# REPORT OF THE CRIMINAL LAW COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON PROPOSED DETERMINATE SENTENCES FOR NON-PREDICATE VIOLENT FELONY OFFENDERS

## I. Introduction

Governor Pataki has proposed legislation which would require determinate sentencing, and increase the mandatory minimum sentences, for first-time violent felony offenders. While we share the Governor's desire to deal firmly with violent crime and to increase public confidence in the criminal justice system, we believe the proposed bill is flawed as written. Specifically, the proposal

- unjustifiedly eliminates a judge's discretion at the low end of the sentencing range for each degree of violent crime,

- will, if enacted, increase state prison time, thus requiring a long-term commitment to expend public funds to expand prison space, and,

- is unaccompanied by any proposal for increased alternatives to incarceration for first-time or predicate non-violent felons.

Accordingly, we recommend against passage of the proposal as it relates to first-time violent felons.

## II. The Proposed Law

The proposed changes in the current sentencing scheme are summarized in the chart below:

| | | Current Indeterminate | | Proposed Determinate |
|---|---|---|---|---|
| | | least severe | most severe | |
| Class B | VFO | 3 - 6 | 12½ - 25 | between 5 & 25 |
| Class C | VFO | 2 1/4 - 4½ | 7½ - 15 | between 3½ & 15 |
| Class D | VFO | not required[1] | 3½ - 7 | between 2 & 7[2] |
| Class E | VFO | not required[1] | 2 - 4 | between 1½ & 4[2] |

By mandating the above determinate sentences for first-time violent felons, and by increasing the mandatory minimums, the proposed bill is plainly intended to increase prison time for first-time "violent" felony offenders. The rationales underlying this intent are (a) to ensure that violent offenders receive harsh sentences and (b) to reduce violent crime committed by potential recidivists by keeping them off the streets longer.

The proposed bill is also intended to virtually eliminate "parole" for all violent felony offenders, not just recidivists. To promote "truth in sentencing," the bill would

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[1] Definite or intermittent jail terms of up to one year are generally permitted, but restricted for "armed" felonies. Straight Probation is not available. The "mandatory" one year sentence required by the "Gun Law", ch.233, L.1980, is unaffected by the proposal.

[2] Last year's proposed statute left unclear whether definite or intermittent jail terms would be available for (D) and (E) first - time VFO's. Paul Schectman, when still serving as the Commissioner of the Division of Criminal Justice Services, advised our committee, however, that the Governor's bill was not intended to alter the availability of currently existing non-prison sentences for first-time violent (D) or (E) felonies.

require first-time violent felons to serve at least 6/7th's of their determinate sentence. Thus, the parties as well as the public would know that the sentence imposed on a violent felon in court would actually be served. It is hoped that public confidence in the integrity of sentencing will increase as a result.

## III. Weaknesses of the Proposed Law

### Summary

The bill, if enacted, would eliminate judicial discretion at the low end of the current sentencing range for each degree of violent felony offense. In our view, that elimination of discretion is unwarranted. Moreover, State prison time will increase, imposing a tremendous burden on State taxpayers for years to come. Notably, the bill is unaccompanied by any provision for an increase in alternatives to incarceration for non-violent felons.

These flaws in the bill are outlined more fully below:

**A. The proposed law would result in an unwarranted elimination of judicial discretion at the low end of the current sentencing range for each degree of violent crime.**

In our view, this is a major defect in the proposed legislation.

In the context of plea-bargained sentences, enactment of the Governor's proposal would shift the ability to exercise discretion away from judges and the parole board and toward police and prosecutors, who would largely dictate the sentence to be served by virtue of their ability to determine the initial charges. Thus, the determination when and whether an inmate convicted of her first violent felony is ready to return to society will be vested primarily in District Attorneys.[3]

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[3] The change from an indeterminate to a determinate sentencing scheme for first-time violent felons represents a major shift in this State's sentencing philosophy regarding who is in the best position to determine when a prisoner is ready to return to society.

District Attorneys determine most sentences by controlling what offense is charged and by the State's practice of sentence bargaining. Judges have true discretion in sentencing only when the defendant pleads guilty to the entire

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Furthermore, removing the discretion to be lenient at the low end of the scale hurts the least culpable offenders the most. By raising the minimum sentences by such a substantial degree, the discretion to be lenient with the least culpable offenders--whether the conviction is after trial or after a plea--will be eliminated.

As an example, if a defendant is convicted of a robbery in which what appears to be a handgun is displayed, it could be for first-degree robbery, for which the indeterminate sentence range is now 3-6 years at the lowest and 12.5-25 at the most. In other words, the judge could now select the minimum term for a defendant of between 3 and 12.5 years. The parole board would determine when the defendant will be released after serving the minimum term.

Under the Governor's proposal, the judge will have to select a determinate sentence of somewhere between 5 and 25 years, at least 6/7th's of which the defendant will actually

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[3](...continued)
indictment or is convicted after trial. With respect to plea-bargained cases, this proposal will vest even more discretion with the District Attorneys. The prosecutors will exercise this enhanced discretion without knowing anything about the defendant other than her prior criminal record and the alleged offense. They will select a length of time they want the defendant to serve without publicly-acknowledged criteria for these decisions and with little public accountability.

When a judge makes the sentencing decision under this proposal, there are still no criteria in the proposed bill by which the judge is to be guided in exercising her discretion. But at least she will do so in open court, and with the factors on which she relied in selecting the sentence articulated on the record and thus subject to Appellate Division review. Even so, judges are no better equipped than prosecutors to determine when a defendant is ready to return to society in any given case. While we recognize that the parole board is not necessarily in a position to determine who is a deserving candidate for parole release, having that determination made by the unguided assessment of either a judge or a prosecutor would appear to be questionable public policy.

Nonetheless, we recognize that this shift to determinate sentencing is driven by a federal requirement that states adopt "truth-in-sentencing" schemes to be eligible for federal funding. It would be unfortunate if a simple offer of partial financial aid acted as a constraint on serious debate on this subject.

serve.[4] Discretion is taken away from judges at the lower end of the sentencing range, where it would do the most good in allowing minor participants to serve a shorter term commensurate with their role in the offense.

To illustrate, let us examine a not atypical case. Three 18-year-old youths, two with close community ties and no prior involvement with the law, and one with a prior misdemeanor conviction, approach and surround some people returning home at night. The youth with the prior record points what appears to be a gun at the victims and demands that they hand over their money, which the victims do. As the youths are fleeing, however, police on patrol stop them. One youth throws something under a parked car, which turns out to be an unloaded gun. The defendants and the gun are identified by the victims at the scene.

All three youths are indicted for first-degree robbery (a class B violent felony) and lesser related counts.

Under current law, upon conviction of the top count the least severe sentence for all three defendants is 3-6 years. (Prior to the 1995 revisions, that sentence would have been 2-6 years). Some judges would be inclined to sentence the two unarmed youths with no prior record to the least severe sentence. Under the proposed law, these youths would be required to receive determinate sentences of at least 5 years in prison. Judges should be able to consider a shorter sentence for the less culpable youths with no prior record.

Finally, the increasing of the minimum available terms is unsupported by any data or reasoning other than a general desire to deal more harshly with violent felons. The proposal's assumption that judges will inappropriately set sentences at the low end of the sentencing range if the

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[4] For a defendant sentenced to the minimum for a class B felony, the proposal increases the time he must serve by almost 50% - from 3 years (first parole eligibility) to 4 years, 5 months (release for good behavior).

Similarly, the proposal increases the time a defendant who is sentenced to the maximum available term by almost 70% - from 12½ years (first parole eligibility) to 21 years, 5 months (release for good behavior).

The proposal comes on the heels of recent amendments to the Penal Law which already increased minimums and maximums by 50% above those established in 1978 with enactment of the Violent Felony Offender Law. Ch. 3, L. 1995.

minimum sentences were left unchanged is, in our view, unwarranted.

**B. The proposal will increase State prison time, requiring the long-term expenditure of public funds for increased prison space.**

Increased sentences will come at a cost to the public for increased prison space. A well-documented study by State Senator Catherine M. Abate[5] has posited that enactment of this proposal for first-time violent felons would require the creation of more than 13,000 prison beds, at a total cost of more than $3.5 billion by the year 2005. That expenditure is in addition to the 10,000 new prison beds at a total cost of almost $2.5 billion, by the year 2005, that will be required as a result of the 1995 Sentencing Reform Act relating to second-time violent felons.

While there might be some cost offset achieved by the reduction in violent crime that the bill promises, our committee doubts that such would decrease the public expenditures required by the Governor's proposal.

In our view, the proposal's requirement that more prison space be built places an extraordinary and unnecessary long-term burden on State taxpayers.

**C. This proposal is unaccompanied by any provision for alternatives to incarceration for non-violent felons.**

No bill to increase prison sentences for violent offenders should be passed without serious consideration of increased use of alternatives to incarceration for non-violent felons.

(i) A necessary component to any revision in sentencing that will result in more State time for violent felons is that judges be given the statutory discretion to impose non-incarceration sentences for first-time and predicate non-violent felony offenders.

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[5] Dollars and Cells: An Analysis of Governor Pataki's Sentencing Reforms and Proposals, January 1996.

This Association has already recommended in a previous report,[6] that alternatives to incarceration -- including intensively supervised probation -- be authorized for predicate offenders convicted of non-violent felonies. The legislature must authorize and fund, as part of any increase in State prison time for violent felons, well structured programs to serve as such alternatives to incarceration. Such programs should include well-constructed therapeutic treatment programs for substance abusers, and judges should be statutorily authorized, in the exercise of their discretion, to send non-violent predicate felons to those programs rather than State prison.

(ii) We understand that there is a debate whether the Willard Program, as currently constituted, meets the definition of a well-constructed therapeutic program for substance abusers.

The legislature's goal, in creating the Willard Program in 1995, was to reduce the number of non-violent, drug-addicted inmates in the State prison system by authorizing treatment in appropriate cases. Eligibility for the Willard Program is strictly limited to non-violent felons convicted of Class D or Class E felonies, and local prosecutors are given the power to refuse the program to those eligible felons convicted of Class D felonies.

There were two reasons why the Willard Program was passed in 1995. The first was the desire to determine whether non-violent street level drug violators with addiction problems could be rehabilitated by treatment rather than imprisonment. The second was a recognition that the 1995 increases in prison sentences for second-time violent felons would severely strain the State prison system, unless fewer non-violent felons were incarcerated.

District Attorneys have generally taken the position that the Willard Program's 90 day initial placement is too short a time to be effective and that in-patient programs of 1 to 2 years are preferable. As a result, they have generally withheld consent to Willard placement for defendants convicted of Class D felonies. As a result, a little over a year after the Willard facility opened with an annual budget in excess of 19 million dollars, less than 25% of the Willard slots are being used for their intended purpose.

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[6] "Report on Alternatives to Incarceration and Probation," The Record of the Association of the Bar of the City of New York, Vol. 49, NO. 4 (May 1994), pp. 382, 405-406.

[7] Ch.3, L.1995. (Supervised Parole).

While a 90 day initial placement may indeed be too short to achieve its therapeutic purpose, the current underutilization of the program prevents the development of statistical data necessary to inform the legislature whether this is actually so. Moreover, since the Willard Program's broad parameters fit within the type of alternative to incarceration already endorsed by this Association, we urge that the Program be given a fair opportunity to generate statistical data pending evaluation and/or reformulation.[8]

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One criticism of the proposed bill that we have examined and found unwarranted is the prediction that its enactment would reduce the incentive to defendants to enter into plea bargains.

Opponents of the Governor's bill have voiced concern that mandating determinate sentences for first-degree violent felony offenders drastically will reduce plea bargaining, increase criminal case backlogs and divert judicial resources from civil cases. As one upstate Supervising Judge observed:

> [A]ny significant further restriction on the criminal court's ability to dispose of (D) and (E) first time felony offender cases would significantly hamper the system's overall ability to appropriately and fairly dispose of the tremendous number of criminal cases pending in the courts of this state. The criminal courts need to be able to dispose of by plea bargain a majority of the (D) & (E) violent offender cases in order to accommodate the trial and disposition of the more serious violent felony offender cases.

Supporters of the Governor's sentencing proposal deny that it would result in any significant decrease in the number of pleas. They suggest that once defendants and defense counsel become accustomed to the increased minimum sentences, the exposure to greater maximums will induce as many pleas as at present.

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[8] One avenue toward full utilization of the Willard Program might be the elimination of the requirement that local prosecutors consent to placement in the case of Class D felonies. We note, however, that District Attorneys could easily close this avenue simply by refusing, in the first instance, to consent to a plea-down to a Class D felony.

Although forceful arguments are made on both sides, there appears to be no objective way to project the effect on plea bargaining if the Governor's bill becomes law. Although an analogy could be made to the effect of the Sentencing Reform Act of 1995, it appears that no statistical analysis has been conducted of the impact of that law on the number of pleas taken since its passage. An informal survey of the District Attorney's Offices in New York, Bronx, Brooklyn and Queens indicates that the 1995 law has not had a significant effect upon pleas, but that intelligence is only anecdotal. It thus appears that any arguments whether the Governor's bill will or will not reduce the number of pleas and lead to court congestion are speculative.

## IV. Conclusions

This committee recommends against passage of the Governor's proposal relating to first-time violent felons, as it is currently drafted.

The proposal would eliminate judicial discretion to exercise leniency with respect to the least culpable first-time violent offenders. Moreover, it would require a long-term commitment of increased public funds to create more prison space. No effort is made to tie this proposal with one to provide meaningful alternatives to incarceration for first-time or predicate non-violent felony offenders, in order to obviate the need to build more prisons.

While we share the governor's desire to deal firmly with violent crime and to increase public confidence in the criminal justice system, we do not recommend in favor of passage of this bill unless the above-stated concerns are addressed.

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