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**REPORT ON LEGISLATION BY THE
TASK FORCE ON MASS INCARCERATION,
CORRECTIONS AND COMMUNITY REENTRY COMMITTEE,
CRIMINAL COURTS COMMITTEE,
AND CRIMINAL JUSTICE OPERATIONS COMMITTEE**

**A.8588
S.7681**

**M. of A. Quart
Sen. Benjamin**

AN ACT to amend the criminal procedure law, in relation to authorizing courts to reduce or modify sentences for certain individuals when such sentence is deemed to be greater than necessary to achieve the purposes of sentencing

The Second Chance Amendment

THIS BILL IS APPROVED

This report is respectfully submitted by the New York City Bar Association’s (the “City Bar”) Task Force on Mass Incarceration, Corrections and Community Reentry Committee, Criminal Courts Committee, and Criminal Justice Operations Committee.¹ The City Bar submits this report in support of the Second Chance Amendment, which would provide a mechanism for the modification of certain prison sentences for eligible applicants.

The City Bar issued a memo in January 2019 proposing the introduction of this legislation. In drafting the proposed legislation, the City Bar evaluated existing initiatives and programs and was informed by the substantial research on mass incarceration’s effects on communities and on the criminal justice system. We believe that the Second Chance Amendment will parallel other

¹ The Task Force on Mass Incarceration is comprised of leaders committed to criminal justice reform—prosecutors, defense attorneys, judges, and other experts on criminal law. The Task Force is committed to reducing the mass incarceration rate with a focus on our home state of New York. The Corrections and Community Reentry Committee addresses issues affecting people in jails, prisons and other detention facilities (as well as people on probation and parole with conviction histories), including conditions of confinement, sentencing, classification of prisoners, and use of criminal records by potential employers, educational institutions, and others. The Criminal Courts Committee consists of prosecutors and criminal defense attorneys who analyze laws and policies that affect the criminal courts in New York. The Criminal Justice Operations Committee has expansive jurisdiction involving issues relevant to New York State penal law and procedure and the functioning of the courts with regard to criminal cases. For more information on the committees and their work, visit <https://www.nycbar.org/issue-policy/issue/criminal-justice>.

innovative and impactful legislative initiatives to improve the justice system while reducing New York State's prison population.

I. BACKGROUND

Mass incarceration is one of this country's most significant social, economic, and political issues. In just four decades, the U.S. prison population increased from 300,000 to 2.3 million.² The U.S. now has the highest incarceration rate in the world³ and, with just 4.4 % of the world's population, incarcerates 22 % of the world's prisoners.⁴ New York State currently houses about 48,000 prisoners.⁵

The cost of these staggering figures is borne both by the millions of families and communities affected by the incarceration of sons, daughters, and parents, as well as by taxpayers: In New York, the average annual cost per inmate is \$69,355.⁶ The concomitant effects on the children of incarcerated individuals are also increasingly widespread. An estimated 7 % of children have had a parent incarcerated at some point in their life,⁷ the effect of which has been found to be associated with increased emotional difficulties, low academic engagement, and issues at school.⁸

Communities of color have been disproportionately impacted by these incarceration rates. Currently, African-Americans and Latinos account for 60% of the prison population nationwide.⁹ The figures for New York State are even more striking: over 73% of inmates are African American or Hispanic.¹⁰ African-American and Latino communities therefore bear the bulk of the effects of mass incarceration, including poverty, long-term unemployment, and the break-up of families.

² Equal Justice Initiative, Mass Incarceration, at <http://www.eji.org/massincarceration>; Roy Walmsley, International Centre for Prison Studies, World Population List 3 (10th ed. 2013), www.prisonstudies.org/sites/default/files/resources/downloads/wppl_10.pdf (all websites cited in this report were last visited on Oct. 23, 2019).

³ *Id.*

⁴ Timothy Williams, "One Robber's 3 Life Sentences: '90s Legacy Fills Prisons Today," N.Y. Times, July 4, 2016, <http://www.nytimes.com/2016/07/05/us/mass-incarceration-drug-offenses-zero-tolerance-prisons.html?smid=pl-share&r=0>.

⁵ DOCCS Fact Sheet, New York State Corrections and Community Supervision, Oct. 1, 2019, available at <http://www.doocs.ny.gov/FactSheets/PDF/currentfactsheet.pdf>.

⁶ Vera Institute of Justice, The Price of Prisons: Prison Spending in 2015, <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending>.

⁷ Child Trends, *Parents Behind Bars: What Happens to Their Children?*, Oct. 2015, <https://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf>.

⁸ *Id.* at 1.

⁹ President Barack Obama, Annual Conference at the NAACP, July 14, 2015, <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.

¹⁰ State of New York Dep't of Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population As of January 1, 2016*, Jan. 2016, available at http://www.doocs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf [hereinafter "Under Custody Report"].

The roots of mass incarceration stem in large part from the increase in tough-on-crime legislation, beginning in the 1970s. Longer sentencing ranges and mandatory minimum sentencing came into widespread use. In addition, during the 1980s a focus on prosecuting drug offenses led to a substantial increase in both incarceration rates and lengthy prison terms. Between 1992 and 2009, the average prison sentence continued to increase by 36% nationwide, with states such as Florida seeing an increase of 166%.¹¹ In New York, the average minimum sentence length is 10 years with almost 1/3 of the population serving 10 years or more.¹²

This trend has not gone unchallenged. There have been significant efforts both at the state and federal levels to combat the human and economic consequences of increased incarceration. For instance, in 2005 and 2009, New York State passed drug law reform bills to eliminate certain mandatory minimum sentences and authorize judges to sentence certain offenders to drug treatment programs instead of prison. These reforms also provided those incarcerated for drug offenses the opportunity to petition for reduced sentences under the new sentencing regime. In 2010, Congress passed the Fair Sentencing Act, designed to reduce the disparity between the amounts of crack and powder cocaine required to trigger statutory mandatory minimum and maximum penalties. Between November 2014 and March 2015, California released 2,700 prisoners under Proposition 47, or the Reduced Penalties for Some Crimes Initiative, by reducing their non-violent felony convictions to misdemeanors.¹³ And in 2014 and 2015, the “Smarter Sentencing Act” was introduced in both the U.S. Senate and House, demonstrating bipartisan support for sentencing reform.¹⁴ This was followed by the “Sentencing Reform and Corrections Act of 2017,” which the Senate Judiciary Committee approved with bipartisan support, and which called for reducing reliance on mandatory minimum sentences, permitting the Fair Sentencing Act to be applied retroactively, and sealing and expunging juvenile delinquency records.¹⁵ Most recently, Congress and the White House enacted the “First Step Act,” bipartisan sentencing reform legislation, which takes some steps toward reforming mandatory minimums and reducing mass incarceration.¹⁶

Judges also have begun to speak out about their inability to appropriately sentence, or to modify the sentences of, certain defendants. For instance, in 2016, District Judge Stefan Underhill wrote an essay for the New York Times concluding that the sentence he gave to a former drug dealer was too long, but lamenting that he was unable to modify it. In 2006, Judge Underhill had sentenced the man (who had been incarcerated since 2001) to 18 years in prison. In 2012, the judge visited him in prison and learned that he had taken advantage of educational and job

¹¹ The Pew Charitable Trusts, *The High Cost, Low Returns on Long Prison Sentences*, June 2012, <https://www.pewtrusts.org/en/research-and-analysis/reports/2012/06/06/time-served-the-high-cost-low-return-of-longer-prison-terms>.

¹² Under Custody Report, *supra* n. 10.

¹³ Melody Gutierrez, *California Prisons Have Released 2,700 Inmates Under Prop. 47*, SFGATE, Mar. 6, 2015, <https://www.sfgate.com/crime/article/California-prisons-have-released-2-700-inmates-6117826.php>.

¹⁴ A bipartisan group of senators re-introduced the bill in October 2017.

¹⁵ The City Bar’s report in support of the Sentencing Reform and Corrections Act of 2017 is available at https://s3.amazonaws.com/documents.nycbar.org/files/2017354-SentencingReformCorrections_FEDERAL_COURTS_3.22.18.pdf.

¹⁶ Public Law No. 115-391 (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/756/text?r=104&s=4>. The City Bar’s report on the First Step Act is available at <https://s3.amazonaws.com/documents.nycbar.org/files/2018462-FirstStepAct.pdf>.

opportunities, and exhibited good character. When Judge Underhill approached prosecutors about the possibility of early release, he learned there was no readily available mechanism that would allow for such release. Despite the prisoner’s evident success in changing his life by at least 2012, if not earlier, he remained incarcerated until 2016—serving 14 years of his 18-year sentence. Judge Underhill observed that “[t]he last three years of that sentence, if not more, were a waste of time.”¹⁷

There have been other attempts by academics and reformers to permit the re-examination of excessive sentences. The American Law Institute, a non-governmental organization of judges, lawyers and academics, has recently approved revisions to the Model Penal Code. The MPC was developed in 1962 to introduce uniformity and coherence to criminal codes in the states. In one revision, the Code calls for state legislatures to enact a “second look” provision, which would create a mechanism to reexamine a person’s sentence after 15 years no matter the crime or length of original sentence. The Code recommends that the sentence be revisited every ten years if it is not reduced.¹⁸

Despite these efforts and advocacy from judges, lawmakers, and community organizations, the clear fact remains that there are still millions of people behind bars serving inordinately long sentences. Some are there as the result of strict mandatory minimums—an issue beyond the scope of the Amendment. But others are there because they were given a harsh sentence that may have seemed right at the time to the sentencing judge, but that deserves a second look. The Second Chance Amendment is designed to permit judges to revisit such sentences and reduce them where warranted, giving the individuals the opportunity to return to their families and communities to rebuild their lives.

II. THE SECOND CHANCE AMENDMENT

Currently, New York Criminal Procedure Law § 440.20 (CPL) permits a defendant to make a motion to set aside a sentence on the grounds that it was unauthorized, illegally imposed or otherwise invalid as a matter of law. Although this provision offers an avenue for relief for some defendants, it does not permit a reduction of sentences that are valid but nonetheless excessive in light of the crime and the defendant’s individual circumstances, including evidence of meaningful rehabilitation while serving the initial sentence. Any such claims regarding excessiveness can currently only be raised on direct appeal.¹⁹

The Second Chance Amendment is designed to give individuals the chance to prove, part way through their sentences, that they deserve a reduction in sentence. It adds a new subdivision to CPL § 440.20 to allow a motion for reduction or modification of a sentence after the individual has served a specified portion of that sentence or a certain number of years on the grounds that the sentence was excessive—that is, greater than necessary to achieve the purposes of sentencing. It

¹⁷ Judge Stefan Underhill, “Did the Man I Sentenced to 18 Years in Prison Deserve It,” N.Y. Times, Jan. 21, 2016, <https://www.nytimes.com/2016/01/24/opinion/sunday/did-i-sentence-a-murderer-or-a-cooperative-witness.html>.

¹⁸ Steven Zeidman, “For Justice and Decarceration, Enact Second-Look Sentencing,” Gotham Gazette, June 26, 2018, <http://www.gothamgazette.com/opinion/7766-for-justice-and-decarceration-enact-second-look-sentencing>.

¹⁹ *E.g.*, *People v. Cunningham*, 305 A.D.2d 516 (2003). Note that direct appeals generally conclude within two years of sentencing, often before the defendant has the opportunity to demonstrate rehabilitation, and new information not part of the record on appeal is generally not permitted.

will allow the presentation of evidence regarding the individual's age, personal circumstances, and medical condition, as well as confinement record, including indicators of rehabilitation. The Amendment will therefore incentivize both good behavior and participation in programming designed to help prisoners gain education and vocational skills.

The Amendment would apply to those serving sentences of ten years or more who are more than two years away from scheduled Conditional Release.²⁰

The Amendment excludes those serving sentences for homicide, sex offenses, and any crime that involved the infliction of serious physical injury (unless culpability is solely accessory), although such individuals will be eligible for relief if the district attorney consents.

The following examples, drawn from cases handled by a variety of New York City-based defender organizations, demonstrate a range of situations in which motions under this Amendment might be appropriate:

- R.H., at age 20, was convicted of first-degree robbery, despite a plausible claim of innocence. He also had no criminal record, a stable home life, steady work history, and was about to enter the U.S. Army. He was active in his church and veterans support organizations. Despite the joint request by the prosecution and the defense for the 5-year minimum, and numerous letters of support from family and friends attesting to R.H.'s good character, the judge sentenced him to 15 years.
- L.R. was convicted of first-degree drug possession, conspiracy, and several third-degree sale charges. She had dropped out of school at age 15 to care for her mother, who was dying of AIDS. After her mother's death, L.R. turned to drugs to support herself and her brother. The minimum for first-degree drug possession is 8 years. The minimum for second-degree conspiracy with no prior felony convictions is 5 years. Third-degree sale carries no mandatory minimum jail time. Despite numerous letters submitted on her behalf, and no prior felony convictions, L.R. was sentenced to an aggregate term of 25 years.
- K.A., at age 32, was convicted of first-degree robbery after he and a friend robbed a stranger, taking a necklace and phone. Although they showed a gun during the robbery, no one was harmed. K.A. had four prior misdemeanors but no prior felony convictions. He also held a steady job at Con Edison and was a father of four. The minimum sentence for first-degree robbery is 5 years. The judge sentenced K.A. to 15 years.
- F.M., in his early 30s, was convicted of first-degree robbery after he and a co-defendant robbed a clinic a few days after September 11, 2001. F.M. had committed two prior class D felonies in his late teens, making him a mandatory persistent violent offender and requiring a minimum sentence of 20 years to life. F.M.'s co-defendant simulated a gun, and made a comment about all police officers being busy at the World Trade Center—a comment that was incorrectly attributed to F.M. during his sentencing. F.M.

²⁰ A person serving a determinate prison sentence is eligible for conditional release after serving six-sevenths of that sentence, if the person earns all of his/her good time. Penal Law §§ 70.40(1)(b), 70.30(4)(a); Correct. Law § 803(1)(c).

was sentenced to 40 years to life. His excessive sentence claim was denied but his co-defendant's was granted, by a different panel of judges, and reduced to 17 years. F.M., for a robbery during which no one was injured, is serving more time than most convicted of murder, and will not be eligible for parole until age 72.

In each of these cases, the sentence imposed is likely far in excess of what is required to achieve the purposes of incarceration. Like the drug dealer sentenced by Judge Underhill, each of them may serve several years—or decades—that are a waste of time and resources, and only contribute to the cycle of poverty and loss of family ties that are hallmarks of our incarceration system.

The Second Chance Amendment would give those who deserve the opportunity a chance to regain a “claim to their future.”²¹ In doing so, it will ultimately encourage prisoners to exhibit good behavior, job and educational advancement, and will incentivize participation in rehabilitative actions like substance abuse programs. The Second Chance Amendment will also save taxpayer money. The amount of money that could be saved is evidenced by the high annual cost of housing and guarding inmates in New York State – over \$69,000 per inmate.²²

In addition to the enormous benefits of the Amendment to resident New Yorkers, enactment would make New York a model state for criminal justice reform. A number of other states have recently implemented reforms to their sentencing processes.²³ The Second Chance Amendment would not only draw on these reforms, but would improve upon them. This proposed legislation would eliminate much of the administrative cost present in other states' programs, which typically require substantial input from the states' departments of correction in order for a sentence to be reduced.²⁴ In adopting the Second Chance Amendment, New York would become a national leader in reducing mass incarceration.

III. PROPOSED LEGISLATION

The Second Chance Amendment would join current legislation reform efforts on the federal and state levels to reduce the prison population.

²¹ Eric Holder, July 9, 2009, Vera Institute of Justice's Third Annual Justice Address, <https://www.justice.gov/opa/speech/attorney-general-eric-holder-vera-institute-justice-s-third-annual-justice-address>

²² Vera Institute of Justice Report, *supra* n. 6.

²³ *E.g.* Indiana Pub. Law 164 (May 13, 2015) (allowing individuals to apply for reduced sentences conditional upon good conduct in prison); Louisiana Acts No. 280, 281, 282 (June 15, 2017) (allowing judges to reduce sentences for subsequent offenses for individuals with prior criminal records); Oklahoma H.B. 1548 (April 21, 2015) (allowing for sentence modification for individuals incarcerated for a number of drug-related offenses); North Dakota Century code Title 12.1, Ch. 12.1-32-02.03 (allows judges to sentence below the mandatory minimum at the time of sentencing if the minimum would be unreasonably harsh); Texas Code of Criminal Procedure Ch 42, Arts. 42.0199, 42.12 (allowing individuals to apply for reduced sentences following the submission of a report from the Department of Corrections).

²⁴ *Supra* n. 22, Indiana, Oklahoma, Texas.

a. Subsection A

This subsection permits an eligible individual to make a motion to the court that imposed his or her sentence to reduce or modify that sentence on the grounds that the sentence is excessive – that is, greater than necessary to achieve the purposes of incarceration. Modification includes the running of consecutive sentences concurrently.

b. Subsection B

This subsection addresses the eligibility requirements, which include that an individual must be serving a sentence of at least 10 years and, if an appeal was taken, must have exhausted the direct appeal.

Individuals less than two years away from conditional release will not be eligible. Individuals convicted of homicide and sex offenses shall not be eligible, unless the district attorney consents. Individuals convicted of offenses that result in the infliction of serious physical injury shall not be eligible for relief, unless (a) liability was based on the conduct of another, or (b) the district attorney consents to eligibility.

The individual must have served at least one-third (1/3) of the aggregate minimum term of an indeterminate sentence or at least one-third (1/3) of an aggregate determinate sentence.

c. Subsection C

This subsection provides that an otherwise ineligible individual shall be deemed eligible upon the consent of the district attorney.

d. Subsection D

This subsection provides that individuals sentenced to the minimum permitted under the Penal Law are not eligible for relief, as this Amendment does not intend to alter statutory mandatory minimum sentences.

e. Subsection E

This subsection provides that the motion shall be referred to the judge or justice who imposed the original sentence and, if that judge or justice is unavailable, the administrative judge of the applicable court shall assign the motion to another judge or justice of the court.

f. Subsection F

This subsection provides that the court may consider any relevant facts or circumstances submitted by the individual or the district attorney, including age, personal circumstances, and medical condition, as well as record of confinement.

g. Subsection G

This subsection provides for the opportunity for a hearing, and requires that the court place its reasons for the modification or denial on the record.

h. Subsection H

If an individual's motion is denied, this subsection permits a new motion three years after the motion's denial date.

i. Subsection I

This subsection provides a right to appeal.

j. Subsection J

This subsection provides that a defendant may not waive the right to eligibility for relief under this statute as a condition of any plea or agreement, and such a waiver will be unenforceable.

k. Subsection K

This subsection confirms that an order reducing or modifying a sentence does not affect the validity or status of the underlying conviction.

l. Subsection L

This subsection provides for the appointment of counsel.

IV. CONCLUSION

We urge our state leaders to support the Second Chance Amendment, which is a step towards reducing our prison population and providing individuals with a second chance. We are hopeful that this legislation will bring balance, fairness, and an opportunity to encourage proactive and positive actions by incarcerated individuals.

Task Force on Mass Incarceration
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Criminal Courts Committee
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