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**REPORT ON LEGISLATION 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**

**S.5712**

**Sen. Salazar**

AN ACT to amend the penal law, in relation to authorizing courts to depart from mandatory minimum sentences in certain cases and requiring courts to report such cases to the division of criminal justice services

**The Justice Safety Valve Act**

**THIS LEGISLATION IS APPROVED**

On behalf of the New York City Bar Association (“City Bar”), we are writing to express our support for the proposed legislation, which would provide a “safety valve” that would permit a sentencing court to depart from applicable mandatory minimum sentences under certain circumstances. The City Bar is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice, and has an extensive record of commenting on and testifying about statutes, programs and policies relating to the reform of the New York criminal justice system. The City Bar issued a memo in May 2018 (reissued in April 2019) proposing the introduction of this legislation.<sup>1</sup>

**I. SUMMARY OF THE PROPOSED LEGISLATION**

The “Justice Safety Valve Act,” would amend section 60.01 of the Penal Law to give judges the ability to impose sentences that fall below statutory mandatory minimums if, giving due regard to the nature of the crime, history and character of the defendant and his or her chances of successful rehabilitation, the court finds that (a) the imposition of the mandatory minimum would

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<sup>1</sup> The City Bar committees involved in the drafting of this report include the Criminal Courts Committee, Criminal Justice Operations Committee, Corrections and Community Reentry Committee, Mass Incarceration Task Force, and the Pro Bono and Legal Services Committee (the “Committees”). The Committees support legislative and other initiatives to reduce over-incarceration, enhance the fairness of our criminal justice system, reduce racial disparities in sentencing, and, at the same time, protect public safety. For more information on the Committees, their membership and their work, visit <http://www.nycbar.org/issue-policy/issue/criminal-justice>.

result in substantial injustice, and (b) the mandatory minimum sentence is not necessary for the protection of the public.<sup>2</sup> The bill further provides that the court shall report such cases on a form developed by the Office of Court Administration and which shall be forwarded to the Division of Criminal Justice Services.<sup>3</sup>

## II. BACKGROUND

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.<sup>4</sup> 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.<sup>5</sup>

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)

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<sup>2</sup> The full text of the proposed legislation is available at <https://www.nysenate.gov/legislation/bills/2019/s5712>. The bill language, which was proposed by City Bar, was adapted 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 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 Oct. 23, 2019).

<sup>3</sup> See *id.*

<sup>4</sup> PL § 160.00.

<sup>5</sup> PL § 70.02 lists the felonies classified as violent.

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 incarceration which, in turn, costs taxpayers more money. Meanwhile, studies have found mandatory minimum sentences to be ineffective<sup>6</sup> 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.<sup>7</sup> In fact, all seventeen states that have cut their prison population over the past decade have also had a decrease in crime rates.<sup>8</sup>

### III. JUSTIFICATION

Many states, including Iowa<sup>9</sup> and South Carolina,<sup>10</sup> 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,<sup>11</sup> 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.

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<sup>6</sup> 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](http://www.nola.com/opinions/index.ssf/2017/05/louisiana_sentencing_reform.html).

<sup>7</sup> *A Study on the Use and Impact of Mandatory Minimum Sentences*, Pennsylvania Commission on Sentencing, Oct. 21, 2009; see also Cynthia A. Kempinen, Ph.D., *A Multi-Method Study of Mandatory Minimum Sentences in Pennsylvania*, Pennsylvania Commission on Sentencing Research Bulletin, Vol. 9, Issue 1, April 2010, <https://fam.org/wp-content/uploads/ResBulletin201001.pdf>.

<sup>8</sup> Newburn, *supra* note 2.

<sup>9</sup> Iowa, SF 445 (2017).

<sup>10</sup> Omnibus Crime Reduction and Sentencing Reform Act of 2010, S1154 (2010).

<sup>11</sup> Florida HB 89, Chapter No. 2014-195, <https://www.flsenate.gov/Session/Bill/2014/89>

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 proposed legislation is more expansive and includes those with a prior criminal history, where application of a mandatory minimum is overcome by substantial and compelling reasons.

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.<sup>12</sup> 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.<sup>13</sup> Minnesota allows courts to depart from mandatory minimum sentences for certain gun crimes and other offenses, and is not limited to drug cases.<sup>14</sup> North Dakota,<sup>15</sup> Oklahoma,<sup>16</sup> and Hawaii<sup>17</sup> 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 defendant<sup>18</sup>). 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.<sup>19</sup>

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<sup>12</sup> Maine Revised Statutes 17-A:51 §1252:5-A(B) (2003).

<sup>13</sup> Maryland Chp. 515 (2016); based on the “Justice Safety Valve Act”, *supra* note 2.

<sup>14</sup> Minnesota § 609.11 (2017).

<sup>15</sup> North Dakota, HB 1030 (2015).

<sup>16</sup> Oklahoma, HB 2479, (2016) which includes a safety valve mechanism for both first and second time drug convictions.

<sup>17</sup> Hawaii, SB 68 (2013).

<sup>18</sup> New York Penal Law §1.05(6).

<sup>19</sup> Newburn, *supra* note 2.

#### **IV. CONCLUSION**

For the foregoing reasons, the New York City Bar Association supports the proposed law.

Criminal Courts Committee  
Terry Stella Rosenblatt, Chair  
Gary Kaufman, Mandatory Minimums Subcommittee

Criminal Justice Operations Committee  
Sarah J. Berger, Chair

Corrections & Community Reentry Committee  
Gregory D. Morril, Chair

Mass Incarceration Task Force  
Sean Hecker, Chair

Pro Bono & Legal Services Committee  
Amy P. Barasch and Jennifer K. Brown, Co-Chairs

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