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## TIME SENSITIVE MEMO

**TO: Officers & Executive Committee Members**

**FROM: James B. Vargason *JBV***

**RE: Rockefeller Drug Law "Reform"**

**DATE: June 12, 2003**

Attached is our latest communication in response to the Senate's request concerning the above referenced matter. I encourage everyone to reach out to their respective Senator and express the sentiments expressed in my letter.

If anyone has any questions, do not hesitate to call me.

**COURTHOUSE ANNEX, 154 GENESEE STREET  
AUBURN, NEW YORK 13021  
TEL. (315) 253-1391 FAX (315) 253-1521**

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PAST NYSDAA PRESIDENT

June 11, 2003

Honorable Joseph L. Bruno  
Temporary President and Majority Leader  
Senator, 43<sup>rd</sup> Senatorial District  
Room 909, LOB  
Suite 330  
Albany, New York 12248

Dear Senator Bruno:

I am writing in my capacity as President of this Association to convey the overwhelming opposition of the majority of the Association's members to the Governor's June 2003 proposal to change New York's drug laws.

First, we have consistently endorsed legislation that ameliorated the potentially harsh aspects of mandatory sentencing for Class A1 drug offenses, and to fully fund statewide access to established and proven treatment programs for non-violent drug addicts.

We believe, however, that in order to enact balanced legislation, it is important to focus on the whole rather than the individual parts, because although some of the changes in the proposal may appear minimal or technical in nature, their cumulative effect is quite profound, and will affect all aspects of drug prosecutions for decades to come. We recognize, however, that if such a principled position needs to yield in the face of inevitable momentum, we nonetheless want to be on record highlighting our most pressing concerns. They are:

### CONCERN #1

We strongly oppose the elimination or diminution of the function of the prosecutor as "gatekeeper" for DTAP or similar programs and the expansion of judicial discretion into an area that has been the appropriate and historical prerogative of the District Attorney. This opposition is more than prosecutors unwilling to concede "power" to judges. The proposal establishes a system whereby in many counties throughout New York State OCA designated judges from other jurisdictions would make decisions which impact the quality of life in our communities. Prosecutors have more information available to them due to their active involvement in the law enforcement community, and are directly

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accountable to the community. In contrast, OCA visiting judges are often times unaware of the specific problems that confront individual communities. Accordingly, empowering these visiting judges while exempting them from being held accountable to the people we serve is problematic.

There have been several reasons for the success of prosecutor administered drug treatment programs like DTAP (Drug Treatment Alternative to Prison). One is the strong incentive to stay in treatment provided by the mandatory prison terms the defendants face. Another is the screening function that prosecutors have provided to insure that defendants who pose a serious safety risk are not placed in community based programs. This bill undermines both of these lynchpins.

DCJS estimates that 58% of the drug offenders sentenced to prison in 2001 would be eligible to apply for CADAT. This means a plethora of proceedings, delays in case processing and a high probability of non-addicted offenders being sent to treatment programs. This legislation will provide defendants with a motivation to feign addiction and an opportunity to delay their cases.

First offenders who are sentenced to CADAT receive a 5 year probationary sentence with a requirement of residential or outpatient treatment. No resources are provided to probation to supervise these offenders. Indeed, local probation departments are having their budgets cut dramatically and many departments are terminating probation early or increasing caseloads of probation officers in response. Without additional funding, probation cannot effectively supervise these additional offenders.

### **CONCERN#2**

Putting aside the question of who controls discretionary drug treatment, under this proposal, all defendants would face greatly diminished potential criminal sanctions. For example:

A second felony B drug seller who now faces a minimum indeterminate term of 4 ½ to 9 years would, under this proposal, face a determinate sentence with a range of 3 to 12 years. If the defendant received the minimum term of 3 years, he could actually serve as little as 6 months. This is because he would receive 1/7 off for merit time, 1/7 off for good time or 28% off his minimum. This would reduce his sentence to just over 2 years. As soon as he served the 4 to 6 months necessary to bring him within 2 years of parole eligibility, he would be eligible for work release. Consequently, he could be back in the community in as little as 6 months.

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And on his 3<sup>rd</sup>, 4<sup>th</sup> or 5<sup>th</sup> felony conviction, if the judge imposed the minimum sentence, the same calculations would apply.

A defendant with no prior felony convictions who sold over 2 ounces of cocaine would now be an A-I felon subject to a mandatory minimum indeterminate sentence of 15 years to life. Under the new proposal, this defendant would receive a determinate sentence with a range of 8 years to 20 years. If the judge imposed the minimum sentence of 8 years, because the proposal makes A-I felons eligible for merit time and because a determinate sentence takes good time off the minimum, the defendant would receive a 28% reduction of that sentence for merit time and good time, reducing the sentence to 5.7 years. In just 3.7 years, the defendant would be eligible for work release. Thus, the defendant could serve as little as 3.7 years in prison for an A-I felony.

A defendant who possessed 5 ounces of cocaine would now be an A-I felon subject to a mandatory minimum indeterminate sentence of 15 years to life. Under the proposal, the weights for A-I possessory crimes would be doubled, so that this defendant would only be chargeable with an A-II felony. The sentences for A-II felonies have also been reduced. As a first offender, the defendant would be facing a determinate sentence with a range of 3 to 10 years. Here again, a 3 year minimum sentence would be reduced by 28% and within six months, the defendant would be eligible for work release.

It is our position that these significant sentence reductions go too far and in the process deprecate the seriousness of drug crimes in general and particularly repeat drug sales. There has been much discussion about the length of A-I sentences, but where is the empirical evidence demonstrating that B, C, D and E felons' sentences are too long and in need of change? Indeed, DCJS notes that the average prison sentence for a drug offender is now only 36 months. Under this proposal, many drug offenders would face no more than 6 months in prison. We are asking police officers to risk their lives to engage in undercover drug sales and community members to risk their lives cooperating with law enforcement to get repeat drug dealers off the streets of our communities. What message do we send to them when these non-addicted repeat offenders are back on the street in less than a year? What possible deterrence could such a sentence have?

If the point is to get more addicted offenders into drug treatment, it is difficult to see how this new proposal accomplishes it.

For example, it removes leverage to get offenders into DTAP and other programs by making the prison alternative minimal. Treatment is hard. If it

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weren't, addicted offenders in New York City would go voluntarily when they receive probation for their first felony. With only a three year sentence for a second felony drug offender ( for which the offender would actually serve only 4-6months), there is no incentive for a defendant to enter a rigorous 12 month residential treatment program. It will be easier and quicker to go to prison.

The proposal also eliminates the distinction between addicted offenders and non-addicted offenders who sell for profit inasmuch as both get their sentences reduced. A drug seller keeps getting the benefit of the reduced sentences even after their 3<sup>rd</sup>, 4<sup>th</sup> or 5<sup>th</sup> felony. And we know that many who appear to be second felony offenders have actually committed additional felonies but received lenient treatment for their first arrest. (Reduction to misdemeanor, Youthful Offender treatment)

With determinate sentences, all drug offenders without violent priors will get a 28% reduction off their new lower sentence through good time and merit time credit. They may also be eligible almost immediately for shock incarceration, CASAT, work release or conditional release programs. These programs return offenders to the community after prison stays of as little as 6 months. And if none of this helps, there is always earned eligibility and presumptive release.

Those already in prison who might not benefit from merit time, CASAT, conditional release and other programs are eligible for retroactive re-sentencing so that they, too, can return to the community.

In all, the reduced determinate sentence structure, especially, for second B felons, is too low. We earnestly believe that this is a public safety issue which must not be compromised. We urge the Senate to require that second B felons must serve at least two years of the minimum before being eligible for work release.

### **CONCERN#3**

We are troubled by the retroactivity provisions for many reasons. First, philosophically, consider the message that would be sent to the public. Hundreds and potentially thousands of convicted drug dealers would be eligible for immediate re-sentencing and/or work release. They would return to the communities from which they wrought misery. Does anyone really believe these offenders will not return to their prior activities? And if not, what justification can be offered to the law abiding citizens? We believe the public will understandably

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be outraged when they learn hundreds, if not thousands of convicted drug dealers are receiving such a windfall.

Notwithstanding our philosophical objection, there are practical problems that will adversely impact district attorney offices across the state. Currently, we have been asked to do more with less. Aid to prosecution, DA salary reimbursement etc. has been cut 15% and many counties have imposed additional cuts. This proposal will create extra work for overburdened offices. Will there be additional resources to update investigations, manage the re-sentencing hearings, and respond to copious appeals that will inevitably follow?

#### CONCERN#4

The bill makes no appropriation for all of the additional residential and outpatient treatment necessary for offenders sentenced to CADAT as well as aftercare programs. Nor is there any funding provided to probation for supervision or for the assessment and screening of those who apply for CADAT. Similarly, there is no funding for expansion of DTAP. This appears to be an unfunded mandate on the counties.

We are troubled that the new proposal provides that the CADAT provision will not take effect until funding is appropriated. Should funding not be provided, it would appear that the rest of the legislation – i.e. sentencing reductions, merit time and other provisions would take effect while the treatment options for defendants would not. This would be contrary to the entire justification for this “reform” i.e. to offer treatment rather than incarceration to addicted offenders.

#### CONCLUSION

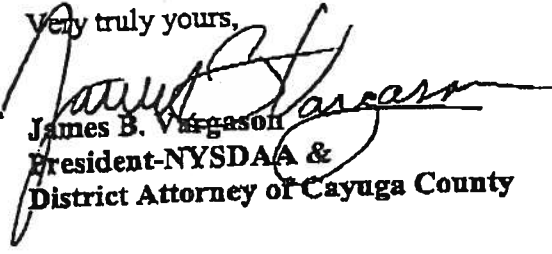
In considering the above concerns, it is important to remember that even were the final bill to preserve District Attorney discretion in its current form, defendants whom prosecutors seek to send into drug treatment would have a significantly diminished incentive to participate. This could well change the culture of plea negotiations, as many defendants will opt for a few months of incarceration – or some form of minimal CASAT – as opposed to a much more rigorous DTAP program. Drug treatment, therefore, could well become less effective as a result.

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Ultimately, it has and remains the opinion of this Association that the vigorous enforcement of our current drug laws has been a major reason why we have seen a dramatic reduction in crime-particularly violent crime-over the past decade. Any "reform" must be prudent and balanced. It must not be based on myths or a desire to appease advocates who may well have a hidden agenda.

Thank you for listening to our concerns.

Very truly yours,

  
James B. Vargason  
President-NYSDAA &  
District Attorney of Cayuga County

JBV/ts