The Association of the Bar of the City of New York

OFFICE OF THE PRESIDENT

42 WEST 44TH STREET
NEW YORK, NY 10036-6689
(212) 382-6600
WWW.ABCNY.ORG

PRESIDENT
Evan A. Davis
(212) 382-6700
Fax: (212) 768-8116
edavis@abcny.org

August 1, 2001

The Honorable George E. Pataki
Governor, State of New York
Executive Chamber
State Capitol
Albany, New York 12224

Dear Governor Pataki:

On behalf of the Association of the Bar of the City of New York, we are writing once again in support of major reform of New York's Rockefeller drug laws. We commend your Felony Drug Law Reform Act, and your July 24, 2001 proposed revision thereof (the "Proposed Revision") (collectively "your proposal"), as significant steps towards substantive reform. The Association believes, however, that an effective and equitable approach to drug sentencing requires additional steps as part of a more comprehensive plan to eliminate the substance abuse which lies at the core of most of New York's criminal behavior. Many of the provisions that would accomplish these goals are found in the Assembly's bill, the Drug Law Reform, Drug Treatment, and Crime Reduction Act of 2001, which we support to the extent described herein. Your proposal and the Assembly bill suggest that there is now an opportunity for meaningful change; that opportunity should not be lost. We believe that your most recent proposal materially moves us towards what should be everyone's goal - not to let this legislative session end without implementing substantial change to the prevailing unjust drug crime sentencing scheme.

We believe it to be particularly important that a reform proposal (a) maximize the opportunities to reduce the number of incarcerated low-level drug offenders; (b) create more proportionate prison sentences for all drug offenders; (c) provide funding for, among other things, expanded drug treatment, offender testing and supervision, drug court operations, alternative to incarceration services, and resources for the increased roles of probation and parole supervision; (d) restore, to a greater extent, judicial sentencing discretion; (e) increase, in appropriate cases, the number of offenders diverted from prison to substance abuse programs; and (f) provide for retroactivity.

Mandatory Minimum Prison Sentences. In considering the issue of mandatory minimums, it is important to remember that adjusting such requirements does not mean that a judge cannot impose a harsher sentence. In order to promote uniformity, it also is possible to allow the People, as well as defendants, to appeal from sentences which are not invalid as a matter of law. With this background, the Association favors: (a) reducing the length of mandatory sentences for almost all drug felonies; (b) increasing the weights required to trigger the most serious Class A offenses; (c) permitting offenders charged with Class A offenses to plead guilty to Class B offenses; (d) permitting (not requiring) judicial diversion of most drug offenders to treatment; and (e) permitting judges to avoid overly harsh sentences for Class B offenders by imposing determinate prison sentences that include periods of probation; and (f) providing for retroactivity.

Both you and the Assembly appropriately propose to adjust mandatory minimum sentences. We believe, however, that the Assembly's proposals in this regard are more equitable. The Assembly bill would reduce the range of sentence for first time A-I offenders to an indeterminate minimum sentence of 5 - 15 years to an indeterminate maximum of 8 1/3 - 25 years. Repeat A-1 offenders would face an indeterminate sentence of 7 1/2 - 25 years. Similarly the mandatory sentences for Class A-II offenders would be reduced to a minimum indeterminate sentence of 3 - 9 years to a maximum indeterminate sentence of 8 1/3 - 25 years for first-time offenders. Repeat offenders would face a minimum of 5/-10 years to a maximum of 12 1/2 - 25 years.

We believe the weight thresholds to trigger Class A-I and A-II treatment should be adjusted. We believe that an appropriate adjustment would be to double the existing weights.

We also endorse the concept found in both your and the Assembly's proposals, to allow the court, upon the consent of the prosecutor, to sentence a first time Class A-I offender as a Class B offender. Given the requirement of prosecutor consent, however, we believe that the requirement to impose a mandatory minimum in these circumstances is unnecessary.

For offenders of Class B drug offenses who are not second felony offenders, the Assembly's proposal would allow judges to consider the nature and circumstances of the charged crime, as well as the offender's history, character and condition, in order to determine whether an indeterminate prison sentence would be harsh and excessive and, if so, to impose a six month sentence of imprisonment and a five year period of probation. We support this provision.

A Class B predicate felony drug offender, under your proposal, could receive a determinate minimum sentence of 4 years - reduced from the current indeterminate term of 4 1/2 -9 years - but only if his prior felony conviction was for non-violent felony. Under your proposal, if a Class B felony offender has a prior violent felony conviction, he would face a minimum determinate sentence of 6 1/2 years. The Association believes that a mandatory minimum sentence of 6 1/2 years for selling what might be $5 worth of a controlled substance is inappropriate.

The Association believes that a judge should have the ability to impose downward departures of mandatory minimum sentences beyond the opportunity to divert offenders of drug laws to drug treatment programs. Your proposal moves in the right direction in this regard. It provides that a sentencing court finding that a sentence of imprisonment is necessary for a Class C, D or E first time drug offender, but that the mandatory minimum would be unduly harsh, may impose a definite sentence of 1 year or less. The Association supports this provision of your proposal and calls upon you to work with the Legislature to similarly expand judicial discretion to first offenders of Class B drug offenses.

The Association supports the expansion of judicial discretion to the greatest extent possible. We believe it is important for judges to retain the discretion to continue to impose the maximum penalties available under current law and to be able to better tailor sentences for non-violent drug offenders to fit the facts and circumstances of each case. Judges will be best able to adapt sentences to fit the crimes if they are given a wider range within which to impose appropriate sentences.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 WEST 44th STREET
NEW YORK, NY 10036-6689

PHONE: (212) 382-6700 FAX: (212) 768-8116

Diversion to Substance Abuse Treatment. One of the most needed reforms of the current law is the expansion of opportunities for judicial diversion of addicted drug offenders to substance abuse treatment programs instead of prison. Again, both you and the Assembly tackle this issue in your proposals.

While diversion obviously only should be authorized in cases determined to be appropriate, the number of offenders potentially eligible for diversion from prison to mandated treatment at a judge's discretion is staggering. The Legal Action Center reports that 4,872 individuals committed to the Department of Correctional Services in 2000 would have become eligible for a non-incarcerative sentence under the Assembly's proposal. While your Proposed Revision takes a substantive step towards increasing the number of offenders who may be eligible for diversion beyond those who would have been eligible under your original bill, under your current proposal, many fewer would be eligible than under the Assembly's.

Both the Assembly bill and your proposal (as outlined in your Proposed Revision) give judges the discretion to divert Class B, C, D and E felony drug offenders, whose offense resulted from chemical dependencies, to drug treatment. However, your proposal, as described in your Proposed Revision, would limit the number of offenders potentially eligible for diversion by precluding those who have a prior non-violent non-drug felony conviction or anyone who has more than one prior drug offense. Again, as described above, the Association supports the broadest latitudes for judicial discretion possible. To this end, we believe that preclusions to eligibility must be held to a minimum. Certainly, a judge should consider an offender's complete history in assessing the appropriateness of diverting him; but, a prior non-drug non-violent felony conviction or more than one prior drug offense should not automatically preclude an offender from an opportunity to receive treatment - especially in light of the fact that many drug users have several prior drug offenses as a result of a long standing addiction and many resort to theft and other non-violent crimes to support their habits.

Similarly, your Proposed Revision suggests that an offender may be precluded from diversion eligibility if a drug test administered at arraignment bears a negative result. Undoubtedly, judges should be able to consider such a negative result as a factor in assessing the appropriateness of diversion. However, the Association believes that whether an offender is an appropriate candidate for diversion should be based on all available evidence and that no offender automatically should be disqualified on the basis of one test result.

An additional concern arising from your Proposed Revision is that a defendant hoping to enter the diversion program would feel pressured into accepting a guilty plea before they have been declared eligible for the program. This gives the defendant no guarantee of treatment even if a guilty plea has been entered. The defendant and her attorney are therefore placed in an unfair dilemma where they must weigh the risk of a more severe sentence against the hope of getting treatment. A more equitable solution would be to determine eligibility for diversion before requiring a plea.

Furthermore, while the Association agrees that it is appropriate for an offender seeking diversion to make a showing that he or she has a drug dependency, given the subjectivity of some of the factors to be considered in

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 WEST 44th STREET
NEW YORK, NY 10036-6689

PHONE: (212) 382-6700 FAX: (212) 768-8116

assessing the appropriateness of diversion, we do not support a requirement that offenders make such a showing by a "clear and convincing" standard.

While judges may, and should, determine not to divert some eligible offenders, the Association believes that the greater number of addicted offenders that are eligible for treatment, the greater the possibility of reducing recidivism among those being driven to crime by their addiction. Because the Assembly's proposal would render a greater number of addicted offenders eligible for treatment than would yours, the Association supports those relevant provisions of the Assembly bill.

Generally, under the Assembly's proposal, drug treatment would last from one to two years, part of which would be residential. Additionally, the Assembly proposal would provide for the supervision of every offender diverted to substance abuse treatment, either though the Department of Probation or through a licensed program, if the judge were to so designate. The proposal specifically recognizes that participants in substance abuse programs frequently relapse and thereby may violate one or more of the conditions of their court ordered treatment. Upon such violation or violations, the proposal would provide judges the discretion to modify any of its conditions of treatment, reconsider any order of recognizance or bail, or terminate the order for treatment and restore the criminal action to the calendar. For offenders who successfully complete treatment the Assembly proposal would provide that they not face a felony conviction - either the drug charges against them would be dismissed or reduced to a misdemeanor.

Additionally, the Assembly proposal would require that every drug offender on probation, parole or in a correctional facility, at the time of the proposal's passage into law, be evaluated for a substance abuse problem and, if such a problem were documented, that offender would be eligible to undergo a treatment program of at least one year. Mandatory drug and alcohol treatment would also be required for all juvenile offenders place in juvenile facilities or programs.

The Association endorses the Assembly's proposals regarding drug treatment, drug testing and supervision of diverted offenders.

Past Violent Felonies. We find troubling, though, the fact that both outstanding bills preclude the benefits of its sentencing reforms to all offenders with a violent felony conviction at any point in their past. We do not see any justification for such a blanket exclusion which applies regardless of the nature and circumstances of the prior felony and the length of time between the current offense and the prior one. The preferred approach would be that while a judge should be required to consider a violent felony, irrespective of when it occurred, that fact alone should not preclude judicial discretion to impose less than a mandatory minimum prison term for class B and lower offenders. If that result cannot be reached, an acceptable step would be to eliminate the absolute bar to diversion when the violent felony was committed in the distant past. For example, under the proposed Assembly scheme, a first time drug offender committing a class A-I felony by carrying a package containing the requisite weight of drugs faces a minimum sentence of five to fifteen years. If that same offender, however, had a felony assault conviction stemming from a barroom brawl thirty years earlier, the minimum sentence he or she would face would be fifteen years to life. That same addicted offender who was involved in barroom fight three decades before but carrying class B felony weight drugs

faces mandatory state prison time rather than being eligible for diversion. These differences cannot be justified. We urge that you work with the Assembly to modify these aspects of both proposals by applying a 10-year limitation on the preclusive effect of a prior violent felony conviction. Such a limitation - where sentence for a prior felony conviction must have been imposed less than ten years before the commission of the offender's current felony for that prior conviction to have effect - already is used in the penal law to render second violent felony offenders (Penal Law § 70.04) and second felony offenders (Penal Law § 70.06).

Up-Front Resources . It is axiomatic that reforming New York's drug laws and drug treatment system, requires up-front funding (which later will be recouped by the savings in prison operating costs). The Assembly proposal supports its plan to expand judicial discretion and expand availability of drug treatment for offenders by allocating $100 million in resources to expand treatment for diverted offenders. The Assembly proposal includes financial support for offender supervision and all related services which operate pursuant to the bill, i.e. the expansion of drug courts and/or D-TAP programs, and the hiring of additional parole and probation officers to reduce caseload ratios and more carefully monitor offenders. The Assembly proposes to implement a long-term plan to use cost savings from diverting offenders from prison and reinvest it in drug abuse prevention and treatment programs in both prisons and communities. The proposal would leave to the discretion of local communities how best to use the funding. The Association endorses this aspect of the Assembly's proposal.

"Retroactivity." We believe that in order to ameliorate injustices that have been meted out under the current drug sentencing scheme, reform legislation must permit current inmates who would be treated better under the provisions of reform legislation to be able to petition for that treatment.

Under the Assembly's proposal, inmates currently serving sentences for Class A drug offenses would be able to petition their sentencing courts to have their sentences modified under the new law. Further, the Assembly's new drug treatment diversion program would be applicable to current inmates who would be able to petition their sentencing courts for early entry into the treatment programs operated by the Department of Corrections. Eligibility for the CASAT program would be expanded to allow early entry into ASAT and CASAT. Current law provides inmates must be within two years of competing their minimum sentences to enter CASAT. Under the Assembly proposal, drug offenders within three and one half years of their minimum sentence would be eligible to begin the CASAT program.

Your proposal would permit first time Class A-I offenders serving their sentences at the time of the bill's passage to petition the sentencing court for reduction of their sentence in accord with your plan. However, the trial court would not have the power to grant the request; the court would only have the option to grant a certificate of eligibility for appellate division review so as to enable the offender to appeal from the original sentence.

The Association endorses the broader provisions in the Assembly's proposal that would permit many convicted offenders serving indeterminate prison sentences to apply for re-sentencing or early entry into drug treatment programs. The Assembly's provisions would have the salutary effect of making certain aspects of the proposal retroactive as a practical matter, enabling

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 WEST 44th STREET
NEW YORK, NY 10036-6689

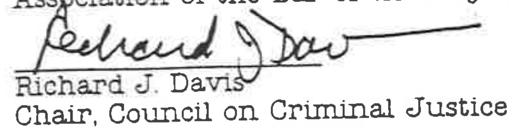
PHONE: (212) 382-6700 FAX: (212) 768-8116

offenders currently serving disproportionately harsh sentences to obtain sentence reductions that would make their punishment consistent with that given to offenders sentenced in the future.

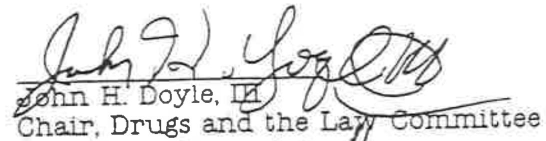
In sum, we believe that it is possible for real reform of the Rockefeller Drug laws to come this year. This letter describes what we believe should be done, but we recognize that enactment of reform legislation will require compromise between you, the Senate and the Assembly. We urge you to work with the Senate and Assembly (and that they work with you) to continue the effort to create a fairer, but still effective system of drug sentencing laws by enacting legislation that will restore sentencing discretion to judges, reduce the incarceration of low level drug offenders and eliminate disproportionately severe sentences.

Very truly yours,

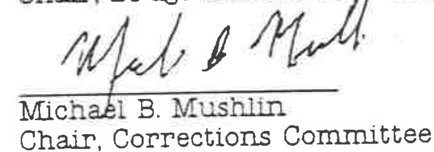
Evan A. Davis
President,
Association of the Bar of the City of NY



Richard J. Davis
Chair, Council on Criminal Justice



John H. Doyle, III
Chair, Drugs and the Law Committee



Michael B. Mushlin
Chair, Corrections Committee

cc: Hon. Sheldon Silver
Hon. Joseph L. Bruno
Hon. James M. McGuire