



January 31, 2022

Hon. Alvin Bragg
Manhattan District Attorney
Manhattan District Attorney's Office
One Hogan Place
New York, NY 10013

Re: Recommendations for the Manhattan District Attorney's Office related to Combating Mass Incarceration

Dear District Attorney Bragg,

On behalf of the Mass Incarceration Task Force (Task Force), the Criminal Justice Operations Committee, the Corrections and Community Reentry Committee, and the Criminal Courts Committee of the New York City Bar Association (City Bar), we congratulate you on your historic and exciting election as District Attorney of New York County. We write as well to express our desire to work with you to bring about fundamental reforms in the criminal justice system. As you know, as a member of the Association, the City Bar is an independent organization and professional home for approximately 25,000 lawyers, judges and law students. Our mission is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest. Our committees address issues that impact the criminal justice system, including operations, procedure, and the rights of defendants and persons with prior criminal convictions. The Task Force was formed to examine the issues surrounding mass incarceration, monitor developments on the federal, state and local levels, encourage dialogue among various groups with differing interests, and advocate for reform.

The Committees, led by the Task Force, have compiled a report that details key areas of focus and comprehensive policy recommendations to reduce mass incarceration across New York City and New York State.¹ The report calls on our City and State legislators to implement sweeping

¹ "A Pathway Out of Mass Incarceration And Towards a New Criminal Justice System: Recommendations for the New York State Legislature," New York City Bar Association, May 13, 2021, <https://www.nycbar.org/member-and->

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

revisions to the criminal justice system, so that it may address the root causes of crime and more effectively and compassionately prevent further crime. The report details how this can be done by arresting fewer people, arraigning fewer people, convicting fewer people, sending fewer people to prison, reforming prisons, reforming parole and reentry, expanding sealing of convictions, recognizing mental health issues and concerns, and including those convicted of crimes of violence in reform.

We are heartened that you share many of our goals. In particular, we are in complete agreement that there is no conflict between public safety and criminal justice reform. That supposed conflict presents a false dichotomy. As you recognize, thoughtful and fundamental reforms that reduce recidivism increase public safety. To that end, we agree with and support the following:

Drastically reducing the use of pre-trial detention, and embracing the presumption of non-incarceration for most cases pre-trial

We commend your stated intent to “abide by the spirit and the letter of the bail reform law” and its presumption of pre-trial non-incarceration in lower-level offenses and most felonies. The existing research demonstrates that bail reform has worked to reduce the use of jail and conviction without compromising public safety.² We urge you to add your influential voice and to use data, facts and transparency to correct misinformation that threatens to undermine this landmark criminal justice reform. Additionally, where offenses are not entitled to the presumption of pre-trial non-incarceration, we urge your office to carefully weigh, in addition to particular vulnerabilities, an individual’s ability to pay when requesting bail, and request bail in an amount reasonably calculated to ensure their return to court.

[career-services/committees/reports-listing/reports/detail/a-pathway-out-of-mass-incarceration](#). (All sites last visited Jan. 26, 2022).

² Tiana Herring, “Releasing people pretrial doesn’t harm public safety,” Prison Policy Initiative, Nov. 17, 2020, <https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/>; see also “Empire State of Incarceration,” Vera Institute of Justice, February 18, 2021, <https://www.vera.org/empire-state-of-incarceration-2021> (“the first few months of bail reform implementation showed that releasing more people pretrial made communities no less safe”; citing University of North Carolina study showing Philadelphia District Attorney’s decision to stop requesting bail for people charged with one of 25 misdemeanor and felony offenses decreased the number of people who spent at least one night in jail and “did not increase failures to appear for court or re-arrests of people out on bail”); “The Facts on Bail Reform and Crime in New York City,” Center for Court Innovation, Feb. 3, 2021, https://www.courtinnovation.org/sites/default/files/media/documents/2021-02/Handout_Bail_Reform_Crime_02032021.pdf (New York Post analysis of NYPD data revealed that, of 528 shootings through June 30, 2020, only one person released due to New York’s bail reform was charged with a shooting; and studies of New Jersey, Chicago and Philadelphia’s restricted use of bail and pretrial detention found the reforms had no adverse effect on recidivism or court attendance. “There are no rigorous evaluations of bail reforms in any jurisdiction suggesting that they compromised public safety”).

See also New York City Bar letter to Hon. Eric Adams, Jan. 19, 2022, <https://s3.amazonaws.com/documents.nycbar.org/files/2020967-AdamsTransitionMassIncarceration.pdf> at 5 - 6 (citing NYC data showing that, of the 11,000 people released from New York City jails between January and June of 2020—as a result of bail reform and in response to the threat of COVID-19 behind bars—less than one percent were involved in any gun violence during that period; and showing that in June 2021 less than one percent of people awaiting trial in New York City were rearrested for violent felony offenses.)

Making alternatives to incarceration the norm, not the exception

We agree that prosecutors should decline to prosecute certain minor charges and seek carceral sentences in only the most serious offenses. We believe that, in conjunction with your related ATI proposals, an overall policy of decarceration will advance the goals of both reducing incarceration and promoting public safety.

In particular, we applaud the creation of a new “Pathways to Success Bureau” that will seek community-based services instead of confinement, conviction, and burdensome fines and fees, at every stage in the process, from pre-charge to post-conviction, and across the spectrum of severity from low-level offense to serious felony.

We further support your proposal to create a Public Health Unit within the Pathways to Success Bureau to address issues posed by those who commit crimes and have behavioral health and/or other related issues. Substance use disorder and behavioral health are public health, not criminal justice, issues. Court-involved people with mental health and behavioral issues must be provided with treatment and diverted from the criminal justice system.

Finally, we agree that, as research has shown, brain development continues up to age 25, which means that young people in particular will benefit from interventions and services and should receive every opportunity to avoid a criminal record, which will drastically increase opportunities for success and reduce recidivism.

Recognizing the Importance of Reentry

We support your proposal that ADAs consider reentry at every meaningful stage of the criminal justice process and not just at sentencing. As you stated in your campaign memorandum, “It is well established that helping an offender transition back into the community and avoid future contact with the criminal justice system helps build safer neighborhoods.” Having ADAs support the earliest possible release on parole, and using asset forfeiture funds to assist people reentering find employment, housing, and other necessary elements to a successful reentry, are positive steps that will reduce recidivism and promote public safety.

RECOMMENDATIONS

In the spirit of your proposals, we also urge that you consider the following reforms:

Create a New Sentence Review unit

We support the newly announced policies that limit the maximum carceral sentences that your office will seek. We also urge your office to review the sentences of those individuals who were sentenced in a more punitive era, and are either serving sentences of life without parole or of more than 20 years, or are serving a sentence that is excessive and longer than necessary to serve the needs of the individual and the community. As you correctly recognized in your campaign memorandum, it is “clear that longer sentences do not deter crime or result in greater safety to the community.” As your office will no longer request a sentence of life without parole, or a sentence

of more than 20 years, absent exceptional circumstances, we urge you to apply this principle to people already serving long sentences, particularly those individuals who are serving life sentences as the result of a persistent felony offender finding.³ Justice and fairness support applying the same principles retrospectively, so as to avoid unwarranted disparities in how incarcerated people are treated and to release those incarcerated people, many aging or infirm,⁴ who pose no threat to public safety.

Adopt additional policies that will promote justice in charging

We applaud your commitment to charge crimes in a manner consistent with common sense and justice rather than charging the absolute highest-level crime the Penal Law may permit. For example, you note that shoplifting cases should not be charged as burglaries. We completely agree and urge your office to discontinue the use of “trespass notices” to elevate such shoplifts to burglaries. Similarly, “package burglaries,” in which packages are taken from building lobbies, should not be charged as the violent crime of second-degree burglary, but as a petit larceny or a third-degree burglary. In fact, any burglary that does not involve actual entry inside an individual’s home should not be charged as second-degree burglary. That includes not only thefts from commercial establishments that happen to be on the ground floor of apartment buildings, but also thefts from a building basement or lobby. In addition, where the loss amount is less than \$5,000, we urge you to exercise your discretion to charge larceny and criminal mischief crimes as misdemeanors.

No longer seek appeal waivers

During the campaign, you committed to declining to seek waivers of the right to appeal as a condition of a guilty plea.⁵ We urge you to keep this promise.

The State Legislature has never sanctioned the use of waivers of the right to appeal. While in theory appeal waivers are “bargained-for,” in fact, defendants are rendered victims of “situational coercion” by these “automatic, non-bargained-for waivers.”⁶ These waivers, which in practice do not save prosecutorial or judicial resources, deprive defendants of an important fundamental right, and also remove opportunities for the appellate courts to correct injustices.⁷

³ In many cases, your office can consent to a finding of ineffective assistance of counsel at sentence and thus the vacatur of the sentence pursuant to CPL § 440.20. And there are often other bases on which your office can consent to a reduction or modification of a sentence. We also urge you to support legislation, *see* below, that would permit a judge to review an excessive sentence.

⁴ *See* Nick Reisman, “DiNapoli: New York’s prison population has gotten smaller and older,” Spectrum News 1, Jan. 13, 2022, <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2022/01/13/ny-s-prison-population-is-smaller--and-older>.

⁵ 5 Boro Defenders, *Race To Decarcerate: Manhattan DA Debate* (February 18, 2021), https://www.facebook.com/watch/live/?ref=watch_permalink&v=428669465131357 at 32:48.

⁶ *See People v. Thomas*, 34 NY3d 545, 593 (2019) (Wilson, J., dissenting).

⁷ *See* “Report on Legislation to Amend the Criminal Procedure Law in Relation to Removing Impediments to Appellate Review of the Fairness, Uniformity, and Transparency of Criminal Sentences,” New York City Bar Association, Dec. 2021, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/removing-impediments-to-appellate-review>; “Report on Legislation to Amend the Criminal

Because of the realities of the criminal justice system, this deprivation primarily and disparately impacts young Black and brown people. Accordingly, their use should be discouraged.

Advocate for legislation that will contribute to ending mass incarceration

We also urge you to support legislative changes that will further reduce mass incarceration. Specific legislation that we hope you will support and advocate for includes:

- Supporting the end of mandatory minimum sentences and returning discretion to judges to determine who should go to jail, including supporting the repeal of:
 - predicate felon status;
 - violent predicate felon status; and
 - mandatory and discretionary persistent felony offender statutes.
- The Second Chance Amendment (S.8077 Sen. Cleare),⁸ which will permit a judge to review and modify an excessive sentence at the post-conviction stage.
- An increase in youthful offender age (A.3536-A AM O'Donnell / S.5749-A Sen. Myrie).⁹
- Elder Parole (A.8855 AM Davila) / S.15-A Sen. Hoylman).¹⁰
- First Time Felony Offender Diversion.¹¹
- Reforms to appellate review procedures by:
 - enabling appellate review of the fairness and appropriateness of an imposed criminal sentence (A.5687 AM Cruz / S.1280 Sen. Bailey);¹² and

Procedure Law in Relation to Facilitating Appellate Review of Rulings That Implicate Issues of Public Concern,” New York City Bar Association, Dec. 2021, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/review-of-police-misconduct-allegations-in-criminal-cases>.

⁸ See “Report in Support of the Second Chance Amendment,” New York City Bar Association, Feb. 7, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-second-chance-amendment-report-in-support>.

⁹ Available at <https://www.nysenate.gov/legislation/bills/2021/s5749/amendment/a>.

¹⁰ Available at <https://www.nysenate.gov/legislation/bills/2021/s15>.

¹¹ “Creating a First-time Felony Diversion Court,” New York City Bar Association, Dec. 9, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/creating-a-first-time-felony-diversion-court>.

¹² See “Report on Legislation to Amend the Criminal Procedure Law in Relation to Removing Impediments to Appellate Review of the Fairness, Uniformity, and Transparency of Criminal Sentences,” New York City Bar Association, Dec. 2021, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/removing-impediments-to-appellate-review>.

- facilitating appellate review of rulings that implicate issues of public concern (A.5688 AM Cruz / S.1281 Sen Bailey).¹³

We also urge that you include those charged with and convicted of violent crimes in your proposals to reduce mass incarceration. We recognize and appreciate the difficulty elected officials face when it comes to addressing violent crime. However, as we stated in our report, we cannot end mass incarceration by targeting only non-violent offenders.¹⁴ We must find better ways to respond to those driven to commit violent acts if we want to prevent further crime and make the community safer. In addition, simply incarcerating those who commit violent crimes, rather than seeking to address the reasons individuals commit those crimes, does not make our communities safer. Individuals who commit violent crimes often have experienced unaddressed trauma and adverse childhood events, factors that are only exacerbated by the trauma of incarceration. We hope that your goal to focus on incarceration as the exception rather than the default will extend to those who commit violent crimes.

Address the humanitarian crisis at Rikers Island

We recently wrote to the New York City District Attorneys regarding the ongoing humanitarian crisis at Rikers Island. The letters recommended actions that each District Attorney office could take to quickly and safely bring this terrifying health, safety, and human dignity crisis to an end.¹⁵ We hope these recommendations can be helpful as you develop your office's policies.

We look forward to working with you and engaging in dialogue about our mutual goals, including at our upcoming panel discussion on February 16. We are honored that you have agreed to participate and look forward to hearing you talk about the implementation of your innovative policies.

Again, our heartfelt congratulations, and we look forward to working with you on these vital and important reforms.

Sincerely,

Jullian D. Harris-Calvin, Co-chair
Mass Incarceration Task Force

¹³ See "Report on Legislation to Amend the Criminal Procedure Law in Relation to Facilitating Appellate Review of Rulings That Implicate Issues of Public Concern," New York City Bar Association, Dec. 2021, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/review-of-police-misconduct-allegations-in-criminal-cases>.

¹⁴ "A Pathway Out of Mass Incarceration And Towards a New Criminal Justice System: Recommendations for the New York State Legislature," *supra* n. 1, pp. 35-36.

¹⁵ Available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/addressing-rikers-island-inmate-death-crisis>.

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