Dear Sir or Madam:

I am strongly opposed to the New York State ("NYS") Parole Board's proposed changes to rules 9 NYC=R §8002.2 and 9 NYCRR §8002.3 (the "Proposed New Rules"). The proposed changes to 9 NYCRR §8002.2 would make the rule less clear and misleading. The proposed changes to 9 NYCRR $8002.3 are in conflict with and certainly do not satisfy the requirements of existing law, including New York Executive Law §259(c)-4 and New York Correction• Law §71-a (hereinafter, the "2011 Amendments").

9 NYCRR §8002.2

The changes to 9 NYCRR §8002.2 would remove the reference to a minimum term of an indeterminate sentence being fixed by either the court or the Board of Parole, replacing that concept with language indicating that the minimum period of imprisonment or parole eligibility date is "as fixed by the Department of Corrections and Community Supervision."

The proposed new language is misleading at best and at worst appears to be an attempt by the Parole Board to usurp judicial powers from NYS sentencing courts. The "minimum term" of an indeterminate sentence is always, in point of fact, set exclusively by the sentencing court. The "minimum term of imprisonment" or "parole eligibility date" to use the proposed language, is first set by the sentencing court. Then the Department of Corrections and Community Supervision (the "DOCCS") calculates a merit or, in some cases, shock release date, if an inmate is eligible, all of which is based on the minimum sentence imposed by the sentencing court. In the case of merit and shock release dates, therefore, the minimum term of imprisonment is set by the courts AND the Parole Board. In cases where there are no merit release dates or where inmates are not merit or shock eligible, the minimum term of imprisonment or parole eligibility date is set exclusively by sentencing courts.

The new language suggests that the NYS courts have no role in setting a minimum term. This is problematic on the face of it because the Parole Board may not take away from the courts their judicial powers. It is, for example, well established that it is unlawful for the Board to re-sentence prisoners.

One might rightly assert in response that the proposed changes will not change the reality, especially of well-established law. However, the Board should also not create rules that create unnecessary ambiguities or APPEAR to take away or usurp judicial power.

The current language is clearer and more accurate. Therefore, I am opposed to the proposed changes to 9 NYCRR §8002.2. The rule as currently drafted doesn't require fixing and is less likely to lead to additional challenges and conflict in the courts.

9 NYCRR §8002.3

The proposed changes to 9 NYCRR §8002.3 are more egregiously problematic than those discussed above. It appears that the changes may be the Board's disingenuous or failed attempt to comply with the requirements of the 2011 Amendments, and specifically the requirements of NY Executive Law 259(c)-4. The proposed changes appear more likely to be a disingenuous attempt because they are so clearly in conflict with it and most definitely insufficient to meet the requirements of the 2011 Amendments. A discussion of the purpose and language of the 2011 Amendments make it obvious just how far afield the Board is going with the proposed changes to 9 NYCRR §8002.3.

Purpose of the 2011 Amendments

The 2011 Amendments were written to change the parole decision-making process dramatically by requiring a more modern, evidence-based approach to analyzing individual parole applicants.

Taken together, the 2011 Amendments require that the Board write new procedures incorporating risk and needs analysis instruments , and then use such instruments and procedures to determine the risk levels and rehabilitation of applicants as well as the likelihood of success of such persons upon release (See Executive Law §259 (c)-4).

The 201 1 Amendments were meant to shift the analysis of parole applicants to an analysis of them as individuals based on hard data and scientifically derived factors. The shift to this present and future-focused analysis was meant to move the Board away from its seemingly intractable typically static, past-focused decision-making, which in most cases focused almost exclusively on the crime that parole applicants were convicted of in the first place years before the parole decision was made. The old static, past and crime focused system of the pre-201 1 Amendments (the 11 Old System") is what led to the problems that created the impetus for the passage of the 201 1 Amendments. But instead of shifting to a more modern, rational decision-making process, the proposed changes to 9 NYCR R §8002.3 (the "proposed New Factors") would cause or allow the Board to continue to make decisions exactly as it had preceding the passage of the 201 1 Amendments pursuant to the Old System.

Proposed New Factors -- Inconsistent with Purpose & Do Not Satisfy Requirements of Amendments

The Proposed New Factors do not fulfill the requirements of the 2011 Amendments. NY Executive Law §259(c)-4 requires the Board to establish new written procedures to be used by the Board in making parole release decisions utilizing risk and needs analysis and other dynamic individualized considerations. The Proposed New Factors, however, make TAP and COMPAS optional considerations and simply add them to a number of Old System factors for potential consideration.

Nothing in the 2011 Amendments indicate that its requirements are optional, or that the risk and needs analysis/instruments are optional considerations. If the legislature meant for the procedures and analysis to be optional, it would have simply written the law that way , using the word "optional" or words "at the Board's sole discretion" or language with similar connotations. Instead Executive Law §259(c)-4 requires that the new procedures be "used" and "assist" the board in its decision-making process.

If the legislature meant that the new procedures were to be optional considerations and drafted the law that way, then the case law finding that the Board has been holding unlawful hearings (without any procedures using risk and needs analysis) over the last two plus years would not exist. In fact the lack of use of such non-optional new procedures has been found to be unlawful and to require re-hearings in cases like Morris v. New York Department of Corrections and Community Supervision, Thaites v. New York State Board of Parole, and Zarro v. New York State Department of Corrections and Community Supervision, affr'd by the Third Dept., among others. To put in simpler terms, the Proposed New Factors represent an attempt to do something inconsistent with

The 2011 Amendments did not intend that the new procedures would simply be tacked as two new factors onto the existing list found in §259-i (c) (A) (the "Statutory Factors"). If the new procedures were meant to be factors simply tacked on to the old Statutory Factors , the legislature would have simply amended the law inserting the new factors it wanted to be considered into Executive La w §259-i (c)(A) . Also, why would the legislature draft language requiring the establishment of new procedures if the Old System's procedures, and specifically §259-i (c) (A) were already sufficient? The reason the 2011 Amendments called for the establishment (thus creation of new) procedures is because it wanted the Boar d to create new procedures that incorporated the dynamic risk and needs and other principles set forth in Executive Law §259 (c)-4 to be considered separate and apart from the existing old Statutory Factors. This of course does not mean that the Statutory Factors will not be considered; if that was the legislature's intent §259-i(c)(A) would have been completely revised or repealed in 2011.

The requirements of the 201 1 Amendments indicate that the new procedures (presumably utilizing TAP (Correction Law 71-a) and COMPAS) would be used during every parole release decision-making process in parallel, alongside yet apart from the existing Old System Statutory Factors. This structure would best implement the 2011 Amendments purpose and language; it would do the best job of complying with the law and working to put it into effect in a w ay that accurately represents the legislative design and will of the people.

Delay by Board

For over two years (Since October 201 1) the Parole Board has chosen not to com ply with the law. The Board has continued to ignore the requirements of the 2011 Amendments and continues to render its decisions without the use of new procedures it was required to establish back in 2011. It is unbelievable that after two plus years, the Board's first attempt at complying with law not only fails to do so but moves in the opposite direction, attempting to make the 2011 Amendments merely factors for consideration under the Old System and optional ones at that. The Board's Proposed New Factors in fact appear to be a disingenuous attempt by the Board to comply with existing law.

The Board's Proposed New Rules are meant to fit into the Board's scheme or vision and are meant to accomplish the Board's goals, not what the NYS legislators designed to put into effect with the 2011 Amendments. And doing what it wants, and disregarding the requirements of the 2011 Amendments in the process, the Board is attempting to usurp legislative powers by changing the rules in a way that controverts law.

COMPAS and TAP and new procedures separate and apart from existing procedures must first be drafted , then be used together with , and incorporate , the concepts written into the 2011 Amendments. The Board should make a good faith effort to achieve the goals of the current law. If the Proposed New Rules are implemented, there will continue to be litigation and challenges to Parole Board decision-making processes as well as numerous other consequences.

Effects of Non-Compliance; Potential Benefits of Compliance

The New Proposed Rules are in conflict and otherwise insufficient to be in compliance with the 2011 Amendments. Thus the Board will continue to hold unlawful hearings and the Article 78 proceedings challenging such unlawful hearings will continue to burden the NYS Attorney General's office and NYS taxpayers.

The Board's job is not to re-sentence prisoners based on the serious nature of a crime. The 2011 Amendments were meant to focus the Board on the individuals coming before it their risk to the community and rehabilitation, among other things. A natural result would be an increase in releases for those who are low risk. In effect, unlawful re-sentencing would be less common because the 2011 Amendments would lead the board to base its decisions on rational factors for determining risk and needs. As the Proposed New Rules do nothing to guarantee a shift to a more rational decision-making process, the most likely result is the status quo, resulting in thousands of men and women being denied release even though the meet the statutory requirements. The resulting litigation and cost of warehousing such low-risk inmates will continue to be high or increase. The Board won't bear the expensive burden, but the NYS taxpayers will--in many cases unwittingly.

If the Board drafted rules that complied with the 2011 Amendments and followed those rules, it would go a long way towards modernizing the parole decision- making process in New York State by placing the focus primarily on who the person appearing before the Board is today and whether that person can succeed in the community after release. The Board, however, seems intent on continuing to focus on the past and on who the person was years earlier when he or she committed the crime that led to incarceration. More commonly, the Board doesn't even consider the individual at all and zeroes in on the serious nature of the crime itself, to the exclusion of all else.

If the Board complied with the 2011 Amendments, it would release more than 20% of all parole applicants. As crime decreased along with NYS prison populations the percentage of first time parole applicants denied release increased from 43.5% in 2003 to 73.4% in 2012. If the numbers went back to what they were in 2003, it would save NYS HUNDREDS of millions of dollars each year. Over time if the Board released those who the law suggests it should, the total release percentage would likely increase to around 50%. If the current percentage of total releases (less than 20% of total parole applicants) was increased to about 50%, NYS would save $240 Million a year and more than $1.2 Billion in just five years. As the public becomes more aware of just how far NYS lags behind and as the taxpayers are informed of the increased wastefulness of the anachronistic NYS DOCCS and Parole Board system, there will be greater support for more progressive parole reform. Effective lawful implementation of the 2011 Amendments would be a good first step towards a more rational, progressive and less wasteful system, and a way to show the public that the Board listens to their concerns as well.

Conclusions; Politics

What is the motivation behind the Board's attempt to bypass the requirements of the 2011 Amendments after two plus years of disregarding legislative intent and the will of increasingly progressive and cost-conscious NYS taxpayers (as codified in

The Proposed New Rules, unfortunately, indicate more of the same from a Board that, unbelievably, despite attestations to the contrary, is in bed with both the DOCCS - despite the strong potential for conflicts of interest - (under whose umbrella the Parole Board sits), and special interest political groups. Like the DOCCS, the Board appears to be a typical self-perpetuating bureaucracy - with rule's and efforts directed at self-perpetuating goals.

As crime has decreased dramatically over the last twenty years, one way to keep the DDCCS and the Parole Board in business is by lengthening sentences - for all crimes where special interest groups exert real political power. However , where that is not politically tenable--where special interest groups pushing for punitive revenge (via longer non-rehabilitative sentences) don't have enough strength--the best alternative at extending sentences legally, is to have the board extend sentences ILLEGALLY by denying parole to an excessively high percentage of inmates who come before them. If crime goes down and sentences remained flat or only increase based on changes in law and judicial decisions, tens of thousands fewer men and women would be in prison. Overall, there has been a significant decrease in the prison population in NYS over the last decade and beyond. However, the Board has done its best to stem the tide by denying parole to upwards of 80% (and increasing) in recent years.

The Board denies upwards of 80% generally using the same conclusory language in their denials. Most of the time the board denies based on the serious nature of the crime or based on the ambiguous conclusion (without explanation) that a release would be incompatible with the welfare of society. In many cases, the Board concludes these things even when analysis by the DOCCS suggests just the opposite. And in several recent cases where the Board was found to have conducted unlawful hearings, the judges amended their decisions to point out that the Board had gone further and withheld evidence, specifically refusing for some time to release reports indicating that prisoners denied release were low-risk and whose release was supported by all available evidence (other than the crime that such prisoners were originally convicted of years earlier).

When the Board concludes that a crime was too serious to warrant release with little or nothing else, it is an illegal re-sentencing. And when it concludes that prisoners are a danger to society while DOCCS analyses show that the prisoner is not a danger, the Board is disregarding the 2011 Amendments. In many cases, however, prisoners do not have the resources or legal training or access to information necessary to mount a legal fight to have unlawful hearings "reversed" (and new hearings scheduled in accordance with court orders). Just because the Board knows that in the super-majority of cases it may get away with various illegalities and nefarious political maneuvers doesn't mean that it should.

Since 2011 the Board has been aware of the legislature's desire (as codified in the 2011 Amendments) that release decisions should be based on the more modern, individual, present and future-focused analysis. Yet the Board has continued to illegally re-sentence and extend sentences. This is not because crimes are 30-40% more serious or because prisoners are 30-40% more dangerous than a decade ago.

The changes reflect the politics of the Parole Board as discussed above. This conclusion is not only supported by the Parole Board's disregard of the 2011 Amendments and lack of real explanations for their conclusion filled denial explanations. It is also the reality according to many former Parole Board Commissioners and Chairs. The Board is more beholden than ever to special interest groups and the fear of raising the ire of such groups with the granting of parole. No matter whom the person appearing before the Board is, no matter how rehabilitated or low risk, if the Board doesn't like a prisoner's crime, parole will be denied. In other words, all that remains is the status quo that preceded the 2011 Amendments. Yet it was the status quo and the old way of doing things that motivated the legislature to pass the 2011 Amendments.

One of the Board's public justifications of its continuing policy of extending sentences is that it reduces recidivism. However, most studies show no impact on recidivism and many actually show that longer sentences increase recidivism. (See Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment, by Valerie Wright, PhD (The Sentencing Project, Nov. 2010.

These studies underlie the national trend to be more rational and cost-conscious about the decisions to lock people up for long periods of time and to extend sentences. The Proposed New Rules appear to be the Board's last ditch effort to avoid moving towards a more progressive cost-conscious system, a move that would be consistent with the national trend and a move that, again, was partly what the NYS legislators had in mind with the 2011 Amendments.

I strongly oppose the Proposed New Rules and humbly request that the Parole Board respond to my concerns as set forth above.

If the above seems cynical it is only based on the publicly available information that I have at my disposal on short notice. By proposing the new rules just before the end of the year during holiday season the Board of course did a disservice to the public. The timing decreases transparency at a time when there are already demands for greater transparency.

It is my sincere hope that a longer and more open public discourse will take place but because of my cynicism about the current Parole system in NYS, I am not counting on it.

Thank you for your time and attention.

Sincerely,

Jenelle R. Guarnieri
(This is considered to be my legal signature)