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**REPORT BY THE CRIMINAL COURTS COMMITTEE,
CRIMINAL JUSTICE OPERATIONS COMMITTEE,
CORRECTIONS AND COMMUNITY REENTRY COMMITTEE,
MASS INCARCERATION TASK FORCE AND
PRO BONO AND LEGAL SERVICES COMMITTEE**

**RECOMMENDING THAT NEW YORK STATE ADOPT LEGISLATION
WHICH WOULD CREATE A SAFETY VALVE TO
PERMIT JUSTICES OF THE STATE SUPREME COURT TO
IMPOSE AND PERMIT SENTENCING BELOW CURRENT
MANDATORY MINIMUM SENTENCES**

I. INTRODUCTION

This report is respectfully submitted by the Criminal Courts Committee, Criminal Justice Operations Committee, Corrections and Community Reentry Committee, Mass Incarceration Task Force and Pro Bono and Legal Services Committee (“the Committees”) of the New York City Bar Association. The Association is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The City Bar has an extensive record of commenting on and testifying about statutes, programs and policies relating to the reform of the New York criminal justice systems and the Committees support legislative and other initiatives that will reduce over-incarceration, enhance the fairness of our criminal justice system, reduce racial disparities in sentencing, and, at the same time, protect public safety.¹

II. THE PROPOSAL

The Committees propose that legislation be introduced in the New York State Legislature to create a “safety valve” which would give judges and prosecutors the ability to impose and recommend sentences that fall below statutory mandatory minimums in cases where there are substantial and compelling reasons, giving due regard to the nature of the crime, history and character of the defendant and his or her chances of successful rehabilitation, such that the imposition of a mandatory minimum sentence would result in a substantial injustice to the defendant and is not necessary for the protection of the public.²

¹ For more information on the Committees, their membership and their work, visit <http://www.nycbar.org/issue-policy/issue/criminal-justice>.

² This language is taken in large part from the “Justice Safety Valve Act,” as proposed by the American Legislative Exchange Council; *see* Gregory Newburn, State Project Director of Families Against Mandatory Minimums, *Mandatory Minimum Sentencing Reform Saves States Money and Reduces Crime Rates*, The State Factor, March

III. THE PROBLEM

Under New York's current sentencing scheme, many offenses carry statutorily mandated minimum sentences, whereby a judge is required to impose a sentence with a fixed minimum period of incarceration on individuals convicted of certain crimes, regardless of other mitigating factors. Additionally, Criminal Procedure Law § 220.10(5) provides certain limitations with respect to post-indictment pleas, whereby the prosecuting attorney is constrained by a statutorily mandated minimum charge in making a plea offer, along with a minimum time that must be served on that charge. This is further complicated by Penal Law § 70.06, which classifies as a predicate felon anyone convicted of a felony who has a prior felony conviction that is less than ten years old, tolled by periods of incarceration, and mandates enhanced punishment with increased and mandatory periods of incarceration. Sentences are further enhanced when the prior conviction was for a statutorily violent offense.

New York's predicate felon statute does not differentiate between defendants who were released from incarceration one week prior to their new arrest and those released nine years and eleven months before their most recent arrest. Additionally, whether an offense is statutorily violent is not necessarily a reflection on whether there was actual violence used at the time of the crime's commission. For example, Robbery in the Third Degree under Penal Law § 160.05 is a statutorily non-violent offense. This is the case even though one of the elements necessary to establish robbery is the use or threatened use of immediate physical force upon another person.³ On the other hand, Burglary in the Second Degree under Penal Law § 140.25(2) is a statutorily violent offense, simply because the burglary was of a dwelling. This is the case even if the defendant was not armed, did not use or intend to use force, and took precautions to make sure that the dwelling was vacant at the time of the crime's commission.⁴

Such inconsistencies in the Penal Law can create situations where a defendant is facing an unjustly long sentence for a relatively minor offense. For example, consider a person who, just under ten years after his release from incarceration for a violent offense, is arrested for selling or possessing with the intent to sell a small quantity of a narcotic drug under Penal Law §§ 220.39(1) or 220.16(1). These are Class B drug felonies and carry a minimum sentence of six years of incarceration for violent predicate felons under Penal Law § 70.70—regardless of the amount of narcotics in the current case, the fact that the person has stayed out of trouble for nearly ten years, whether or not actual violence was used in the prior offense, or any other mitigating circumstances.

Under mandatory minimum sentencing, mitigating factors, no matter how compelling, cannot be used to justify a sentence below the statutory minimum because prosecutors and judges have no flexibility to go below the statutory floor in plea negotiations or sentencing. This rigid sentencing structure necessarily leads to more people serving longer periods of

2016, <https://www.alec.org/app/uploads/2016/03/2016-March-ALEC-CJR-State-Factor-Mandatory-Minimum-Sentencing-Reform-Saves-States-Money-and-Reduces-Crime-Rates.pdf> (all websites last visited May 22, 2018).

³ PL § 160.00.

⁴ PL § 70.02 lists the felonies classified as violent.

incarceration which, in turn, costs taxpayers more money. Meanwhile, studies have found mandatory minimum sentences to be ineffective⁵ in reducing the recidivism rate: neither the length of sentence nor the imposition of mandatory minimums alone has been shown to have any bearing on recidivism.⁶ In fact, all seventeen states that have cut their prison population over the past decade have also had a decrease in crime rates.⁷

IV. THE SOLUTION

Many states, including Iowa⁸ and South Carolina,⁹ have taken action in recent years to either eliminate or weaken the effects of mandatory minimum sentencing. While none of this legislation involves the complete elimination of such sentence floors, these laws provide procedures which enable courts and prosecutors to impose and recommend sentences below statutory mandatory minimum sentences under specific circumstances. The ability of a court to go below mandatory minimums in the appropriate circumstances is often referred to as a “safety valve.”

In some states, safety valves apply exclusively to drug crimes; in other states their use applies to more offenses. For example, under Florida House Bill 89, also known as the Threatened Use of Force Act, passed and signed into law in 2014, a judge has the discretion to sentence a defendant below the mandatory minimum sentences of ten years, twenty years, and life in prison, for aggravated assault with a firearm if the defendant believed he was acting in self-defense, the offense was not committed in the course of another offense, the defendant does not pose a threat to public safety, and the totality of the circumstances of that offense does not justify the imposition of the mandatory minimum sentence.

The federal sentencing framework also allows judges to impose sentences below statutory mandatory minimums in certain limited circumstances. For example, 18 U.S.C. § 3553(f) - a “safety valve” for first-time, non-violent, low-level drug offenders - permits sentencing below mandatory minimums if the defendant’s circumstances meet a strict five-part test.

It should be noted that New York does not have a mandatory minimum sentence for first time offenders for most drug offenses. The proposal offered here is more expansive and includes those with a prior criminal history, where application of a mandatory minimum is overcome by substantial and compelling reasons.

⁵ David Keene, *The Conservative Case for Sentencing Reform in Louisiana: Opinion*, The Times Picayune, May 2, 2017, http://www.nola.com/opinions/index.ssf/2017/05/louisiana_sentencing_reform.html.

⁶ *A Study on the Use and Impact of Mandatory Minimum Sentences*, Pennsylvania Commission on Sentencing, Oct. 21, 2009, http://pwr.la.psu.edu/specialty_programs/pacs/publications-and-research/testimony/2009-2010-legislative-session/mandatory-minimum-sentencing-study-hr-12-findings-and-recommendations-october-21-2009-house-judiciary-committee-ppt-presentation/view.

⁷ Newburn, *supra* note 2.

⁸ Iowa, SF 445 (2017).

⁹ Omnibus Crime Reduction and Sentencing Reform Act of 2010, S1154 (2010).

States across the United States have passed safety valve legislation with bipartisan support. In 2003, Maine authorized courts to suspend mandatory prison sentences if such sentences were found to create a substantial injustice and doing so would not diminish the gravity of the offense or endanger public safety.¹⁰ In 2016, Maryland passed the “Justice Reinvestment Act,” whereby judges are free to depart from a mandatory minimum sentence in any drug case where the court believes that the mandatory minimum is not necessary to protect public safety or would result in a substantial injustice to the defendant.¹¹ Minnesota allows courts to depart from mandatory minimum sentences for certain gun crimes and other offenses, and is not limited to drug cases.¹² North Dakota,¹³ Oklahoma,¹⁴ and Hawaii¹⁵ have also passed safety valve legislation.

Safety valve legislation is proliferating around the country, and for good reason. Such legislation helps to address our country’s problem with mass incarceration, by removing from prisons those who pose little or no threat to public safety. It gives judges and prosecutors greater flexibility in sentencing, which promotes fairness and justice (by aligning punishments more closely with the specific circumstances of the case) and the goals of sentencing (which are to impose a sentence that is sufficient, but not greater than necessary, to address certain objectives such as the need for deterrence, public safety, and educational, medical or other treatment for the defendant¹⁶). Such legislation strikes a balance between the absolute repeal of mandatory minimum sentencing laws and the inflexible applications of such laws, which do not consider mitigating circumstances.¹⁷

V. CONCLUSION

The Committees urge the New York State Legislature to pass legislation modeled on “safety valve” legislation that has been passed in other states across the country. Such legislation would give judges and prosecutors the ability to impose and recommend sentences that fall below statutory mandatory minimums in all cases where there are substantial and compelling reasons to do so, while giving due regard to the nature of the crime, and the history and characteristics of the defendant (including his or her chances of successful rehabilitation), and where the imposition of a mandatory minimum sentence would result in a substantial injustice to the defendant and is not necessary for the protection of the public.

¹⁰ Maine Revised Statutes 17-A:51 §1252:5-A(B) (2003).

¹¹ Maryland Chp. 515 (2016); based on the “Justice Safety Valve Act”, *supra* note 2.

¹² Minnesota § 609.11 (2017).

¹³ North Dakota, HB 1030 (2015).

¹⁴ Oklahoma, HB 2479, (2016) which includes a safety valve mechanism for both first and second time drug convictions.

¹⁵ Hawaii, SB 68 (2013).

¹⁶ New York Penal Law §1.05(6).

¹⁷ Newburn, *supra* note 2.

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