July 19, 1982

RECOMMENDATIONS TO GOVERNOR HUGH L. CAREY REGARDING PRISON OVERCROWDING

From the Executive Advisory Commission
on the Administration of Justice
Arthur L. Liman, Chairman

On March 19, 1981, Governor Carey created this Commission and charged it with the task of investigating and proposing solutions for the problems which plague the criminal justice system in New York. The Commission quickly turned its attention to the system's most pressing crisis -- overcrowding in the prisons. After visiting prisons and jails throughout the State, interviewing administrators of the Department of Correctional Services, corrections officers, inmates, sheriffs, prosecutors, public defenders and corrections experts, and holding public hearings in New York City and Albany, we are more convinced than ever that the problem posed by the burgeoning population of the State's prisons and jails must be addressed without delay.

The Crisis in Our Prisons

New York's prison population has more than doubled in the past decade -- from 12,400 in 1972 to more than 27,000 in 1982. The ranks of prisoners swelled by 4,000 in 1981 alone, and by more than 1,600 in the first 26 weeks of 1982. Prison admissions regularly exceed releases by more than 60 per week. Most alarmingly, the Department of Correctional Services ("DOCS") estimates that the prison system is filled

to 115% of its operational capacity.[1/]

Similar overcrowding prevails in county jails -- indeed, conditions are so severe in New York City, and Nassau, Westchester and Orange Counties that their jails are operating under federal court order. Nevertheless, because of its own overcrowding, DOCS sometimes refuses to accept sentenced prisoners promptly from the overcrowded jails in Nassau, Suffolk and Westchester Counties.

Prison overcrowding is not a problem that is unique to New York. Its national dimension is illustrated by the fact that 29 states are operating prisons under court orders because conditions fostered by overcrowding have been found to violate the constitutional rights of inmates. The lesson for New York is clear: either solve the crisis of overcrowding in the prisons, or forfeit State supervision of New York's prisons to the federal courts.

Moreover, the prisons in New York are filled with serious offenders. Thus, the population explosion in the prisons cannot be solved simply by diverting petty offenders

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1/ The "capacity" of a prison is an elastic term, especially in this State. According to Commissioner Coughlin of DOCS, prison capacity can be defined in either of two ways: "operational capacity" -- the optimum number of inmates necessary to enable a correctional facility to function at peak efficiency and "physical capacity," which is determined by the ability of the facility to provide each inmate with his or her own cell (or where dormitories are used, with at least 60 square feet of space per inmate in each dormitory).

to alternative forms of punishment. While such alternatives are needed to impose sanctions on those wrongdoers who now escape punishment altogether, they will not reduce the prison population to any substantial degree, or stem the tide of new inmates into penal institutions.

While the evidence is crystal clear that prison overcrowding has reached crisis proportions in New York, we have been alarmed to discover that there is no statewide consensus concerning what to do about an already critical problem that is becoming worse each day.

Because major actors cannot agree upon what should be done about prison overcrowding, the State is drifting toward disaster. The Governor recently proposed to convert a portion of Pilgrim Psychiatric Center in Suffolk County to a prison for inmates from Long Island, which supplies enough inmates to fill two such institutions. Nevertheless, the proposal met furious opposition in the Legislature, the courts, and the community. A similar proposal to convert a portion of Creedmoor Psychiatric Center in Queens was derailed by community opposition, even though Queens voted 2 to 1 in favor of a 1981 referendum to fund prison construction. The public wants prisoners locked up, but not in their own neighborhoods.

In the absence of significant change, the State's prison population will continue its upward spiral. More and more offenders will flood the prisons as the police continue

to arrest serious offenders in greater numbers, as prosecutors continue to secure more indictments and convictions and as more judges sentence more offenders to prison terms.2/ There will simply be no place to put these offenders. The State has taken steps to increase prison capacity by building new prisons and converting mental health facilities but unless further steps are taken immediately, the number of offenders committed to prison will far exceed the capacity of the prison system to house them. Complacency invites disaster.

The effects of prison overcrowding are already apparent. The primary concern of prison administrators has become how to find vacant beds for new inmates. It is to the credit of DOCS that no prisons in New York have yet been taken over by the courts on the grounds that they constitute cruel and unusual punishment. While grappling with an unmanageable influx of inmates, DOCS has rejected such superficially attractive but ultimately dangerous solutions as double celling. Instead, the Department has continued to press for the construction of new urban-based facilities -- even in the face of recurrent community opposition -- and has called for expansion of vocational and educational

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2/ For example, the Governor and Legislature have agreed to create 98 new judgeships in order to fill urgent needs in the court system. If they follow present dispositional patterns, the new judges assigned to felony cases will produce approximately 800 additional commitments to State prison per year -- more than the capacity of any of the new maximum security facilities being built by the State.

programs. Yet, population pressures have forced the curtailment of educational and vocational programs and other needed support facilities.

Towards a Solution to Prison Overcrowding

In searching for a solution to the population crisis in our prisons, the Commission was guided by a set of principles which its members -- and, we expect, the general public -- share:

-- We want efficient and effective law enforcement. We want the police to detect crime and apprehend the criminal swiftly; our district attorneys to prosecute vigorously and fairly; and our courts to mete out the appropriate punishment. The solution to prison overcrowding cannot be a cap on arrests, prosecutions, convictions or commitments to prison of those who justly belong there.

-- We want safe and secure prisons, where criminals are incapacitated and correctional officers are able to carry out their difficult job safely and humanely. To achieve this, we need a prison system that has enough room to house all inmates in institutions that are safe and conform to constitutional standards. It is therefore imperative that the State implement, without further delay, a comprehensive, rational and pragmatic plan to manage and enlarge its scarce prison resources. The alternative is continued deterioration of the prison system, and ultimately chaos, which will lead to the State's losing sovereignty over its own prison system,

or, even worse, to a possible repetition of the bloodshed at Attica.

-- We want inmates to obey the law when they are released from prison. Whether or not prisons are suitable places to achieve the rehabilitation of offenders, the public can demand, at the very least, that inmates not be made worse than they were -- more angry, more violent, and more hostile -- by their imprisonment. The functionally illiterate should learn to read and write, and those without marketable skills should acquire them. It should be easier for ex-offenders to survive economically in society without committing new crimes. At the same time, there must be adequate post-release supervision for those who present a risk to the community. Accordingly, the solution to prison crowding cannot be simply to warehouse inmates at the sacrifice of prison programs and to abandon effective parole and probation.

We are convinced that none of these goals can be achieved by operating prisons at 115% of their capacity, as the State now does, with worse yet to come.

One obvious answer to prison overcrowding -- construction of new cells -- has received less than unanimous support, as evidenced by the 1981 defeat of the proposed prison bond referendum. In part, the public may have engaged in an intuitive cost-benefit analysis, and concluded that at a cost of $100,000 to build a maximum security cell, and $20,000 a

year to maintain a prisoner in that cell, prison construction is just too expensive a remedy no matter how serious the problem. But the situation has become so severe that the State now has no option but to create more prison cells, either by conversion of existing facilities or construction of new institutions.

We agree that new prison construction alone cannot supply a permanent cure for prison overcrowding at an acceptable price, nor will it be a panacea for the larger crime problem. The size of the prison population at any given moment is a direct function of the State's sentencing and release policies. In recent years, these policies have been in an almost constant state of flux that has rendered long-range planning impossible. New York has vacillated between periods of tough, but unenforceable, mandatory sentencing laws and periods of nebulous indeterminate sentences. The present sentencing laws combine the worst aspects of each approach. Both the Executive Advisory Committee on Sentencing, chaired by Robert Morgenthau, and the Governor, in appointing the Advisory Commission on Criminal Sanctions, have recognized the urgent need to bring clarity, rationality and stability to the sentencing policies of this State. We agree that sentencing reform is urgently needed.

New York can no longer afford its present fragmented sentencing structure in which the decision regarding how long a sentence an offender will actually serve is divided

among the Legislature, the courts and the Parole Board, with no concern for the impact of this decision on the size of the prison population. We conclude that the sentencing function should rest with the court, which would impose sentence on the basis of sentencing guidelines. These guidelines would bring an end to sentencing disparity, and would bring consistency, rationality and order to the way in which the State sentences criminals.

Until the State adopts a determinate sentencing plan, we recommend that the present, indeterminate sentencing system be amended to achieve some of the same effects.

As part of our proposed sentencing reform, the court, operating under guidelines established by the judiciary itself, would fix as the minimum sentence the term that the offender is actually intended to serve. There would then be a presumption of parole release at the date set by the court. The primary task of the Parole Board would be to determine whether the inmate's prison conduct, or special circumstances, indicate that the inmate should not be released from prison at the expiration of the minimum term.

In addition, we call for the continued development of alternatives to incarceration, such as intensive community supervision and community service sentences. These sanctions should be encouraged not only as alternatives for less serious offenders who might otherwise receive prison terms, but also

for those who presently escape any punishment at all because incarceration is perceived as too harsh. Such alternatives to imprisonment must operate and be perceived as punishment, so that judges will invoke them when sentencing appropriate offenders, and the community will be satisfied that all offenders pay in some coin for their crimes.

Notwithstanding these recommendations, the Commission has concluded that, whatever changes are made in other aspects of the system, a measured amount of prison construction is required as well. In the absence of new construction -- and no matter what other reforms occur -- there will be ever more people crammed into increasingly inadequate space, further reductions in programs and training, double celling and increased danger to inmates and corrections officers. We hope that the day will come when the problem of crime recedes, the number of inmates diminishes, and antiquated prisons can be closed, rather than expanded. The State cannot, in the interim, allow the development of barbaric and dangerous conditions in undeniably overcrowded prisons.

We believe that new prison facilities should be located in or near New York City and other urban population centers, from whence almost all of the State's inmates come. We urge that the plan to transfer at least a portion of the Rikers Island jail complex to the State be reconsidered, and recommend that if a serious effort is made to resurrect this

plan, the terms should insure that New York City need not expend additional funds. If the Rikers Island exchange proves too difficult, other public facilities in the metropolitan area should be considered for conversion into a prison.

We also urge that the State enact a standby release plan -- under which, in an emergency, the scheduled release dates of inmates would be accelerated by a few months, and released inmates placed under intensive parole supervision -- to guard against periods of unacceptable overcrowding in our prisons.

Finally, we recognize the need to lower the barriers facing inmates attempting to reenter society. To assist the inmates' return to the world outside prison walls, we recommend that all inmates have the opportunity to live in or near their home communities and participate in work release programs in the months immediately preceding release. To this end, we recommend the acquisition of more minimum security beds in the urban communities which send most prisoners to the State.

The Commission's Recommendations

Accordingly, the Commission recommends to the Governor the following measures:

I. New York should adopt a determinate, guidelines sentencing system:

a. The guidelines should be established by an independent commission;

b. Adoption would be automatic unless disapproved by the Legislature or Governor within 60 days;

c. Guidelines should provide for the right to appeal by prosecutor and defense for sentences outside the guidelines.

II. Until the Legislature adopts a determinate sentencing structure, New York should enact a modified indeterminate sentencing system which would include:

a. Establishment of guideline sentences by the judiciary with the assistance of an independent commission;

b. Adoption of presumptive parole, under which inmates are released at court-set dates unless risk assessment by the Parole Board requires otherwise;

c. Affording prosecutors, as well as defendants, the right to appeal sentences outside the guidelines;

d. Limiting the grounds on which the Parole Board may advance or delay release dates to consideration of inmates' post-sentence behavior and consideration of facts which demonstrate an

insensitivity to human life and an inability to control violent behavior.

III. As long as indeterminate sentences are retained, the sentencing court should be empowered by the Legislature to depart from the mandatory prison sentences required for certain non-violent offenders:

a. In certain cases involving non-violent second felony or controlled substance offenders, the court would be permitted to review its sentence after 120 days;

b. The Department of Correctional Services (DOCS) would evaluate and classify the defendant during that period;

c. The court, upon reviewing the evaluation of DOCS, could resentence the defendant to a new community surveillance unit, within the Parole Division, with an average caseload of fifteen.

IV. The State should intensify its efforts to provide alternative forms of punishment and supervision that are more effective than probation but are less expensive than incarceration, including:

a. State takeover of probation costs and supervision;

b. Expansion of the intensive supervision program of the Division of Probation;

c. Development of community service sentencing and restitution programs throughout the State;

d. Assistance to counties in developing programs to reduce their jail populations;

e. Creation of a community surveillance unit, with an average caseload of fifteen, in the Division of Parole.

V. The State should continue with its existing plans to expand the prison system by completion of three new 512-bed maximum security facilities, and conversion of underutilized mental health facilities to prisons.

VI. The State and New York City should resume negotiations to transfer at least part of the Rikers Island complex to the State.

VII. Additional prison expansion required by the State should occur in or near urban areas:

a. New facilities should consist primarily of small minimum security institutions;

b. They should be created by conversion of existing public facilities;

c. There should be a site selection process which designates the locality in which a new prison will be located but permits the local community to choose the site;

d. An office to serve as liaison between the State's criminal justice agencies and local community leaders should be established;

e. All inmates should be permitted to participate in a work release program at least three months prior to their release.

VIII. The Governor should have standby release power which would require him to advance the release dates of inmates when prisons become unacceptably overcrowded:

a. The Commission of Correction would set a maximum population level for each State correctional facility;

b. There would be earlier parole release hearings;

c. DOCS would create a roster of inmates in order of their scheduled release dates;

d. If maximum prison population levels were exceeded for three successive months, the Governor would be required to accelerate the release of inmates in the order of their scheduled release dates;

e. Inmates so released would be subject to intensive supervision by the Parole Division's community surveillance unit.

THE COMMISSION'S RECOMMENDATIONS

Recommendation No. I.

New York should adopt a determinate, guideline sentencing structure.

New York's sentencing laws are in urgent need of reform. Mandatory minimum sentences and enhanced penalties for repeat offenders have been grafted onto an indeterminate sentencing structure, creating a confusing hybrid. The absence of sentencing guidelines for the court too often means that similar offenders receive dissimilar sentences, depending on the predilections of the sentencing judge. And because the Parole Board, rather than the sentencing judge, determines how long a sentence an offender will actually serve, no one knows, at the time of sentencing, what that sentence actually means.

A fair and rational sentencing system should treat like offenders alike. This Commission supports the effort to eliminate disparity of sentences that is reflected in the report of the Executive Advisory Committee on Sentencing and the Governor's appointment of the Executive Advisory Commission on Criminal Sanctions. We believe that the punishment for any criminal act should be imposed by the judge alone. Therefore, we favor a revision of the Penal Law to replace indeterminate sentencing with a determinate

sentencing system based upon sentencing guidelines, to be established by an independent commission. Under this sentencing system, the sentence established by the guidelines, and imposed by the judge, would be the sentence the offender would actually serve, except as it may be reduced by good-time. Parole release would be abolished.

To preserve the Legislature's voice in determining punishment, the guidelines would be submitted to the Legislature and Governor for approval. Unless rejected within sixty days, the guidelines promulgated by the commission would become law. In addition, the determinate sentencing plan should permit an appeal of the sentence by the defense or the prosecution if the court elects to impose a sentence outside the guidelines.

Sentencing guidelines can take into account the resources of the State prison system. The State is unable to provide as many trials, incarcerate as many offenders or impose sentences as harsh as many citizens would prefer. Inevitably, whatever guidelines are chosen, some citizens will find them too lenient. Indeed, one reason indeterminate sentencing persists is to preserve the fiction that long sentences are being imposed when, in fact, they are not. If the experience of other states is repeated in New York, determinate sentencing may well lead to longer average

sentences. Thus, if sentencing guidelines are promulgated without regard to prison capacity, major spending increases for prisons and courts might be required; for example, if the release of all inmates from New York's prisons in 1981 had been delayed by only three months, there would have been 2,300 more inmates incarcerated at year's end -- enough additional prisoners to fill and overcrowd another Attica.

We note, however, that the experience of Minnesota demonstrates that sentencing guidelines can be drawn so that the prison resources are <u>not</u> overtaxed. There, a sentencing commission established guidelines that specified which offenders should go to prison and for how long, and created the guidelines so that no more inmates would be imprisoned than the system could accommodate. Thus, if specifying a 30 month sentence rather than a 27 month sentence would require the State's expenditure of $100,000,000 to build a new prison, the guidelines commission might very well opt for the shorter sentence -- unless the Legislature decided to expand prison capacity. Today, no one in the criminal justice system does such a cost-benefit analysis regarding sentencing policies.

We recommend, if guidelines are adopted here, that the example of Minnesota be followed: either the sentencing guidelines should be drawn to prevent excessive growth of the prison population, or else the number of prison beds

should be increased prospectively to match the anticipated effect of the guidelines. Failure to adopt one of these two courses in setting guidelines can only aggravate the present predicament in the crowded prisons.

An additional virtue of sentencing guidelines is that such a system enables prison officials to make rational plans. At present, because prison officials do not know when an inmate will leave prison until virtually the date of release, they cannot properly estimate the system's long-range needs. With fixed release dates, alterable only for good behavior, DOCS would know long in advance when every inmate would actually be released. The need for prison expansion would be more predictable, and planning could become a reality.

Recommendation No. II.

Until a determinate sentence structure is adopted, New York should enact a modified system of indeterminate sentencing with presumptive parole.

Despite our enthusiasm for a determinate sentencing system, it is uncertain whether the State is ready for so fundamental a change. Over three years have elapsed since the Morgenthau Commission first recommended determinate sentencing. To date, there has been no legislative action. Similar proposals for the reform of federal sentencing laws have yet to be enacted. Accordingly, we recommend that the State adopt an

interim indeterminate sentencing structure which would, however, return the discretion now exercised by the Parole Board to the sentencing court acting within guidelines.

Under this system, sentencing guidelines would be developed and adopted by the courts themselves. The machinery is in place. The Governor has appointed the Executive Advisory Commission on Criminal Sanctions, chaired by a distinguished Justice of the State Supreme Court, Peter J. McQuillan, to examine sentences that have been imposed for various types of criminal conduct throughout the State. We recommend that the judges of the four judicial departments, with the assistance of the Executive Advisory Commission on Criminal Sanctions, together formulate sentencing guidelines. These guidelines would provide the sentencing court with a range within which to impose an indeterminate sentence. The guideline sentence would depend primarily upon two factors: the severity of the offense and the criminal history of the offender. The minimum sentence imposed should represent the time that the court intends the offender to serve. To be effective this would require -- and we recommend -- the elimination of the requirement that certain minimum sentences be 1/3 of the maximum and we note that the existence of guidelines would eliminate the need for any mandatory minimums.

Courts would be free to depart from guideline sentences, but only for reasons stated on the record, and such deviation would be subject to appellate reconsideration. Present law provides for appellate review of sentence at the defendant's request. Thus, an appellate court could strike down a sentence imposed in excess of the guidelines if the sentencing court did not articulate adequate reasons to justify the longer sentence. However, sentences that are shorter than the guideline term could not, under present law, be appealed by the prosecutor. We recommend the passage of legislation to permit prosecutors to appeal sentences which fall below the guideline range. This would promote the goal of reducing disparity among the indeterminate sentences that are imposed.

To provide greater certainty in sentencing -- which would not only deter crime, but would permit rational planning as well -- we recommend the adoption of presumptive parole as part of such an intermediate sentencing system. Since the sentencing guidelines set forth the recommended sentencing range, and the sentencing judge, in imposing the sentence, will determine the sentence actually to be served, the Parole Board would be limited to its original function: risk assessment.

Presumptive parole would require the release of an inmate at the expiration of the minimum sentence imposed by

the court unless events subsequent to sentencing, or other special circumstances, indicate that the inmate poses too great a risk to society to be released. Under such a system, the Parole Board would no longer be engaged in attempting to correct sentencing disparities -- that task would be accomplished by the sentencing guidelines and the courts themselves.

Presumptive release would not, however, entirely eliminate the Parole Board's role in making release decisions. The Parole Board would be permitted to increase minimum sentences, based primarily upon post-sentencing events. The Board could increase sentences for inmate misbehavior or refusal to participate in available programs, but such an increase would be limited by the court-imposed maximum (as reduced by any good behavior credits earned in prison). Increases beyond the court-imposed minimum would also be authorized for inmates who have demonstrated an insensitivity to human life and an inability to control violent behavior. Only in such cases would the Parole Board consider the seriousness of the offense and the prior record of the offender, insofar as these factors reflect the inmate's potential risk to society.

This sentencing scheme would also allow the Parole Board, in exceptional cases, to decrease long minimum sentences. Inmates with minimum sentences longer than four years could be allowed to earn earlier parole release by

maintaining good prison behavior and successfully completing educational, treatment or work programs, to be established in an agreement between each inmate and the Parole Board early in the inmate's term of incarceration. Release under this plan would be predicated upon the inmate's obtaining good behavior credit from DOCS and fulfilling the program specified by the Parole Board. Even if these conditions were met, the Parole Board would not be obligated to afford early release to the inmate unless it was satisfied that tne inmate presented no risk to the community. Upon release, the inmates would be supervised by parole officers with average caseloads of fifteen until the expiration of their minimum sentences (see p. 32).3/

Presumptive parole would have a substantial effect in reducing prison overcrowding. More than 20% of the prison population as of March 1, 1982 -- approximately 5,500 inmates -- had already served their minimum sentences and remained in prison because they had been denied parole. Many, if not most, had acceptable prison records. We expect that a plan providing for the release of inmates with

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3/ Some members of the Commission would allow no early release under this plan even with these stringent conditions. Others believe that the decision to accelerate the court-set minimum should be entrusted to the sentencing court, not the Parole Board.

acceptable behavior at the expiration of their minimum sentences would reduce the present prison population by several thousand, thereby alleviating the dangerously crowded prison conditions that exist today.

We recognize that presumptive parole release is not a cure-all for overcrowded prisons. The prison population growth of the last few years has resulted largely from more prison commitments and longer minimum sentences. These, in turn, stemmed from conscious policy decisions by the Legislature, judges, and prosecutors. A cure for overcrowded prisons would require a change in these policies. Nevertheless, with crowding as severe as it is now, the existence of several thousand inmates being kept in prison by decision of the Parole Board offers New York an option unavailable in other states -- an option which should be exercised in appropriate cases, so that offenders who most clearly belong in prison may be given the cells of those who do not.

In sum, this sentencing plan:

-- creates guidelines, based upon statewide sentencing experience, which will reduce disparity;

-- creates guidelines which realistically consider cell space and prison resources;

-- creates guidelines which allow meaningful appellate review;

-- establishes a right of prosecutors to appeal sentences;
-- returns the sentencing function to the proper forum, the sentencing court;
-- creates certainty for the inmate and prison officials;
-- eliminates the resentencing power of the Parole Board except where appropriate;
-- enables planning for prison needs -- something not possible under the present system.

Recommendation No. III.

As long as indeterminate sentences are retained the sentencing court should be empowered by the Legislature to depart from the mandatory prison sentences required for certain non-violent offenders.

The direction of New York's sentencing legislation over the past decade has been to require lengthy terms of imprisonment for broad classes of offenders, most notably violent felons, drug dealers and second felony offenders. We question whether mandatory minimum sentences for all such offenders result in the most rational use of scarce prison resources. Until guideline sentencing is adopted, thus eliminating the need for mandatory minimum sentences, we recommend that certain existing mandatory minimum sentences be subject to review by the courts and DOCS.

According to almost every participant in the criminal justice system, the rigidity of mandatory minimum sentences

results in unnecessary imprisonment in a not insubstantial number of cases. Society is not always better served by incarcerating first-time drug dealers or second-time non-violent felony offenders; a sentence of intensive community supervision might do as well, thereby freeing a prison cell for a more active or violent criminal. As the Commissioner of Correctional Services, Thomas A. Coughlin III, told this Commission: "We are presently housing within our facilities property offenders convicted and sentenced as second felons who pose no physical danger to the community and for whom a meaningful criminal sanction could be developed elsewhere than in state prison."

We recommend the enactment of a procedure for converting the mandatory minimum prison sentence to one of community supervision in appropriate cases. Specifically, for inmates convicted of Class D and Class E non-violent second felonies, such as grand larceny or commercial burglary, and Class B controlled substance felonies, such as small scale narcotic offenses, the sentencing court should be permitted to review the required sentence of imprisonment after 120 days. During that period, the inmate would be evaluated and classified by DOCS. If, after having examined the DOCS report, the court determines that the inmate would be unlikely to commit another crime if

released to community surveillance, it would be permitted to commit the inmate to a parole unit with an average caseload of fifteen for the duration of the mandatory minimum sentence (see p. 32). Failure to abide by the conditions of release would result in an automatic return to prison. The requirement that the court consider the recommendation of DOCS should assure that only non-violent, non-career criminals are released to the community under this plan.

Under the federal system there is a sentencing provision whereby a federal judge can impose the maximum sentence and ask for an evaluation and recommendation by the Bureau of Prisons. The judge may then resentence the offender to probation, a shorter term of imprisonment, or retain the original maximum sentence.

The federal system also gives defendants the right to seek to have their sentences reduced within 120 days of imposition.

At present, more than 3,000 inmates convicted of non-violent offenses could potentially be affected by adopting such a provision for the State system. Some would be suitable candidates for non-incarcerative sentences. The reduction in the prison population might be significant. Whatever the number, given the cost of new construction

and the expense of housing each prisoner, the State simply cannot afford to imprison offenders who would pose no risk of violence if released to community supervision.

Providing for this limited departure from mandatory minimum sentences would:

-- enable rational review by the sentencing court and DOCS of the necessity of imprisonment for certain non-violent offenders;
-- establish an incentive for offenders to cooperate;
-- reduce prison overcrowding.

Recommendation No. IV.

The State should intensify its efforts to provide alternative forms of punishment and supervision that are more effective than probation but less expensive than incarceration.

Many more individuals are convicted of crimes each year than our prisons and jails are able to confine, even for brief periods. Consequently, the courts sentence thousands of defendants without imposing a prison sentence. In 1980, 96,000 adult offenders were on probation; only 21,000 were in prison. Probation, however, is a non-punitive sanction, unless punitive conditions are attached. To insure that all lawbreakers who deserve punishment -- in some form -- receive it, we recommend increasing the use of alternative

sanctions, such as fines, restitution orders and community service requirements.

The effort to supervise offenders must also be intensified. With caseloads averaging 190, New York City probation officers are unable to do much more than paperwork. Hence, judges may be reluctant to sentence offenders to probation, while they might be more willing to do so if adequate supervision were a reality. Because prisons now operate with a ratio of one correctional officer to every three inmates, giving probation officers caseloads of less than ten probationers each would be less costly than imprisoning these same offenders. Therefore, although these proposals may appear to add to the State's financial burdens, when their costs are compared to the expense of incarcerating offenders in the State's prisons, they actually save money.

First, we recommend that the State assume the entire cost of probation supervision throughout New York, and, for counties which agree, assume the operational responsibility for probation as well. Only by assuming local probation costs can the State remove the financial disincentive to imposing probation sentences. Now, if a defendant is sentenced to prison, the county pays nothing; if the defendant is sentenced to probation, the county pays more than half

the cost of supervision. We recognize that the State takeover of probation would be a substantial economic burden for the state at a time when it is having difficulty balancing its budget. But probation can be cost-effective in the long run if it provides sentencing authorities with an alternative to prison. A rational corrections policy cannot justify perpetuating an historical accident which imposes the costs upon the State if an offender is sentenced to prison, but upon the local community if the same offender is sentenced to probation.

Second, the intensive supervision program under which probationers considered to present the greatest risk of recidivism are supervised most closely, should be continued and expanded throughout the State. The current ratio of 25 probationers per officer permits the type of close supervision that will encourage sentencing courts to impose sentences of probation upon suitable candidates.

Third, the Division of Probation should be provided with adequate funds to develop, expand, and administer or contract for community service sentencing and restitution programs throughout the State. The goal of such programs would be to impose some punishment upon all convicted felons and misdemeanants and also to insure that those who are not imprisoned repay the victim or the community in a tangible way. A substantial cause of the increased use of imprison-

ment is the public perception that nothing short of imprisonment can be punishment. That perception needs to be corrected.

In the past, community service sentences have usually been imposed on middle class defendants who would not otherwise have gone to jail. Recently, the Vera Institute's Community Service Sentencing project has demonstrated that community service can also be a meaningful alternative to incarceration. The defendants in the Project presented a jail-bound profile: 45% were sentenced to jail on their last conviction; 58% were arraigned on felony charges; most had been arrested twice in less than a year; nearly all were black or Hispanic; all were unemployed. Nevertheless, 90% completed the required two weeks' unpaid community service work. Of the 10% who violated, two-thirds were returned to court for resentencing, receiving sentences between 15 days and a year in jail.

This program now operates in only three boroughs in New York City. We urge that the State undertake to develop similar programs throughout the State. We also recommend that the State administer these programs or contract for them with private, nonprofit agencies like the Community Service Sentencing Project. We recommend that the funds be administered by the Division of Probation.

Fourth, the State should support the efforts of the Commission of Correction to assist counties in developing programs to reduce their jail populations. Jail space, like prison space, is a scarce resource. By insuring that only offenders for whom less severe sanctions are inappropriate are placed in county jails, both the counties and the State can reduce their overcrowding problems.

The Jail Population Reduction Project, funded by the American Justice Institute, is an effort to bring together county decision-makers to focus on jail overcrowding problems. Committees have already been formed in two counties in the State, composed of all the officials whose decisions have a direct effect on jail overcrowding. With assistance from the Commission of Correction, the committees meet to evaluate and monitor how each part of their county justice system influences jail overcrowding. In addition, the Commission of Correction and other State agencies provide staff and technical assistance to the committees. This effort should be extended to other counties and its funding assumed by the State.

A significant reduction in jail population in some counties would permit the State to contract with county officials to place State work release beds within local jails. This would not only ease the soon-to-be-released inmates' transition to their communities, but also provide revenue for

upgrading the county jail. DOCS now has such an arrangement with Nassau County, and contracting with the sheriff to provide work release beds has worked out well for all concerned.

Finally, we recommend that community surveillance units, with average caseloads of fifteen, be formed within the Division of Parole to supervise defendants released for good behavior prior to the expiration of their minimum sentences (see pp. 21-22), defendants released early to ease overcrowding under the standby release plan (see pp. 43-47), and the Class D and Class E non-violent second felony offenders and the Class B controlled substance felony offenders deemed by the court and DOCS not to require imprisonment (see pp. 24-27). Since the offenders supervised by these units would otherwise have been imprisoned at greater expense, this program will save substantial funds for the State, and provide needed space in the prisons.

In sum, these proposals would:

-- reduce the need for new prisons and jails;
-- provide State funding for the development of programs that punish without imprisoning;
-- encourage the State prison system and the county jails to cooperate for more efficient use of scarce resources;
-- provide close supervision for inmates released before their minimum sentences expired and those probationers who are most likely to commit new crimes; and

-- save money by substituting less costly alternative methods of supervision for the present exorbitant costs of incarceration in prisons and jails.

Recommendation No. V.

The State should continue with its existing plans to expand the prison system by completion of three new 512-bed maximum security facilities and the conversion of underutilized mental health facilities.

Because the State prisons are operating above their capacity, DOCS has been compelled to remodel institutions scheduled to close; to convert program, administrative, support, and even basement space to dormitories; to push beds in existing dormitories closer together than safety and decency permit; and to fill the cells of inmates temporarily in hospitals and punitive segregation with other inmates. The result has been a heightened level of tension and substandard conditions. Daily operations have become more dangerous, and assaults upon correction officers have risen concomitantly. Indeed, in the event of a major disturbance, DOCS would have great difficulty in finding space to segregate participants.

Although our other recommendations would help relieve prison crowding in the short run, they will not answer the problem in the long run unless there is a fundamental reduction in the number of convicted felons sen-

tenced to prison. There is no basis for assuming that the level of prison commitments will decline in the next several years. The Office of Court Administration reports a 9.8% increase in felony dispositions, statewide, in the first 24 weeks of 1982, and a 5.3% increase in indictments compared to the same period last year. It appears that the 10,303 prison commitments in 1981, higher by 29% than 1980, will be exceeded in 1982. Thus, the surge in the prison population promises to continue. If the prisons were emptied today, they would be full again in five years, merely by maintaining 1981 levels of commitments and sentence lengths.

In January of 1982 the United States District Court for the Southern District of New York stayed an order requiring DOCS to accept all New York City sentenced prisoners within 48 hours after they are ready for transfer to that Department. That decision was based upon Commissioner Coughlin's affirmation that the reception of more prisoners would be unsafe and that the problem would be solved by the addition of 1,165 beds by March 1, 1982. All but 207 of those beds have already been added and all are occupied.

The Department plans to add the last 207 beds in July, 1982 by converting a former military base at Watertown. It also plans to add 100 beds at Coxsackie Correctional Facility in July, 1982; 240 beds at a

former mental health facility at Ogdensburg in October; and 250 beds at Mount McGregor Correctional Facility in October or November. The average weekly addition to the prison population will have to slow to 33 per week between now and November -- an unlikely prospect -- merely to keep the prison population at 115% of operational capacity. If the present rate of inflow continues, the 797 planned beds will be full in less than 13 weeks.

There is thus an indisputable need to expand the prison system. Moreover, there is no time to be lost. We therefore recommend completion of the Governor's expansion plans, which include construction of three new maximum security facilities -- a lengthy process, which is already under way -- and conversion of State mental hospitals to prisons, which can be accomplished rapidly. The three new 512-bed maximum security facilities will fill an urgent need by housing the inmates who are most difficult to control or protect and, in small groups, providing them with a full level of programming without compromising security. Such facilities, however, cannot answer the entire need for expansion because their construction requires several years, and they cost $100,000 per cell. In contrast, existing buildings already owned by the State can be converted to prisons quickly and at lower cost -- approximately $20,000

per bed. Therefore, we also support the Governor's May 15, 1982 proposal to convert underutilized psychiatric facilities to prisons, but observe that DOCS must consider the suitability of the location of these facilities. For example, Gowanda Psychiatric Center is twice as close to Detroit -- and closer to Fort Wayne, Indiana -- than it is to New York City. DOCS has already successfully made such conversions at Fishkill and Dannemora, and another is presently underway at Ogdensburg. At other sites, schools, factories, and military bases have been successfully converted. We encourage DOCS to continue these efforts and, at the same time, invite the public to examine the astronomical costs of new construction before the predictable opposition is offered.

Recommendation No. VI.

The State and New York City should reopen negotiations to transfer part of the Rikers Island complex to the State.

The consensus of professionals in the corrections field is that new prisons should be small -- less than 500 beds -- and located in the urban communities from which most inmates come. This is the exact opposite of New York's present practices. Two-thirds of the inmates in the State's prisons come from New York City, but only 10% are housed there. For example, more than half of the 2,200 inmates at Attica come from New York City, which is 385 miles away.

Seventy percent of Clinton's inmate population of 2,700 are from New York City and thus 360 miles from the area to which they will ultimately return. Location of prisons in or near urban areas is especially important in this State, where the majority of inmates are black or Hispanic. The location of New York's prisons in distant upstate communities has resulted in the unfortunate situation where, in most institutions, nearly all the guards are white and most of the inmates are not. Merely hiring minority personnel does not solve the problem: most hail from the metropolitan New York City area and, naturally, transfer nearer to home as soon as a position becomes available. The distant location is also extremely stressful and destructive for inmates' families. With a bus ride of seven hours in each direction, few parents, spouses or children are able to make regular visits to prisoners, and many families fall apart. This is an unfortunate result for all, since strong family ties is one of the factors most closely correlated with reduced recidivism.

Rikers Island, a jail complex capable of holding 7,500 prisoners, is located within New York City. Ironically, although it would be ideally suited as a State prison facility, it is ill-suited for its present purposes. Two-thirds of the total Rikers population of 7,500 are awaiting trial. Each day approximately 900 prisoners are transported

to and from Rikers, at an estimated annual cost of $11,000,000, to make court appearances in the various boroughs. These inmates should be housed in jails located near the courts where their cases are pending.

Recognizing all of this, New York City and DOCS began negotiations in 1978 for the State to buy the Rikers Island complex in exchange for sufficient funds to permit the City to build jails nearer to the courts. However, negotiations were terminated after a cost analysis indicated that New York City would have to pay much more money to build the necessary jails than the State was willing to pay for Rikers.

We recommend that the State and the City of New York reopen negotiations on the transfer of at least part of the Rikers Island complex to the State. With moderate renovation, portions of the complex would be suitable as a State prison, especially for the reception and classification of inmates, and for substance abuse and psychiatric treatment programs. However, the price to be paid by the State must cover the City's costs in replacing the cell space transferred to the State.

Apart from the issue of cost, we recognize that the use of Rikers by the State also presents some thorny labor relations issues. New York City corrections officers are currently paid at a higher scale than their State counterparts. This would present an awkward situation for officers working almost side by side at Rikers. However, we observe that other

State employees are paid at differing rates than their city or private industry equivalents, and we do not believe that this should pose an intractable barrier to the State takeover of Rikers -- a plan that is otherwise logical and desirable.

Recommendation No. VII.

Additional expansion required by the State should occur in or near the urban communities from which inmates come, should consist primarily of small minimum security institutions, and should be created by conversion of existing public facilities or take the form of contracts between community organizations and the DOCS.

The need for community-based facilities for inmates nearing release has long been recognized by corrections professionals. For those inmates who are first offenders, with non-violent backgrounds, the community residence helps maintain family ties without subjecting them to the debilitating isolation of large upstate institutions. For inmates serving longer terms, gradual transition to society is far wiser than a sudden plunge from a large isolated institution to the city street. In small, minimum security, urban institutions inmates nearing release can begin employment, education and treatment programs that can continue after release.

We recommend that all inmates have the opportunity to participate in a work release program at least three months prior to their release. For those who succeed, that success

will be strong evidence of suitability for release; for those who fail, that failure would be strong grounds for denial of parole release.

On June 18, 1982, there were only 614 work release participants. To permit an average of three months' participation by all inmates, 2,000 more community-based beds are needed. They should be located in or near the inmates' home counties to increase the likelihood of a successful transition. Of necessity, this will require that most of these new beds be placed in New York City.

In addition to operating its own community-based facilities, we recommend that DOCS be permitted to contract with community organizations to provide custody, counseling, and educational services for selected minimum security inmates. A similar arrangement has been successfully implemented in Michigan, where 12% of the prison population is housed in community residences. These facilities range from State-approved private homes, housing a handful of inmates, to State-run community residential centers of thirty or more beds. Each year, 5,600 to 5,700 inmates pass through the community residential program -- nearly 40% of the prison population. The per capita cost of the community residential program is half that of imprisonment.

Efforts by DOCS, the Division of Parole, county sheriffs, and the Division for Youth to locate facilities

in urban communities, where they belong, have inevitably led to community resistance. No community wants a prison in its midst except those which already have one and depend on it for economic survival.

To assist the development of community-based correctional facilities -- be they minimum security institutions, halfway houses, Parole Board offices, or facilities for alternatives to incarceration -- we recommend the adoption of a site selection process similar to Michigan's.

In the site selection process, a determination would be made by the State that a facility is needed in a particular locality, usually a county. That locality then would have a limited period of time to select its own site for the new facility. If the locality were unable to agree upon an appropriate site within a specified time period, the State would choose a site and claim it by eminent domain. This process gives the locality a voice it does not now have. The dialogue created by such a procedure should, more often than not, lead to equitable compromises.

We also recommend the establishment of a full-time and appropriately funded office within DOCS which would serve as a liaison between the State's criminal justice agencies and local community leaders. The understanding and support of community leaders, politicians, and law

enforcement officials is essential to the funding and development of innovative approaches to community-based correctional facilities. The credibility of these programs and the development of facilities can be strengthened by focusing top management talent on maintaining communication with all parties in the criminal justice system, the press and the public at large. Such an office would be expected to provide answers to legitimate public concerns relating to the placement of correctional facilities in their communities.

In sum, this expansion program will:

-- meet the demands of growth in the prison population;
-- discourage new construction of costly maximum security facilities other than those already planned;
-- create needed State prison cell space in New York City;
-- meet the City's need for pre-trial detention facilities;
-- provide needed community-based facilities for work release;
-- develop methods to overcome community resistance to local correctional services; and
-- save the taxpayer money.

We believe that these recommendations are a reasonable, cost effective means for the State to have secure prisons while increasing the number of urban based facilities.

Recommendation No. VIII.

The Governor should have a standby release power which would require him to advance the release dates of inmates when prisons become unacceptably overcrowded.

Although the adoption of our other recommendations will alleviate prison overcrowding, the problem may, from time to time, recur. Moreover, the construction or acquisition of new prison facilities is a slow process that cannot quickly compensate for sudden surges in the prison population like the one we are presently experiencing.

To avoid repeated episodes of dangerous overcrowding, we recommend that New York institute a standby release plan which sets forth procedures to be followed in the event that the prison population exceeds safe levels for an unreasonable period of time.

This standby release plan envisions the release of inmates only a few months earlier than their scheduled release. To further reduce any risk that might be posed by this group of offenders, it is recommended that, upon release, they be placed under the supervision of a parole officer with an average caseload of fifteen until the date of their scheduled release (see p. 32).

Under this plan, the Commission of Correction would set a maximum population level for each State correctional

facility and hence for the entire system, based upon minimum standards promulgated by the Commission or, until such standards are established, those of the American Correctional Association.

This inventory of prison space would be modified as new space is created or obsolete institutions closed. The Commission of Correction would also review the appropriateness of using space which, but for overcrowding, would not normally be used for housing, and also examine the present practice of "double encumbering" cells.[4/] To the extent that the Commission of Correction's staff must be expanded to perform this work, we recommend that the necessary appropriation be made. We believe that this task,

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4/ According to the Department of Correctional Services:

> "Double encumbering refers to the practice of moving another inmate into a cell vacated by an inmate temporarily confined in a disciplinary segregation or hospital unit. It is a highly problematic practice insofar as it severely disrupts an individual inmate's living arrangements when large amounts of personal property are removed from the cell which the inmate has been occupying for however long a period of time the inmate is confined to restricted housing or hospital. Furthermore, it completely deprives the Department of flexibility in the event of facility disruptions or disasters such as fires. It further raises the possibility, which has occurred on several occasions, of an inmate having completed his time in disciplinary segregation having no cell in general population to be discharged back into, or inmates discharged from infirmaries or community general hospitals for whom there is no cell available to return to."

basic to a safe and secure prison system, should be the primary responsibility of the Commission of Correction, and should be performed whether or not a standby release plan is adopted.

The second aspect of this plan would require the Board of Parole to meet all inmates at least five months prior to their parole eligibility date and determine whether they will be released when eligible. Currently, the parole release hearing is held less than two months before the parole eligibility date. This simply does not allow enough lead time for a meaningful release plan.

The standby release plan would also require the Board of Parole and DOCS to provide the Governor each week with a current roster of inmates scheduled for parole or conditional release during the coming four months, in their order of scheduled release. There would be no vested right in inmates to remain on this list. Institutional misbehavior, for example, might result in the loss of good time credit which, in turn, would delay the conditional release date. Nevertheless, the Governor would know at the beginning of each week which prisoners are scheduled for release that week and in each of the succeeding fifteen weeks.

The plan would then become operative if the prison population exceeded the maximum population level set by the Commission of Correction for three successive months. The

Commission of Correction would notify the Governor and the Governor would report to the Legislature that he was declaring an emergency in the State's prison system. The Governor would then be required to release inmates, in the order of their scheduled release dates, to the custody of the Division of Parole. We would recommend, however, that those inmates who have had their conditional release date postponed because of institutional violations (loss of good-time) not be eligible for early release. To do otherwise would, in effect, return good-time to those who have bad institutional records. This would not contribute to maintaining order within the prisons. The Governor would be mandated to release a sufficient number of inmates to reduce the population to 97% of the system's capacity. The proposal is designed to reduce prison population to 97% of capacity in order to prevent the need for regular use of the standby power and to assure that there will be room for new prisoners.

The inmates released under this plan would be under the supervision of parole officers with average caseloads of fifteen. This close supervision is designed to reduce the risk of recidivism; those who violate the law would be identified and swiftly returned to prison.

This standby release plan:

-- creates new monitoring procedures for the prison population;

-- would accelerate the release dates of inmates a short time in an emergency, and only for those already scheduled to be released; and
-- permits prison administrators to maintain safe population levels.

CONCLUSION

We conclude that the sustained growth in New York's prison population has created a serious problem for the criminal justice system, and that the surge in our prison population will continue. The fact that New York, unlike other states, has kept its prisons free from federal court supervision and has not resorted to double and triple celling of inmates, is not enough. There are already ominous symptoms of the present crisis. Unusual incident reports which reflect conflicts among inmates, and between inmates and guards, are on the rise. There is increased idle time among inmates. Space and resources dedicated to vocational and educational programs are vanishing. There is an ever greater potential for violence in our institutions.

Accordingly, we conclude that wide-ranging action is required. Thus, we call upon the State to revise its policies as well as its statutes. The State must create a rational sentencing structure; formulate a plan to deal with potentially

unsafe prison crowding; change the attitude that only prisons can punish; recognize that community service can be a safe, productive, and far less expensive form of punishment; and get on with prison expansion at an acceptable cost.

We have no illusions that solving the problem of prison overcrowding will solve the problem of crime. The best hope for eliminating the crime problem is to eliminate the social conditions that create crime. It is no secret that the overwhelming percentage of New York's prisoners come from the inner cities. Unless the public is prepared to deal with the mounting problems of the inner cities -- by providing education, vocational training, jobs and social assistance -- high crime rates will persist. In this sense, cutbacks in programs designed to improve education and promote employment among the disadvantaged may be just as harmful to public safety as reducing appropriations for the police, the courts, and the prisons, and social welfare legislation may do as much to promote law and order as the toughest sentencing laws. Although a serious attack on the social conditions which create crime will be difficult and expensive and cannot be expected to succeed in this generation, the effort to achieve social justice cannot be abandoned by any civilized nation.

In the meantime, the State must do whatever it can to protect its citizens and punish crime. Despite the realistic limits on what can be accomplished solely through criminal justice reform, we believe improvement of the criminal justice system can do much to protect our citizens against crime. Our recommendations are intended to provide a means to achieve this end.

Appendix

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Richard L. Gelb, Chairman of the Board of Bristol-Myers Company and Chairman of the Crime Control Planning Board;

Betsy Gotbaum, Executive Director, New York City Police Foundation;

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END