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October 23, 2016

Kathleen M. Kiley
Counsel to the Board of Parole
Dept. of Corrections & Community Supv.
1220 Washington Avenue, Bldg. 2
Albany, New York 12226

Re: PUBLIC COMMENT ON PROPOSED RULE MAKING

Dear Ms. Kiley:

I am one among thousands of New York State Prisoners who have been denied parole release ("twice") 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seriousness of the offense and/or prior criminal history, after the enactment of Chapter 62 of the Laws of 2011, which repealed Section 259-i(1) of N.Y. Executive Law and changed the provisions of Section 259-i(2)(c) enacted under Chapter 904 of the Laws of 1977.

I object to the September 28, 2016 proposed rule making published in the NYS Register regarding "Parole Board Decision Making" on the ground that its retroactive application will result in a longer period of incarceration than under the earlier rule, in violation of the **Ex Post Facto Clause** of Article I, Section 10 of the United States Constitution. A 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 Prisoners serving indeterminate sentences whose minimum period of imprisonment ("MPI") has been fixed by a court, will serve longer sentences as a result of the 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 prior criminal record. These factors are derived from the original legislative intent, and are used when the Parole Board determines the MPI that was "not fixed by a 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 other factors. **See** Governor Hugh L. Carey's August 11, 1977 Memorandum ("it permits a reasonably expectation of parole when a minimum sentence, fixed in accordance with the guidelines, has been served, provided the inmate fulfills the

requirements of 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 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 of 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 not inappropriate to require it 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 not 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, etc.)."

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 continue 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, Prisoners 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 not include the seriousness of the offense and prior criminal history. In fact, section 259-i(2)(c)(A) "only" authorized the Board to consider the seriousness of the offense and prior criminal history in making the parole release decision for persons whose MPI was not fixed by the parole board or a Court pursuant to the Laws of 1977 [Executive Law § 259-i(1)(a)].

To gather the true intention of 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 and professed objects, the necessity therefor, and 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 prior criminal history) for its use in "fixing of minimum periods of imprisonment" and to substitute risk assessment procedures for those outdated guidelines.

The legislative act of removing those outdated guidelines, does not harmonize with Section 259-i(2)(c)(A) which authorizes the Board to use the seriousness of the offense and prior criminal history as factors to impermissibly increase the term of imprisonment for prisoners who experienced change of circumstances rendering them

suitable for parole release after 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 criminal act. An impermissible increase in the punishment for a crime may result not only from statutes that govern initial sentencing, but also from statutes that govern parole or early release. **See California Dept. of Corrections v. Morales**, 514 U.S. 499, 518 (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 not include the seriousness of the offense and prior criminal history as factors to be considered by the Parole Board in making a parole release determination.

Respectfully submitted,

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Certified Paralegal

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