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COMMITTEE ON CRIMINAL LAW

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Re: Violent Crime Control and Law Enforcement Act

Dear Mr. Brooks:

I am the Chairman of the Committee on Criminal Law of the Association of the Bar of the City of New York which consists of a group diverse in both background and experience. The Committee includes present and former State and Federal prosecutors, several law professors, a Justice of the Supreme Court of the State of New York, a Federal Magistrate Judge and a number of lawyers who regularly handle the defense of criminal cases in the State and Federal Courts. I am writing to each of the House and Senate Conferees to convey the Committee's views on the above-referenced legislation.

We focus on two parts of the Crime Bills: We endorse the House approach to mandatory minimum sentences for low-level drug offenders, and we oppose the "Three Strikes and You're Out" approach to persistent serious offenders as ill advised.

1. Mandatory Minimums for Low-Level Drug Offenders.

Currently, the Sentencing Guidelines require mandatory minimum sentences of five or ten years for low-level couriers and sellers of drugs. The Senate Bill would leave those minimums unchanged. The House Bill, which we prefer in this respect, would reduce the minimum sentence to at least two years, rather than five, for low-level couriers and sellers with no significant criminal records, no involvement in violence, and no significant role in any substantial drug operation. See H.R. 4092, 103d Cong., 2d Sess. §§ 201, 202 (1994). While the House approach would tend to shorten average sentences for low-level drug couriers and sellers, the Sentencing Guidelines nonetheless would provide federal district judges with discretion to impose sentences harsher than the two year minimum in appropriate circumstances.

Since the five or ten year minimums for low-level drug couriers and sellers were passed in the Sentencing Reform Act of 1984, they have contributed to dramatic increases in the federal prison population -- increases that show no sign of abating. According to a recent Department of Justice Report, the federal prison population has more than tripled since 1980, rising from 24,000 to more than 90,000 in early December 1993. See U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (Feb. 4, 1994) at 13 [hereinafter *Analysis of Non-Violent Drug Offenders*]. About 16,316 federal prisoners, or about 20 percent of the total federal prison population, were low-level drug offenders,

meaning they had no current or prior violence in their records, no involvement in sophisticated criminal activity, and no prior commitments. Id. at 2.

The sentences being imposed upon low-level drug couriers and sellers with category I criminal history scores (the lowest category) are greater than the median sentences for armed robbery, kidnapping/hostage taking, extortion, arson and almost every other serious crime except murder. See Analysis of Non-Violent Drug Offenders at 12. The average sentence of the low-level drug law offender group was 81.5 months, meaning that under the Sentencing Guidelines these individuals will serve on average at least 5.75 years before release from prison. Id. at 3.

Many of the members of the Committee are intimately familiar with the desperate situations which confront some of the least involved defendants charged with crimes carrying mandatory minimum penalties. Some individuals who make a single delivery of narcotics, for example, do so without remuneration at the request of a friend or relative, while others are driven by dire economic circumstances to make a telephone call or delivery for a paltry sum. The conduct in issue in such cases often does not indicate a criminal lifestyle or livelihood, but rather a gross lack of judgment influenced by loyalty to friends and family or overwhelming financial burdens. Lowering of mandatory minimums, particularly with the sentencing guidelines in place, will therefore help achieve equitable results and, at the same time, better enable the allocation of scarce law enforcement resources.

The cost for housing each of these low-level drug offenders will be at least \$20,000 per year. Moreover, there is a significant reason to doubt the incremental deterrent value of sentences of more than two years for these low-level offenders, whose non-recidivism rates are very good.

By reducing average sentences for the significant population of low-level couriers and sellers of drugs, the House Bill would make prison cells available for more serious offenders. Money saved could be used to strengthen federal enforcement efforts against criminals with more a substantial role in drug organizations or involvement in violent crime.

2. "Three Strikes and You're Out"

Both the Senate and House Bills would require sentences of life in prison, without the possibility of parole, on a third conviction for certain serious crime. See S. 1607, 103d Cong., 1st Sess. § 2408 (1993); H.R. 4092 § 501. This "Three Strikes and You're Out" approach we believe would do little good at a tremendous cost.

Because only a relatively small amount of criminal law enforcement is done at the federal level, "Three Strikes and You're Out" seems at first to be not much more than an empty rallying cry. In fact, supporters sometimes justify their position on the ground that "Three Strikes and You're Out" will have little practical effect.

The problem is that the "Three Strikes and You're Out" provisions surely would result in mandatory life sentences for some criminals that would do little good

through their old age, that is, long after they have become too old to pose any real threat to society. As a result, the public will pay the significant cost of decades of useless imprisonment.

It is immediately evident upon stepping inside any prison that violent crime is an occupation almost exclusively for young men. But consider what would happen under the Crime Bills to an armed robber convicted for the third time at age 25. Under the current Sentencing Guidelines for third violent offenses, he would be facing imprisonment of perhaps as long as 18 to 30 years -- into his 40's or 50's. Nonetheless, the House and Senate Bills would require him to be held in prison for another two, three, or four decades beyond that time even though we believe that virtually no 60-year-olds commit armed robberies. Further, the prospect of imprisonment until age 80, as opposed to age 50, is not likely to deter a 25-year-old.

Old people simply do not commit violent crimes in numbers that can even begin to justify the tremendous cost of housing, feeding, and caring for third-time offenders through their 50's, 60's, 70's, and 80's -- at a cost per prisoner of \$20,000-\$30,000 per year (the cost goes up as elderly inmates require more medical care at public expense). For years 50-69 of the 25-year-old armed robber's life, the bill might be \$400,000-\$600,000. "Three Strikes and You're Out" is a poor use of our scarce law enforcement resources. Holding three-time losers in prison for decades after there ceased to be any real reason to do so, advances no legitimate societal interest.

Mr. Brooks

-6-

June 2, 1994

Unlike much in the Crime Bills, five or ten year mandatory minimums for low-level, non-violent, first-time drug offenders and "Three Strikes and You're Out" are not real remedies for any of the country's problems. They are terribly expensive ways to pander to the public's now-rampant fear of crime. We urge you to reject them.

Respectfully,



John J. Kenney

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