



NEW YORK
CITY BAR

**REPORT ON LEGISLATION BY THE CRIMINAL JUSTICE OPERATIONS
COMMITTEE AND THE MASS INCARCERATION TASK FORCE**

**A.153
S.938**

**M. of A. Cruz
Sen. Bailey**

AN ACT to amend the criminal procedure law, in relation to removing impediments to appellate review of the fairness, uniformity, and transparency of criminal sentences.

THIS BILL IS APPROVED

The New York City Bar Association (“City Bar”) supports passage of the above-referenced bill, which would allow appellate courts throughout the state to ensure that sentences are imposed equitably and fairly by allowing those courts to review and reduce sentences notwithstanding a defendant’s waiver of the right to appeal.

I. BACKGROUND

Mass incarceration continues to have a devastating impact on our society.¹ Its effects disproportionately fall on people of color.² Racial biases result in worse outcomes for people of color across the criminal justice system. In particular, people of color receive worse plea deals and

¹ See *Mass Incarceration: Where Do We Go From Here?*, New York City Bar Association, Jan. 2017, http://documents.nycbar.org/files/mass_incarceration_where_do_we_go_from_here.pdf; *Mass Incarceration: Seizing the Moment for Reform*, New York City Bar Association, Sept. 2015, https://www2.nycbar.org/pdf/report/uploads/Mass_Incarceration_Seizing_the_Moment_for_Reform-20150928.pdf (all websites last visited April 19, 2023).

² Elizabeth Hinton, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice, May 2018, <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> (“Present day disparities show that the burden of the tough on crime and mass incarceration eras has not fallen equally on all Americans, but has excessively and unfairly burdened black people.”); Shasta N. Inman, *Racial Disparities in Criminal Justice: How Lawyers Can Help*, American Bar Association, https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/public-service/racial-disparities-criminal-justice-how-lawyers-can-help/.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

harsher sentences as compared to similarly situated white people.³ Perhaps the most obvious way to reduce mass incarceration is to ensure that criminal sentences are not excessively long.⁴

Appellate courts in New York have a unique and powerful tool to fight mass incarceration and ensure they are not plagued by racial inequalities—they can review sentences and reduce them “in the interest of justice.”⁵

The Appellate Division’s power to review sentences is deeply ingrained in New York Law. Originally the Appellate Division reviewed sentences pursuant to its inherent authority.⁶ The Legislature codified that authority in C.P.L. section 470.15(2)(c). The power to review sentences is extremely broad. It allows the Appellate Division to reduce any sentence the court determines to be “unduly harsh or severe,”⁷ even absent a finding of legal error or abuse of discretion on the part of the sentencing court.⁸ The intermediate appellate court can lower sentences that were imposed following trials or guilty pleas.⁹

This sentence review power allows the Appellate Division to ensure that mitigating factors in an individual criminal case are adequately taken into account.¹⁰ It allows the Appellate Court to leverage its position in reviewing a broad swath of cases to fight mass incarceration and ensure that sentences are imposed equitably.¹¹

But the Legislature’s attempt to grant broad authority to intermediate appellate courts to review sentences has been curtailed by the widespread adoption of appeal waivers. If the defendant waives his right to appeal as a condition of his plea, an intermediate appellate court will not review his or her claim that the sentence is excessive.¹² The Legislature has never sanctioned the use of waivers of the right to appeal—they are not mentioned in either the Criminal Procedure Law or the Penal Law. But their use is widespread throughout New York’s criminal system, and

³ Hinton, *supra* n.2 at 7.

⁴ See James Austin, Laren-Brooke Eisen, *et al.*, *How Many Americans are Unnecessarily Incarcerated*, Brennan Center for Justice 42 (recommending that lawmakers reduce sentence maximums and minimums to combat mass incarceration).

⁵ C.P.L. § 470.15(2)(c).

⁶ *People v. Thompson*, 60 N.Y.2d 513 (1983).

⁷ C.P.L. § 570.15(2)(c).

⁸ *People v. Delgado*, 80 N.Y.2d 781, 783 (1992).

⁹ *Thompson*, 60 N.Y.2d at 520. The Court’s power to modify sentences is so extensive that the prosecution need not be afforded the opportunity to withdraw its consent to a plea deal when the court reduces a sentence in the interest of justice. *Id.*

¹⁰ *People v. Mitchell*, 168 A.D.3d 531, 531 (1st Dep’t 2019) (quoting *People v. Walsh*, 101 A.D.3d 614 (1st Dep’t 2012)) (explaining the Appellate Division should consider factors such as the “defendant’s age, physical and mental health, and remorse” in deciding whether to reduce a sentence in the interest of justice).

¹¹ *People v. Suitte*, 90 A.D.2d 80, 86 (2d Dep’t 1980) (explaining that the Appellate Division’s sentence-review power allows the court to “rectify sentencing disparities . . . and effectively set sentencing policy through the development of sentencing criteria.”).

¹² *People v. Lopez*, 6 N.Y.3d 248, 253 (2006).

defendants are almost invariably required to waive their right to appeal as a condition of pleading guilty.¹³ Since 98 percent of felony cases are resolved by guilty pleas,¹⁴ the Appellate Division is divested of its power to decide whether the sentence is excessive in the vast majority of cases.

The widespread use of appeal waivers not only deprives individual defendants of the opportunity to argue that their particular circumstances warrant sentence reductions—it also prevents the intermediate appellate courts from using their “birds-eye-view” perspective to ensure that sentences are meted out uniformly, and to reduce racial and other unfair disparities in sentencing.

II. THE PROPOSED LEGISLATION

Parallel bills in the Assembly and Senate (A.153/S.938) would restore intermediate appellate courts’ ability to review sentences. These bills make relatively modest changes to Criminal Procedure Law section 470.15(2), which authorizes intermediate appellate courts to review sentences in the interest of justice. Currently that provision states that upon a finding that a sentence is excessive, an intermediate appellate court “may modify the judgment by reversing it with respect to the sentence and by otherwise affirming it.”¹⁵ The amended statute would instead provide that the intermediate appellate court “shall” modify a sentence “notwithstanding an otherwise enforceable waiver of appeal” upon a finding of excessiveness. In effect, this provision would render appeal waivers inapplicable to appellate claims that sentences are unduly harsh or severe and restore the power of intermediate appellate courts to address sentencing disparities. In doing so, it would contribute to a reduction in mass incarceration and its racially disproportionate effects.

It is hard to imagine any serious negative impact from this bill. While, in theory, an appeal waiver is an extra bargaining chip for the defendant to use in plea negotiations, in practice, given the near-mandatory requirement of appeal waivers as conditions of plea bargains, “defendants receive no benefit in exchange for . . . appeal waiver[s]” and “are often rendered victims of ‘situational coercion’ by these automatic, non-bargained-for waivers.”¹⁶

Nor will removing excessive sentence claims from appeal waivers’ ambit reduce finality or predictability. Even a valid appeal waiver does *not* actually deprive a defendant of the right to appeal. The defendant always retains the right to raise a number of claims, including the waiver’s validity. And the law of appeal waivers is extremely complicated and difficult to navigate,¹⁷

¹³ See *People v. Thomas*, 34 N.Y.3d 545 593 (2019) (Wilson, J. dissenting) (explaining that “defendants are expected, almost without exception, to waive their right to appeal upon pleading guilty” and noting that “[a]ppel waivers have become a ‘purely ritualistic device’—they are ‘standard’ and ‘part and parcel of plea bargaining’”) (quoting *People v. Batista*, 167 A.D.3d 69, 81 (2d Dep’t 2018) (Scheinkman, P.J., concurring)).

¹⁴ Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It’s Too Late*, N.Y. Times (Aug. 7, 2017), <https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html? r=0>.

¹⁵ C.P.L. § 470.15(2).

¹⁶ *Thomas*, 34 N.Y.3d at 593 (Wilson, J., dissenting).

¹⁷ *Id.* at 591 (describing the law of appeal waivers as a “Daedalean maze”).

resulting in appeal waivers’ regular invalidation by intermediate appellate courts.¹⁸ Uncertainty as to whether an appeal waiver will be upheld on appeal undercuts any potential gain in predictability.

Additionally, allowing intermediate appellate courts to assess excessive sentence claims notwithstanding appeal waivers will actually reduce appellate courts’ workload. Determining whether an appeal waiver is valid is more difficult than determining whether a sentence was excessive. Indeed, in the Appellate Division, First Department, the court actually considers the sentencing issue first, reaching the validity of the appeal waiver only if the court is inclined to reduce the sentence.¹⁹ And, in light of the staggering financial cost of incarceration to the State,²⁰ allowing for lower sentences is likely to save money in the long term.

The Legislature, should, therefore make this simple fix to empower appellate courts to reduce sentences where doing so would comport with the interests of justice.

III. CONCLUSION

For the aforementioned reasons, we respectfully urge our elected officials to support A.153/S.938.

Criminal Justice Operations Committee
Ben Wiener, Chair

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¹⁸ See Paul Shechtman, *Large Number of Invalidated Appeal Waivers Illustrates Need for Change*, New York Law Journal, Jan. 6, 2021, <https://www.law.com/newyorklawjournal/2021/01/06/large-number-of-invalidated-appeal-waivers-illustrates-need-for-change/> (noting that intermediate appellate courts had invalidated 90 appeal waivers in the year following the Court of Appeals’ decision in *People v. Thomas*, and more than 380 in the five years before *Thomas*).

¹⁹ Rolando Acosta, *First Department Takes Different Approach to Appeal Waivers*, New York Law Journal, Dec. 7, 2017, <https://www.law.com/newyorklawjournal/2018/12/07/first-department-takes-different-approach-to-appeal-waivers/>.

²⁰ Chris Mai and Ram Subramanian, *The Price of Prisons: Examining State Spending Trends, 2010-2015*, Vera Institute of Justice at 8 (estimating that New York spent \$69,335 per inmate in 2015).

*This report was first published in December 2021 during the terms of the following chairs: Tess M. Cohen, Chair, Criminal Justice Operations Committee; Sarah J. Berger and Jullian D. Harris-Calvin, Co-Chairs, Mass Incarceration Task Force).