necessary. The tremendously negative impact of the Board's continued practice of repeated denials is manifold and affects all New Yorkers. For the individuals themselves who are repeatedly denied parole and have to serve additional years and decades in prison, each parole denial can be devastating, denying people not only their freedom but also often hope as well as faith in the rule of law and the society in which they are a part. For families of people incarcerated, the communities to which they would return if they were released, and all of us New Yorkers, repeated denials strip us of invaluable people who could make incredible contributions on the outside if given the opportunity. The horrific tragedy of John Mackenzie exemplifies the tremendous loss for a parole applicant and our communities of the failures of the Parole Board. John – who offered so much to people while incarcerated – could have done even more for his family, outside community, and New York State had he been released. Instead, the Board's repeated denials – in the face of all evidence demonstrating he should be released and in the face of a New York Supreme Court decision holding the Board in contempt for not properly assessing John's case – led to the tragic loss of John's life. Unfortunately, although John Mackenzie was an amazing individual and of course unique in his own way, his circumstances were far from unique and there are thousands of other people like John who continue to be denied parole and languish in prison in New York even though they pose no risk to society, have accomplished amazing feats while incarcerated, and have clearly demonstrated their readiness for release.

In addition to the devastating impacts on people, families, communities, and all New Yorkers of each person denied parole, the widespread parole denials further an extreme paradigm of punishment and continue to perpetuate mass incarceration in New York State at a tremendous human and financial cost without a benefit to public safety. New York State has one of the highest percentages of people incarcerated who have life on the back of their sentences, with over 9,500 people representing over 18% of all people in New York's prisons. In a related

manner, while the total prison population in New York has decreased by 26% since 2000, the number of people aged 50 or older has almost doubled (increased by 100%). People who are elderly and people who have served long sentences and have been convicted of the most serious crimes have been repeatedly demonstrated to have the lowest rates of new convictions upon release. Yet, the Board keeps denying people release based on the nature of their original crime regardless of their low risk, tremendous accomplishments and growth, and demonstrated readiness for release, continuing to perpetuate the mass incarceration of aging and other people.

The parole and incarceration systems in New York are in crisis. Through the current rulemaking process, the Parole Board has an important opportunity to address this crisis by at a minimum modifying the Board's regulations with the above changes and other changes numerous people have proposed in their submitted comments. These changes, if adopted and implemented fairly and properly, would help ensure that the Board carries out its proper function, fulfills the very purpose of parole, and adopts the requirements of the 2011 changes to the Executive Law, namely to evaluate each person appearing before the Board based on their current risk and rehabilitation, and release all people who have demonstrated their readiness for return to the outside community. Thank you very much for your consideration.

Sincerely,

Scott Paltrowitz