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REPORT ON LEGISLATION BY THE
CRIMINAL COURTS COMMITTEE AND THE
CORRECTIONS AND COMMUNITY REENTRY COMMITTEE

A.4582-B **M. of A. O'Donnell**
S. 4664-A **Sen. Golden**

AN ACT to amend the penal law and the criminal procedure law, in relation to establishing terms of probation sentences and revocations thereof under certain circumstances; and to amend the criminal procedure law, in relation to pre-sentence investigations and written reports thereon in any city having a population of one million or more.

THIS BILL IS APPROVED

The New York City Bar Association (the "Association"), founded in 1870, is a private, non-profit organization of more than 24,000 attorneys, judges, and law professors, and is one of the oldest bar associations in the United States. This report is submitted by the Association's Criminal Courts Committee and Corrections and Community Reentry Committee in support of A.4582-B/S.4664-A, which would amend the penal law to change mandatory terms of probation to discretionary terms and eliminate the requirement of pre-sentence investigations in limited circumstances. For most felonies, instead of the current mandatory term of five years probation, this bill would give the courts discretion to impose a three-, four- or five-year term. For Class A misdemeanors and unclassified misdemeanors with authorized sentences greater than three months, instead of the current mandatory three years, the court would be able to choose between a term of two or three years. This bill would amend the criminal procedure law to authorize the court to increase the term of probation to the maximum in the event of a violation.[1] P.L. § 65.00; C.P.L. § 410.70(5).

The second portion of this bill would amend section 390.20 of the New York Criminal Procedure Law to eliminate the requirement of pre-sentence investigations and written reports in New York City when the parties and the judge have agreed to a sentence of imprisonment of a year or less.

SENTENCES OF PROBATION

The Association endorses this legislation because giving courts the discretion to make individualized sentencing determinations will result in sentences tailored to particular offenses and offenders, and result in a more efficient allocation of the limited resources of our criminal justice system.

[1] The amendments would not affect the longer mandatory probationary terms for certain Class A-II and B drug felonies and felony sexual assault.

Under current law, although probation is available for most offenses and degrees of culpability, judges must impose the same five-year term of probation in connection with almost every felony and the same three-year term in connection with every misdemeanor. For example, a person sentenced to probation for a violent felony offense such as second-degree assault receives the same term of probation as a minor participant in a drug sale. The proposed bill will allow courts to choose the term most appropriate for each individual based on the facts of the offense, the individual defendant, and the risk to the public.

Allowing individualized terms of probation will lead to more just outcomes. One of the basic tenets of fair criminal sentencing is that individuals should be punished in proportion to their degree of culpability and the severity of their crime. This bill will give courts the freedom to issue proportional terms of probation, making the system fairer and bringing it in line with the rest of the sentencing scheme.

Research on effective probationary practices also supports this type of discretionary sentencing.[2] While high-risk individuals fare better with more intervention, low-risk individuals do not require intensive intervention or services, and may actually be more likely to re-offend if unnecessarily over-treated or supervised. Discretionary sentencing will also relieve low-risk offenders of the burdens of unnecessary reporting, which can interfere with work and child care.

In addition to being a more just and effective sentencing practice, restructuring probation terms to distinguish between high- and low-risk probationers is an intelligent strategy for saving resources. Reducing supervision for low-risk individuals would allow scarce probation money and personnel to be targeted to where it is most needed, and would free up resources that could be devoted to those probationers requiring greater supervision.

The bill will also likely conserve court resources. Courts are already well equipped to exercise discretion in the sentencing context. By imposing shorter probation terms at the outset where appropriate, courts will hear fewer applications for early termination of probation.[3] The increased sentencing options may also result in faster resolution of cases: the sheer length of the current mandatory periods of supervision can impede the disposition of relatively minor charges through negotiated pleas.

Finally, the overwhelming majority of violations of felony probation occur within the first three years, and within the first two years for misdemeanor probation.[4] Accordingly, the proposed amendments would not adversely affect public safety because all individuals would remain under

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[2] *See e.g.*, Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F.L.REV. 585, 599-600 (2009) (explaining that grouping high and low risk offenders together increases the risk that low risk offenders will reoffend); Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, Topics in Community Corrections, 1-8 (2004), available at http://www.uc.edu/content/dam/uc/ccjr/docs/articles/ticc04_final_complete.pdf. (Last visited May 24, 2013).

[3] A sentence of probation may be terminated on application. *See* C.P.L. § 410.90.

[4] New York State Division of Criminal Justice Services, Probation Population Profile 2007, available at http://www.criminaljustice.ny.gov/pio/annualreport/nys_probation_report2007_profile.pdf. (Last visited May 24, 2013). *See also* A.4582-B/S.4664-A Memorandum in Support of Legislation, "Reasons for Support."

probation during these critical periods. The bill would also give the sentencing court authority, upon a violation of probation, to increase the period up to the maximum available, which ensures that supervision can be extended if necessary. This new sentencing tool is consistent with research supporting the use of graduated sanctions as an effective technique to address problematic behavior - a concept that has already been tested and accepted in New York specialized drug courts.[5]

PRE-SENTENCE INVESTIGATION

The Association additionally endorses the portion of the legislation that would eliminate the pre-sentence investigation requirement under limited circumstances and when all parties are in agreement.

The applicability of this provision is limited to New York City and to cases in which all parties, including the judge, have agreed to a negotiated sentence of one year or less. Presently, in cases when a jail sentence of more than 180 days is imposed, a court must order a probation report and adjourn a case at least ten business days for sentencing. *See* C.P.L § 390.20(2).[6] This process requires a probation officer to interview the defendant and prepare a written probation report, which entails significant time and effort from the probation officer. The defendant must then be produced to court on the sentencing day causing added cost and congestion for corrections, the courts, and often for defendants, who must return to court for an additional date merely for the imposition of an agreed-upon sentence. Further, unlike upstate sentences where the probation report accompanies a defendant to his/her facility and can be used for discretionary release decisions, for individuals serving sentences of a year or less at local jails in New York City, the probation report serves no purpose after imposition of sentence.

This bill would eliminate this unnecessary step, thereby, reducing costs and eliminating unnecessary delays in the criminal justice process.

CONCLUSION

The Committees on Criminal Courts and Corrections and Community Reentry recommend the enactment of this bill because individualized sentences will lead to more just, proportional punishments, result in a more effective use of probation services, and save judicial resources.

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[5] *See e.g.*, Chief Judge Judith S. Kaye, *Delivering Justice Today: A Problem Solving Approach*, 22 YALE L & POL'Y REV. 125, 135-39 (2004) (discussing the history of New York drug courts and their success).

[6] Currently, a probation report may be waived on consent of all parties when a sentence of time served or probation will be imposed, a probation report has been prepared in the last twelve months, or probation has been revoked. C.P.L. § 390.20(4)