

## COMMITTEE ON CRIMINAL JUSTICE OPERATIONS

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Your Honor:

May 4, 2016

Hon. Daniel Conviser Chair, Advisory Committee on Criminal Law and Procedure c/o Paul McDonnell, Counsel Office of Court Administration 25 Beaver Street New York, NY 10004

## **Re:** New Measures Proposed in the 2016 Report of the Advisory Committee on Criminal Law and Procedure

I write on behalf of the Criminal Justice Operations Committee of the New York City Bar Association. We write to convey our comments on the new measures proposed for enactment by the Legislature in the 2016 Report of the Advisory Committee on Criminal Law and Procedure.<sup>1</sup> The Committee did not take a position on the first new measure, as it does not affect New York City, nor does it take a position on measure #6 related to defendants confined for examinations to determine capacity. As to the remainder of the new measures, the Committee approves of #2, #3, #4, and #7; the Committee does not support #5. Our reasoning is set out below:

**#2. Release of Pre-Sentence Investigation Reports for Post Judgment Motions (CPL 390.50(2))**:<sup>2</sup> The Committee supports this legislative fix, which adds "post judgment motions" to the list of proceedings for which a convicted defendant may receive a copy of the pre-sentence investigation report. There is no reason for the statute to provide presentence reports for some purposes (appeal, parole board appearance, appeal of the denial of parole), but not others (for use in litigating post-judgment motions).

**#3. Juvenile Offenders Apparently Eligible for Youthful Offender Treatment (CPL 720.15(3)):**<sup>3</sup> The Committee is in favor of this proposal. This legislation would fix a loophole in the current statutory scheme which provides that youthful offender convictions be sealed but does not prohibit disclosure of the arrest and pending charges prior to conviction.

<sup>&</sup>lt;sup>1</sup> Available at <u>http://www.nycourts.gov/ip/judiciaryslegislative/pdfs/2016-CriminalLaw&Procedure-ADV-Report.pdf</u>.

<sup>&</sup>lt;sup>2</sup> Introduced as A.9519 (AM Mosley), 239<sup>th</sup> Session (N.Y. 2016). This legislation passed the Assembly on March 28, 2016 by a vote of 138-0.

<sup>&</sup>lt;sup>3</sup> Introduced as A.9520 (AM Lentol), 239<sup>th</sup> Session (N.Y. 2016) into the Assembly Codes Committee.

**#4.** Authority to Grant Poor Person Relief to the sentencing judge upon application of defense counsel (CPL 380.55):<sup>4</sup> This proposal would amend the Criminal Procedure Law to provide the authority to grant poor person relief to the sentencing judge upon application of defense counsel. The Committee approves of this amendment, as it would make it less cumbersome for defendants who have already been deemed eligible for poor person relief at the trial level to eligible for assigned counsel on appeal.

**#5.** Sealing Petty Offenses (CPL 160.55(1)):<sup>5</sup> The Committee does not approve this proposal. The proposal would amend existing legislation to delay sealing of non-criminal convictions – where the sentence was a conditional discharge – until after termination of that conditional discharge period (set by statute at one year for most non-criminal convictions and three years for marijuana-related non-criminal convictions). This delayed sealing would have the arguably unintended consequence of delaying coverage of important state and local employment discrimination protections to individuals convicted of these petty offenses. Both the New York State and the New York City Human Rights Laws prohibit discrimination against individuals convicted of non-criminal convictions which have been sealed (see N.Y. Exec. Law \$296(16); N.Y. C. Admin Code \$8-107(11)).

Particularly as pleas to non-criminal convictions are frequently used to "dispose of" nonserious matters where the will to prosecute or proof may be lacking this delay creates an unfair result. Doing as the proposal would suggest also ignores certain realities of the criminal justice system particularly in urban areas. Many pleas to non-criminal charges occur at arraignments, where it would difficult for an attorney to explain the ramifications of a case being held open during a conditional discharge period. Also, current OCA practice requires, we believe, that court clerks place a "DNS" indicator on cases terminated in a non-criminal conviction in order to keep the case open during the period of a conditional discharge. While clerks then generally remove this indicator at the conclusion of a conditional discharge period, this does not always happen, with the result that these cases are never sealed. While the Advisory Committee's report suggests that courts and prosecutors will be deprived of information if non-criminal cases are sealed at sentencing, these are by definition cases involving conduct that is not criminal in nature. The harm caused by failing to seal these cases at an early stage outweighs the very limited value this information would provide.

**#7. Trial Order of Dismissal: Repealer (CPL 290.10(2) and (3), 450.40(1) and (2)):**<sup>6</sup> The Committee approves this legislation, as it would conform the statute to the case law.

<sup>&</sup>lt;sup>4</sup> Introduced as A.9522 (AM Richardson) / S.7246 (Sen. DeFrancisco), 239<sup>th</sup> Session (N.Y. 2016). This legislation passed the Assembly on March 28, 2016 by a vote of 135-3; it is pending in the Senate Codes Committee.

<sup>&</sup>lt;sup>5</sup> Introduced as S.6939 (Sen. Akshar), 239<sup>th</sup> Session (N.Y. 2016) into the Senate Codes Committee.

<sup>&</sup>lt;sup>6</sup> Introduced as A.9521 (AM Joyner), 239<sup>th</sup> Session (N.Y. 2016) into the Assembly Codes Committee.

Thank you for your consideration of our recommendations. If the City Bar can be of any assistance, please feel free to reach out to Maria Cilenti or Elizabeth Kocienda, copied below. We hope these comments can be helpful as OCA moves forward with its legislative program this session.

Respectfully, Risa Gerson Lew

Cc: Hon. Fredrick Akshar Hon. John DeFrancisco Hon. Latoya Joyner Hon. Joseph Lentol Hon. Walter Mosley Hon. Michael Nozzolio Hon. Diana Richardson Maria Cilenti, Senior Policy Counsel, <u>mcilenti@nycbar.org</u> Elizabeth Kocienda, Assoc. Dir. of Advocacy, <u>ekocienda@nycbar.org</u>