

Memorandum in Support

NYSBA #4

March 27, 2023

S. 938

By: Senator Bailey

A. 153

By: M. of A. Cruz

Senate Committee: Codes

Assembly Committee: Codes

Effective Date: 60th day after it shall have become a law

AN ACT to amend the criminal procedure law, in relation to enabling appellate review of the fairness and appropriateness of an imposed sentence.

LAW AND SECTIONS REFERRED TO: Section 470.15 of the criminal procedure law.

THE NEW YORK STATE BAR ASSOCIATION **SUPPORTS THIS LEGISLATION**

The New York State Bar Association strongly supports S.938(Bailey)/A.153(Cruz), a simple fix to Criminal Procedure Law § 470.15 that would restore an appellate court's ability to combat mass incarceration and racial disparities in sentencing. The State Bar has charged our committee with commenting on legislation that will promote the quality of representation provided to, and the fair access to justice by, indigent criminal defendants in the State courts.

The intention behind this legislation is nothing new. C.P.L. § 470.15(2)(c) allows the appellate courts to reduce sentences where, for example, an excessive prison sentence reflects racial disparity or contributes to mass incarceration. The Legislature determined that this power is so important that it may be exercised even when the defendant pleaded guilty, and even where the sentence is plea bargained.

However, prosecutors routinely thwart this legislative purpose by demanding that defendants waive their right to appeal in exchange for any plea deal. Those who plead guilty are thus unable to access appellate review of their cases for unfair sentences.

Nowhere is the damage from the deprivation of the right to appeal sentences more prominent than within the Black community. A study of criminal case data provided by the Manhattan District Attorney's Office from 2010 to 2011 demonstrated that Black New Yorkers consistently face the most criminal prosecutions, accept the most plea

deals, and receive the worst plea deals with the highest sentences.¹

New York can make its justice system fairer by simply allowing the Appellate Divisions to exercise their sentencing review power unfettered, as the Legislature originally intended. By allowing appellate review of sentences regardless of appeal waivers foisted onto plea deals by prosecutors, appellate courts can review sentences for unfairness.

Moreover, appeal waivers have utterly failed to deliver on their promised benefits of efficiency and finality. The case law on the validity of appeal waivers is constantly shifting, so whether any particular waiver will actually be upheld on appeal is unpredictable. Defense attorneys know this, so they correctly advise their clients that the waiver is assailable, and the defendant's decision whether to appeal ends up unaffected by the waiver. It is thus a misconception that waivers have diminished the volume of litigation that appellate prosecutors and courts confront; rather, such waivers effectively double the work that the litigants and the court must undertake in every sentencing appeal. Instead, for example, of a 15-page brief assailing the sentence as excessive, defense counsel must write a 30-page brief, with 15 pages devoted solely to attacking the validity of the waiver. The appellate prosecutor's workload and the court's is similarly doubled. This extra work is all at taxpayer expense.

S.1280/A.5687 is an urgent and necessary bill to simply restore its original legislative intent to allow the Appellate Divisions to review unduly harsh or severe sentences and in turn ensure sentencing uniformity regardless of race and fend off mass incarceration.

For the above reasons, the New York State Bar Association **SUPPORTS** this legislation.

¹ Kutateladze, B. L., & Andiloro, N. R. (2018). *Prosecution and Racial Justice in New York County* (pp. 114-211, Rep.). Brooklyn, NY: Vera Institute of Justice.