REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK

TASK FORCE ON

The Future of Probation in New York State

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Task Force on The Future of Probation in New York State

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ACKNOWLEDGMENTS

At the first meeting of the Task Force on the Future of Probation in New York on May 8, 2006, Chief Judge Judith S. Kaye urged the members to "think outside the box," draw on lessons learned from successful innovations in other jurisdictions, and come up with a model that will work to strengthen and make probation a vital entity in the State. The twenty-three member Task Force was comprised of judges, court administrators, prosecutors, defense attorneys, academics, probation officials and others from the public and private sectors.

In pursuing its mandate during the past nine months, the Task Force held five plenary meetings, as well as a series of subcommittee meetings, and Task Force members met with state and national probation experts, probation officers and directors and administrative, supervising and trial judges from around the State. In addition, members of the Task Force reviewed the literature of leading experts such as Professor David Duffee of the School of Criminal Justice at the State University of New York at Albany, Professor Edward J. Latessa of the University of Cincinnati, and Professor Faye Taxman of Virginia Commonwealth University. The Task Force held three public hearings – in New York City, Buffalo and Syracuse – receiving testimony from more than 30 individuals, including county probation directors, probation officers, judges and representatives of criminal defense, pre-trial services, community corrections, law enforcement, state and local corrections and county executive agencies and organizations.

The Task Force wishes to thank the administrative, supervising and trial judges and the many probation and other criminal justice professionals who took time from their schedules to meet with its members and provide insight into the operation of probation in the State and how it might be improved and strengthened. In particular, the Task Force thanks the individuals who provided invaluable testimony, both oral and written, at the Task Force's three pubic hearings.

In conducting its work during the past several months, the Task Force was assisted by the National Institute of Corrections in Washington, D.C. We are extremely indebted to George Keiser, Chief of the Community Corrections and Prisons Division at NIC, and Dorothy Faust, Correctional Program Specialist at NIC, for their technical assistance and guidance. The Task Force also wishes to thank Madeline M. Carter of the Center for Effective Public Policy and Mark Carey of the Carey Group, who were selected by NIC to work as consultants to the Task Force. Their experience and expertise in the areas of probation and community corrections helped guide the Task Force in its decision making. Finally, the Task Force thanks Tom White, Director of Operations of Connecticut's Court Support Services Division, and Kathy Waters, Director of the Adult Probation Services Division, Arizona Supreme Court, for sharing their tremendous knowledge and experience with the Task Force.

This Report incorporates the written contributions of individual members of the Task Force as edited by our exceptional staff, John Amodeo and Gretchen Walsh, whose extraordinary commitment made the Report a reality.

The Task Force members wish to thank Chief Judge Kaye and Chief Administrative Judge Jonathan Lippman for the opportunity to participate in this very important work.

I. INTRODUCTION

In her February 2006 call for the establishment of a Task Force on the Future of Probation in New York State, Chief Judge Judith S. Kaye noted that many local probation departments in the State are "[c]ritically overburdened and underfinanced," with "too few officers, too few caseworkers and little modern technology to enforce probation conditions [imposed by sentencing courts]. And because resources vary from county to county, so does consistent enforcement of probation policies. The result is a widespread perception that, at least in some parts of New York State, probation loses precious opportunities to end the cycle of crime." Declaring that "it is time for a new era of State responsibility for probation – intimately tied to the work of the Judiciary and intended to give offenders a second chance to help them reclaim their lives and become productive citizens," Judge Kaye charged the Task Force with examining ways to strengthen probation in the State, and recommended for its consideration the question whether probation services providers should be housed in the Executive or Judicial Branch of State government.

Probation occupies a key position in New York State's criminal justice system. Probation links the system's many diverse stakeholders, including law enforcement, the courts, prosecutors, defense attorneys, community-based organizations, mental health, drug and alcohol and other service providers, the community, the victim and the probationer. It is the one justice system partner that regularly collaborates with all stakeholders as an offender moves through the system.

Probation services in this State are provided by county agencies (57 counties and New York City) charged by law with advising the courts on sentencing determinations in all criminal cases and with supervising some 120,000 adult offenders currently serving a probation sentence. This includes 22,000 Driving While Intoxicated (DWI) offenders, an equal number of drug dependent offenders and nearly 6,000 sex offenders. Ten percent of adult probationers are Violent Felony Offenders, and in some jurisdictions over half the persons supervised are felons.

A sentence of probation is a judicially imposed alternative to incarceration that targets certain offenders "in need of guidance, training or other assistance." Probation has many advantages over incarceration. The cost of probation represents a small fraction of the expense of institutional commitment. Annual probation services per probationer cost the taxpayers approximately $4,000, a small percentage (12.5%) of the $32,000 required to keep an offender in prison for one year. Furthermore, adult and juvenile probationers benefit from remaining in their communities and their homes. Adult probationers who are supervised in their community are better able to support themselves and their family, which increases their ability to pay restitution to the victim of the offense and continue to contribute to society. And juveniles who remain in the community and in school maintain strong family connections and support, which enhances their overall ability to benefit from services. Perhaps most important, with the aid of the court and probation officer, the probationer may be rehabilitated through the

use of community resources. The imposition of conditions appropriate to the offender and the crime also serves to discourage probationers from committing new offenses.

The goal of probation is to improve public safety by assisting offenders to become law abiding and productive members of the community, thereby reducing recidivism. The recent application to probation of so-called "evidence-based practices" is a promising advancement in the effort to reduce recidivism. Newly introduced in New York, it uses an individualized assessment of both the risk and needs of offenders, developing particularized case plans that incorporate targeted goals and identify needed services to assist an offender to change and lead a law-abiding life. Probation officers address the offender's criminal attitudes and thinking, criminal associates and peers, chemical dependency and family dysfunction to effectuate change. At the same time, they hold offenders accountable for their actions and require compliance with conditions set by the courts.

As the agency charged with monitoring the terms and conditions of the court's sentencing "contract" with the probationer – under which the probationer may remain in the community as long as he or she complies with those terms and conditions – probation is properly viewed as the agent and partner of the sentencing court. As an agent of the Judiciary, probation is responsible for administering the probation sentence by creating a "therapeutic" relationship with the offender and employing counseling skills and best practices to modify the offender's behavior. In short, the primary role of probation is to act as an extension of the sentencing court: to assist the court in determining the appropriate sentence based on the information probation gathers during its pre-sentence investigation, and assist the court in implementing probation sentences by monitoring and supervising probationers during the term of their sentence.

In this Report, the Task Force reaches the inescapable conclusion that, due to a long, unyielding history of state funding cuts, the current status of probation in New York is a bleak one. As detailed in the Report, in 1986, New York State was reimbursing county probation departments for almost 47% of their total budgets, close to the 50% reimbursement rate fixed by state statute. In the late1980's, however, the State began gradually and consistently reducing support for local probation departments. As a result, today reimbursement to local probation departments hovers around 18%, a staggering withdrawal of aid over the last two decades. The Task Force estimates that over the last 20 years, county probation departments have lost hundreds of millions of dollars in desperately needed state funding. To make matters worse, over roughly the same period, the State has dramatically cut funding to the State Division of Probation and Correctional Alternatives ("DPCA"), the state agency charged by statute with overseeing local probation departments. As a result, that agency has struggled to meet its statutory mandate to "secure the effective application of the probation system and the enforcement of the probation laws and the laws relating to family courts

throughout the state."[1]

The Task Force concludes that the major reason for this ongoing decimation of probation funding is structural in nature – that discretionary State Executive Branch funding for what is viewed as a local service, provided by local governments primarily to benefit the courts, will always be in jeopardy because the State Executive Branch will assume that local governments will make up the difference if state funding is cut. By and large, however, local governments have *not* made up that difference. Ultimately, the Task Force believes, unless something is done to reverse this decades-long trend, the State's probation crisis will only worsen.

In Sections III and IV of the Report, the Task Force makes two major recommendations[2] with regard to resolving the funding crisis in probation. First, to address the immediate need for additional state funds for probation, the Task Force calls for a $75 million annual increase in state reimbursement, to be phased in over a three-year period, and recommends that counties be required to enter into "maintenance of effort" agreements to ensure that these new funds will not be used to offset the cost of probation services currently supported by the counties.

The Task Force's second, more long-term, solution to the funding crisis is premised on the fact that, while probation's services are utilized by many different components of the criminal justice system, including state corrections and parole, the State's criminal and Family Courts are the primary and direct beneficiaries of well-funded, adequately staffed local probation departments. It is therefore the courts that have the most to lose if the downward spiral in state funding continues. The Report describes in great detail the indispensable services that local probation departments provide to the State's criminal courts, including pre-trial services for new arrestees arraigned in the local criminal courts, preparation of some 130,000 pre-sentence reports to assist judges in making informed sentencing determinations, and, perhaps most important, the supervision and attempted rehabilitation of the more than 120,000 misdemeanor and felony offenders currently serving probation sentences imposed by the courts. As reflected in the public hearing testimony and confirmed by an impressive body of research in this area, absent adequate funding, it is all but impossible for probation departments to effectively apply those probation practices and policies that have been proven to rehabilitate offenders and "end the cycle of crime."

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[1]Executive Law §243(1).

[2]Although the Task Force reached a consensus on most of the major recommendations in this Report, and while all recommendations cited in the Report were supported by a majority of Task Force members, some of the recommendations received less than unanimous support. Accordingly, it should not be assumed that every recommendation in the Report reflects the views of all Task Force members.

In view of the critical role played by probation in the functioning of the criminal courts of the State, the Task Force concludes that the long-term solution to the problem of inadequate state funding of probation in New York ultimately lies in shifting responsibility for state funding and oversight of probation from the Executive Branch to the Judicial Branch of state government. Specifically, the Task Force recommends the creation within the Judiciary of a new Office of Probation and Correctional Alternatives, to replace and assume the responsibilities of the existing Division of Probation and Correctional Alternatives. Under the Task Force's proposal, the budgetary and oversight functions of DPCA would be housed in the Judiciary, leaving actual probation service delivery within local government control. As under the existing system, each county and NYC would continue to appoint a probation director who, in turn, would appoint probation officers and other staff, and all local probation department employees would continue to be county employees. In assuming DPCA's existing statutory responsibilities under the Executive Law, the Judiciary's new Office of Probation and Correctional Alternatives would be responsible for, *inter alia*, securing and distributing state reimbursement funding to local probation departments, and would play a prominent role in implementing and enforcing rules and regulations governing the practice of probation in the State.

The Task Force further recommends in Section IV the creation within the Judiciary of a newly constituted and newly empowered State Probation Commission to replace the existing, largely ineffective, Probation Commission that serves under current law as an advisory body to the Director of DPCA. Under the Task Force's proposal, the Probation Commission, assisted by a newly established Advisory Board, would make recommendations to the Chief Judge on all administrative rules relating to the delivery of probation services, and such rules could only be adopted or modified by the Chief Judge after consultation with the Commission.

In Section V of the Report, the Task Force proposes several less sweeping but critically important changes to improve the delivery of probation services in the State. These include recommendations to: expedite the production of pre-sentence reports to allow for meaningful review by prosecutors and defense attorneys in advance of sentence; adopt uniform procedures to ensure that corrections made to pre-sentence reports at or before sentence are incorporated into the "final" report that accompanies the offender to jail or prison; explore the benefits of increased use of "pre-plea" investigations and reports in criminal cases; adopt court rules to ensure the timely calendaring and conducting of probation violation hearings and other probation proceedings; explore, as a cost-saving measure, the expansion around the State of New York City's automated "kiosk" system for supervising low-risk probationers; require probation departments that currently lack a functioning pre-trial services program to institute one; provide alternative statutory procedures for the prompt temporary detention of alleged probation violators; provide for complete transfer of jurisdiction in all intrastate probation transfer cases and improve the delivery of probation services to juvenile and adolescent offenders in the criminal courts.

In the Report's final section, the Task Force briefly addresses three issues for future consideration – probation's role with respect to victims, probation's role in the Family Court and the expanded use of "evidence-based" practices and policies in probation – and recommends their further study.

For too many years, probation in this State has been squeezed financially and has suffered from a political philosophy that has failed to acknowledge the tremendous potential of supervised rehabilitation of offenders to break the cycle of recidivism. For far too long, probation has been seen as a "dispensable" cog in the wheel of criminal justice, relative to the other, "essential," elements of the criminal justice system – police, corrections, and parole. This cannot be allowed to continue. As a provider of critical services to the criminal courts and to virtually every other component of the criminal justice system, and as the entity responsible for the supervision and rehabilitation of nearly twice the number of offenders currently housed in our state prisons, probation must no longer be treated as the stepchild of that system. It is only logical, then, that probation, as a key implementer of the fundamental sentencing role of the Judiciary, find a place in the Judicial Branch of government.

Many have emphasized that if probation is once again to thrive in this State, it must have a "champion" ready, willing and able to fight for the necessary funding that will enable it to fulfill its rehabilitative mission and provide the critical services upon which our courts, communities, victims, and probationers rely. The Task Force is convinced that this "champion" is the Judiciary – the institution that over the years has come to rely so heavily on probation to help fulfill *its* mission of dispensing justice and ending the "cycle of crime."

II. HISTORY OF PROBATION

A. The Origins of Probation

The concept of probation, from the Latin word "probatio" – meaning testing period – has historical roots in the practice of judicial reprieve. In English Common Law, the courts could temporarily suspend the execution of a sentence to allow the defendant to appeal to the Crown for a pardon.

Probation first developed in the United States in 1841 when John Augustus, a Boston boot maker, persuaded a judge in Boston Police Court to give him custody of a convicted offender, a drunkard, for a brief period and then helped the man to appear rehabilitated by the time of sentencing.[3]

If John Augustus was the "Father of Probation," then Benjamin Salmon and Daniel Chase of Boston should be viewed as the "Grandfathers of Probation." The following is a description of the first recorded instance of a probationary sentence being imposed in the United States:

> [T]he story of probation's rise should begin with the prosecution of Jerusha Chase in Boston in 1830--for Chase may be the first reported instance of the on-file [suspended sentence] mechanism at work. In February 1830, Jerusha Chase appeared in the Boston Municipal Court to face a charge of stealing from a residence. The clerk recorded the result Feb. 8: 'Defendant retracts her [not guilty] plea and pleads guilty and recognized in the sum of two hundred dollars with Benjamin Salmon, trader, and Daniel Chase, Cordwainer of Marblehead, to come when sent for and in the meantime to keep the peace.' The judge released Chase and charged her two sponsors-- Salmon and Daniel Chase--to guarantee her good behavior at risk of forfeiting $200 should they fail. The case itself was placed 'on file' (a fact recorded elsewhere) and would stay there as long as Chase remained on good behavior. Though Chase's conviction then lay dormant, the prosecutor had the power to revive it if Chase's behavior later turned worse.[4]

The evolution of probation in the United States was documented by one noted historian as follows:

> To understand current probation practice, one must appreciate its historical roots...Buoyed by Augustus's example, Massachusetts quickly moved into the forefront of probation development. An experiment in providing children services (resembling probation) was inaugurated in 1869. In 1878, Massachusetts was the

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[3]En.wikipedia.org/wiki/Probation.

[4]Fisher, *Plea Bargaining's Triumph*, 109 Yale L.J. 857, 938-939 (2000).

first state formally to adopt a probation law for juveniles. Concern for mitigating the harshness of penalties for children also led to the international development of probation (Hamai et al. 1995).

Public support for adult probation was much more difficult to come by. It was not until 1901 [that] New York passed the first statute authorizing probation for adult offenders, over twenty years after Massachusetts passed its law for juvenile probationers (Latessa and Allen 1997). By 1956, all states had adopted adult and juvenile probation laws.[5]

Initially, probation officers were volunteers who, according to Augustus, needed to just have a good heart. Early probation volunteer officers were often drawn from Catholic, Protestant, and Jewish charitable organizations. In addition, police were reassigned to function as probation officers while continuing to draw their pay as municipal employees. But as the concept spread and the number of persons arrested increased, the need for presentence investigations and other court investigations increased, and the volunteer probation officer was converted into a paid position (Dressler 1962). The new officers hired were drawn largely from the law enforcement community – retired sheriffs and policemen – and worked directly for the judge.

Gradually the role of court support and probation officer became synonymous, and probation officers became 'the eyes and ears of the local court.' As Rothman observed some years later, probation developed in the United States very haphazardly and with no real thought (Rothman 1980, p. 244). Missions were unclear and often contradictory, and from the start there was tension between the law enforcement and rehabilitation purposes of probation (McAnany, Thomson, and Fogel 1984). But most important, tasks were continually added to probation's responsibilities, while funding remained constant or declined. A 1979 survey (Fitzharris 1979) found that probation departments were responsible for more than fifty different activities, including court-related civil functions (e.g., step-parent adoption investigations, minority age marriage investigations).[6]

Another historian attributes probation's rise to the emerging influence of social science insofar as "[w]hat began as an altruistic endeavor, spearheaded by a few hearty souls often harshly criticized for what was seen as their indulgence, came to play a central part in Progressive Era efforts to humanize, and individualize, criminal justice... [T]his case-by-

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[5]The enactment of probation laws in the various states was fueled by the United States Supreme Court decision in *Ex Parte United States (Killits)* (242 US 27 [1916]), which held that federal courts (and by implication, the state courts) lacked the inherent authority to suspend sentences for indefinite periods.

[6]Petersilia, *Probation in the United States*, 22 Crime & Just 149, 155-157 (1997).

case approach to criminal justice required flexibility and discretionary authority...Good candidates for probation were those criminal offenders who evinced a strong likelihood of repair and low risk of recidivism."[7]

Although the duties of probation officers have increased dramatically over the years, many facets of probation can be traced to its early roots. For example, probation continues its role of assisting the court's sentencing decision by providing recommendations regarding the appropriate sentence to be imposed as well as impartial information concerning the offender's past criminal record, personal characteristics, and outside influences for the court to use in assessing whether the offender presents a good risk for a probationary sentence. Probation officers also continue their social work tradition of determining an offender's needs and finding the appropriate services available in the community to address those needs. Although probation's law enforcement role has become somewhat more pronounced over the past decade due, in part, to the various law enforcement duties that have been statutorily placed in the hands of probation (which are in addition to the probation officer's law enforcement/supervisory role in the enforcement of the conditions of probation), probation professionals across the State recognize the invaluable role they play in the lives of probationers and strive to provide a balanced approach between their social work and law enforcement roles.

B. Probation in New York State[8]

As previously noted, New York was not the first state to enact probation legislation. Indeed, it was not until 1901 that New York enacted its first statute empowering judges "to appoint a person or persons to perform the duties of probation officer or officers as hereinafter described, within the jurisdiction and under the direction of said court or justice, to hold such office during the pleasure of the court or justice making such appointment."[9]

During the early days of probation in New York, a probation officer's duties included the gathering of information about an offender's prior bad acts, character and the nature of the offense charged. The probation officer was further required to "furnish to each person released to probation committed to his care, a written statement of the terms and conditions of his probation, and ... report to the court or justice appointing him, any violation or breach of the terms and conditions imposed by said court, of the persons placed in his care."

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[7]Logan, *The Importance of Purpose in Probation Decision Making*, 7 Buff Crim L Rev 171, 174-175 (2003).

[8]A detailed review of the statutory progression of probation in New York State is attached as Appendix A. A full description of the history of probation in New York City can be found in Lindner, *The History of Probation in New York City* contained in Karmen, *Crime and Justice in New York City* (2001).

[9]Chapter 372 of the Laws of 1901.

Although the courts were statutorily empowered to appoint probation officers, it was not until 1905 that the Legislature gave judges the right to suspend sentences in order to place an offender on probation.[10] Judges were further given the discretion to terminate or revoke a sentence of probation based upon probation violations.

Throughout these early years, probation in New York remained an extension of the court with the court authorized to appoint probation officers to be its "eyes and ears" in enforcing the conditions of sentence. Additional statutory enactments relating to probation during the late 1920's and early 1930's included the requirement that a pre-sentence report be prepared, which was to include the circumstances of the offense and the offender's criminal record and social history.

In the late 1960's, the Governor commissioned a Special Committee on Criminal Offenders (the "Special Committee") to look at improvements that could be made to all aspects of the criminal justice system. In the 1968 Report of the Special Committee, probation was described as "a branch of the post adjudicatory treatment system that has spread to furnishing services in connection with a wide variety of social service matters handled by the courts" to the point where "the term 'probation' has such a broad range as to be meaningless." The Report went on to "try to determine where probation - the homeless service - should fit in the governmental structure." In response to the Special Committee's thorough analysis of the organization and operations of probation, the Legislature in 1970 created a new State Division of Probation (the "Division") in the Executive Branch independent from the State Department of Corrections. The new Division was to have supervision over the administration of probation throughout the State, and the authority to promulgate rules to regulate the methods and procedures utilized by probation officers in their administration of probation.

This new grant of authority to the Division ran head-on into the authority over probation that had historically been exercised by the Administrative Board of the Judicial Conference (the "Administrative Board"). The Administrative Board claimed that its power was derived from the 1962 amendments to the State Constitution (Article VI) and subsequent enabling legislation. The authority over probation exercised by the Administrative Board was acknowledged by the Special Committee when it concluded in its Report that "it appears that the Legislature intended to include probation within the unified court system as an 'auxiliary service.'"

A turf battle between the Executive and Judicial Branches followed. This battle was resolved in 1971 when the Legislature transferred from the Code of Criminal Procedure to the Executive Law all provisions relating to the administration of probation to provide "a more uniform and effective system for administration of probation

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[10]Chapter 656 of the Laws of 1905.

services."[11] This legislation was intended to change "the method of appointment of probation personnel in counties outside the City of New York," namely, that each county's probation director would be appointed by the chief executive officer of each county instead of the Judiciary, and the personnel serving under the director would be appointed by the director – the Judiciary having no say over the employment of probation officers within the State.[12]

The 1971 legislation also reaffirmed the State's commitment to reimburse 50% of a county's probation operating expenses. Notably, as the State's budgetary response to this statutory commitment has weakened over the past 35 years, so too have the underlying justifications for the Executive Branch's control over probation. The Judiciary has evolved since 1971 insofar as it is no longer concerned solely with the process of adjudication and other traditionally "judicial" functions. The best example of this is its establishment around the State of nearly 300 "problem solving" courts, such as drug treatment, community, mental health, sex offender, and integrated domestic violence courts, intended to address not only the special needs of families and victims, but also the rehabilitative needs of offenders through close judicial monitoring and the provision of targeted services. As stated elsewhere in this Report, the Judiciary views probation as its best opportunity for ending the cycle of offender recidivism, and the services probation officers provide to courts are deemed invaluable to that mission. In contrast, the value of probation to the Executive Branch has diminished over the years and is now dwarfed in comparison to the other criminal justice services for which the Executive is responsible (*e.g.*, State Police, DOCS and State Parole).

In sum, the history of probation in New York State over the last three decades and its evolving relationship with the Judiciary and the Executive clearly disprove the notion, as expressed in the Sponsor's Memorandum to the 1971 legislation, that "probation is no more directly related to administration of courts then are the services of police, sheriffs and district attorneys." Time has witnessed the change in the expanding role of probation in New York State and, in particular, its intimate relationship with the Judiciary in the administration of criminal justice.

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[11]An excellent explanation of the then-existing probation system in New York State is found in the bill jacket to the 1971 legislation (Chapter 387 of the Laws of 1971) – a 13-page, single-spaced memorandum to the Governor's Counsel from Peter Preiser, then-Director of the State Division of Probation.

[12]Chapter 387 of the Laws of 1971 amended the Executive Law to establish local probation departments, and Executive Law section 256 mandated each county to maintain or provide for a probation agency to perform probation services therein. Executive Law section 257 provided that all salaried probation officers and their supervisors be in the competitive class under civil service.

III. THE FUNDING CRISIS: RESOURCE NEEDS FOR NEW YORK PROBATION DEPARTMENTS

In New York State, one of probation's most daunting constraints is a startling lack of resources. National academic and policy experts on probation and community corrections have said for years that probation is the most under-funded part of the criminal justice system;[13] New York probation certainly illustrates that point.

Few, if any New York probation departments are funded adequately in terms of having reasonable caseload sizes for either adult or juvenile probationers. Many lack the necessary resources to pay for the essential community based services needed to prevent recidivism such as drug treatment, job and vocational training and placement, and mental health services. Again and again, the Task Force heard from probation directors and other experts that almost all probation departments constantly struggle to control caseload size and triage necessary services with little to no budget growth. Average caseloads for probation officers are frequently well over a hundred to one, far above any acceptable national standard. While this state of affairs is a national phenomenon, it is especially pronounced in New York State, where over the last two decades the State has systematically disinvested in probation.

A. A Short History of Probation Funding in New York State

In 1986, New York State was reimbursing county probation departments almost 47% of their total budgets. Historically, the State provided almost half of county probation budgets since almost half of the adults on probation were convicted felons (and in New York City, the largest probation department in the State, even more). By supervising convicted felons who might otherwise be incarcerated in the state prison system, local probation departments were viewed by the State as saving it the tremendous cost of housing these offenders. For the State, probation offers the largest alternative sentence to prison. Last year for instance, probation departments in New York State supervised 60,000 felons. Two decades ago, the State's fiscal policy for the nearly equivalent split in funding was based on the fact that local probation departments kept thousands of felons out of state prisons, and thus saved huge costs to the State.

In the late 1980's, this all started to change. The State gradually and continually reduced support for local probation departments. Today, reimbursement to local probation departments hovers around 18%, a staggering withdrawal of aid over the last 20 years. The cumulative loss in state aid over this period is difficult to calculate but in the last year alone, the State would have provided almost $130 million to counties as opposed to the $52 million (the amount that now goes directly to local probation departments) it actually provided. Over the last two decades, the State has provided

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[13]Petersilia 1997, Clear 2005.

less funding each year and counties have lost some hundreds of millions of dollars in state aid.

It is difficult to identify the reasons behind this ongoing disinvestment. No similar pattern in state funding to prisons, parole or state police is evident. In the final analysis, it is most likely the case that the State systematically reduced funding to local probation departments simply because it could. That is, state policy and budget officials assumed that if they withdrew aid from local probation departments, then the local county executives, mayors and legislators would have to make up the funding shortfalls with local tax levy dollars. As the State has withdrawn funds from probation, local officials have struggled to make up the budget shortfalls the State created. Even in tightly constrained local budgets, county officials recognize the importance of having at least minimally functioning probation departments to supervise thousands of probationers in their communities and of having at least some ability to provide timely pre-sentence reports to state courts. The probation funding story then is a classic one of the State simply forcing costs down to a county level and of reaping some small state budget savings.

The problem with this situation, however, is that most counties have not made up the entire shortfall from the State. As a result of declining state reimbursement, almost all the new money counties have put into probation over the last two decades has covered budget deficits in local departments. Thus, over time, counties have been unable to adequately fund their departments as the number of probationers has risen, and the cost of technology and information system infrastructure has grown.

As reflected in the testimony at the public hearings and in discussions at Task Force meetings, some counties have attempted to make up at least a portion of this shortfall through increased use of monthly "administrative" or "supervision" fees charged directly to probationers. Although there is statutory authority for the collection of such fees from individuals sentenced to probation on a conviction for certain DWI-related offenses,[14] some counties have exceeded this limited grant of authority by implementing monthly supervision fees for *all* probationers, regardless of the crime of conviction. In a 2003 informal opinion, the Attorney General concluded that counties may not enact local legislation providing for supervision and other probationer fees except as specifically authorized by state statute, and that, with respect to criminal cases, the Legislature had expressly authorized probation supervision fees *only* for DWI-related convictions under New York's Vehicle and Traffic Law Article 31.[15] In the absence of any evidence that the use of probation supervision fees is even nominally effective in reducing offender recidivism, and in view of its questionable legality outside

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[14] *See* Executive Law §257-c; *see also* Family Court Act §252-a.

[15] *See* 2003 Ops Atty Gen No. 2003-4.

the context of DWI-related offenses, the Task Force opposes the expanded use of such fees by localities as a means of addressing declining state aid to probation.

B. The Consequences of Inadequate Funding

Throughout the public hearings conducted by the Task Force, the common refrain was that "probation is not broken, it is just underfunded." Data provided by the State Council of Probation Administrators ("COPA") indicate that probation is the sanction of choice by sentencing courts in New York. In 2005-2006, 120,547 adult offenders were serving a probationary sentence in contrast to 63,284 offenders confined to the Department of Correctional Services and 43,480 on parole. Despite this, probation services received only 3% of the total state funding for overall correction services as opposed to 90% for DOCS and 7% for Parole services. This constituted the principal concern of probation service professionals. These disproportionate funding levels, however, have had varying effects on probation departments throughout the State.

As a result of declining state involvement in funding probation services, the level of probation services in New York has been subject to each county government's order of priorities on an agenda of competing public services. Attached, as Appendix B, is a comparison of eight counties in the State and the differing level of probation services offered. The completion time for a pre-sentence investigation ("PSI") can vary from two weeks to 12 weeks. Appendix C indicates the comparison of probation staff per 100,00 population and again shows a range from 8.17 staff/100,000 population to 33.29. It should be obvious that a consistent and equal level of probation services is not a reality in New York. At the hearing conducted in Erie County, several probation officers from the Erie County Probation Department indicated that, because of their high caseloads (*i.e.*, in excess of 300 probationers per probation officer) and the reduction in funding of probation, they have recommended incarceration to the sentencing court instead of probation in cases where probation is the appropriate sentence. The provision of probation services offered in the State on such an unequal basis raises concerns of a constitutional dimension.

As addressed in other sections of this Report, increased funding by the State of probation services is the major recommendation and plea of COPA and all probation professionals. There are currently no caseload standards promulgated in the State. Accordingly, the caseloads of probation officers vary widely from county to county and also within a county depending on the level of supervision being provided. Virtually all probation personnel testified to the need for state-mandated caseload levels which would provide some uniformity throughout the State. The American Probation and Parole Association, in its *Issue Paper on Caseload Standards* (1991), suggested the following standards for adult caseloads:

CASE TYPE	CASES TO STAFF RATIO
Intensive	20:1
Moderate to High Risk	50:1
Low Risk	200:1
Administrative	500:1

It is difficult for caseload standards to be established without substantial input from the various probation departments in the State and a consideration of local conditions. However, an enhanced State Probation Commission as proposed by this Report should have the power and charge to develop applicable standards.

The evisceration of Erie County's probation department is an alarming example of the consequences of inadequate funding levels for probation. As a result of a county fiscal breakdown and the reduction in the level of state assistance to probation, Erie County reduced its probation department by 30%. As indicated above, individuals otherwise appropriate for probation are being recommended for incarceration. In addition, the period for the preparation of PSRs has tripled, resulting in increased jail confinement in many cases with attendant higher costs to the county. All home visits of supervised probationers were cancelled. At one point, and in clear disregard of statutory mandate, the Erie County Probation Department advised court administration and local criminal courts that it would no longer be preparing PSRs for misdemeanor convictions. (According to DPCA, that agency interceded when advised of such by the Administrative Judge of the Eighth Judicial District, and withheld approval of the Erie County Probation Department Annual Plan – a requirement for state aid funding reimbursement – until such time as the Erie County Probation Director acted to issue a new directive concerning the preparation of PSRs in compliance with state law.) Though many counties have continued to maintain funding to probation services, it was strongly indicated throughout the course of the Task Force hearings that the situation in Erie County could soon spread throughout the State.

Evidence of this may be found in the concerns expressed by probation officers who testified at the public hearings. The officers testified, for example, that legislative changes over the course of the past decade have substantially increased the workload and responsibilities of the officers without any corresponding increase in probation resources. Testimony from COPA indicated a 34% increase in workload for probation personnel resulting from enactment of Chapter 691 of the Laws of 2002, which established additional requirements of extensive community service and the installation and monitoring of ignition interlock devices for repeat DWI offenders. According to the testimony, the requirement under the Sex Offender Registration Act that courts provide a risk level classification for sex offenders has required probation departments to prepare more detailed PSRs and regularly verify the addresses of registered sex offenders on probation. In addition, the recent doubling of probation periods for sex offenders – from three to six years for misdemeanors and from five to ten years for felonies – has had a dramatic effect on caseloads. Finally the recent expansion of the

statutory requirement that offenders convicted of enumerated offenses submit a DNA sample for inclusion in the statewide DNA databank has had a significant impact on the workload of probation, with some courts further requiring probation departments to collect the statutory "DNA databank" fee.[16] Other legislative enactments, including Interim Probation Supervision and the recent Penal Law "offender reentry and reintegration" legislation,[17] have further impacted the work capacity of probation departments.

C. Task Force Recommendation on Additional Resources for Probation

Probation is in dire need of more resources in order to do its job and fulfill its mission to protect public safety. We recommend that the State provide to county probation departments an additional $75 million annually, phased in over three years, bringing total state reimbursement up to almost $130 million annually. This would set the state reimbursement rate to counties at approximately 50%, or just about what it was two decades ago and the maximum amount allowed and impliedly promised by statute.

The Task Force recognizes that this is a significant investment of funds for the State to commit to probation. We are also aware that the State is facing significant out-year budget shortfalls and we do not make this recommendation lightly. However, the potential public safety benefits, measured in part by reduced recidivism, not simply through increased supervision but also by an ability to increase sobriety and the employment prospects of thousands of probationers, make this investment worthwhile. Additionally, any reduction in recidivism is not just beneficial for public safety but can wind up saving significant amounts of money for the State in prison and juvenile placement costs. Finally, the $75 million increase we are calling for on a three-year phased-in basis is a small percentage of the funds that the State now spends on criminal justice (about $3.7 billion). That is not to say that it is an insignificant amount, but that a relatively small investment in probation by the State has the potential both in public safety and financial terms to pay back the sum many times over.

Additional funding will allow probation departments around the State to have average caseloads for high risk adult probationers at 25 to 1 and caseloads for high risk

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[16] It should be noted that, according to DPCA, new specialized state aid funding was provided to the City of New York and County Probation Departments for the first time in many years during Fiscal Year 2006-07: A total of $1 million statewide was provided to local probation departments to assist them in the collection of DNA samples from the retrospective pool of adult probationers (approximately 27,000) owing a DNA sample in accordance with state legislation effective June 23, 2006; and an additional $1.2 million was provided to probation departments for the enhanced supervision services of Level 3 Sex Offenders.

[17] *See* Chapter 98 of the Laws of 2006.

juvenile probationers at 15 to 1. Improved resources will bolster the ability of probation departments to deliver timely and complete PSRs to the State and lower caseloads for mid and low risk probationers as well. (Attached, as Appendix D, is a November 9, 2006 memorandum to the Task Force from Task Force member Michael Jacobson describing in detail how the amount of the proposed increase was derived and what it will fund.) This is actually a conservative estimate since it does not include funds for probation intake, matrimonial and interstate cases.

Finally, the increase includes $15 million statewide to fund community-based services such as drug treatment and employment services. These services are an essential part of what probation needs to be doing in our communities if we are to provide the greatest chance of successfully turning around the lives of the tens of thousands of offenders serving probation sentences in the State.

Because it will take a few years for local county probation departments to hire and train new staff, develop and implement new technology, find and procure new community based services and, in some cases, acquire new space, this new funding should be staggered over the next three years with an additional $25 million provided in the state budget in the 2008 budget, $50 million in the 2009 budget and the full $75 million by 2010.

D. Task Force Recommendation on Local Maintenance of Effort

This additional state funding for county probation departments must be used solely for additional probation services. Accordingly, counties must be required to enter into maintenance of effort agreements that ensure their ongoing financial commitments to probation. Without these agreements, counties will have the ability to simply substitute the additional state funds for county funds and reap budget savings by substituting state dollars for local dollars (much as the State has done over the last 20 years). It is easy to see why counties who have felt the financial burden of lowered state reimbursements over time would want to recoup some of their money by lowering their financial commitments to probation. It would not be an unreasonable position to take on their part. However, for our recommendation for new probation funding to increase and restructure services to have any merit or validity, new state funding must supplement increased services and not supplant local funding.

Enhanced state aid must be utilized by the local jurisdiction to support professional probation staffing levels to ensure compliance with established statewide investigation and supervision caseload standards. The maintenance of effort agreements with the State will require that the counties maintain at least their current level of financial support. As they struggle with their own fiscal issues, many counties may well object to these maintenance of effort agreements as they limit their local governance and essentially make their local funding streams for probation "untouchable." While we understand the frustration this might cause to counties, we think it is more than offset by the increased supervision and access to services that will

be provided to the probationers who live in those counties. Likewise the benefits from these additional funds will accrue to all county residents, as well.

To be eligible for enhanced state aid funding, the local jurisdiction must agree to comply with established statewide caseload standards in managing its probation investigation and supervision responsibilities. It must implement and maintain automated case management information systems as well as actuarial risk and need assessment instruments approved by the Division of Probation and Correctional Alternatives.

E. Exacerbating the Funding Problem: The Inappropriate Use of Probation as a Sentence

Particularly in New York City, inadequate funding of probation has been exacerbated by the inappropriate use of probation as a sentencing option. Stated simply, only those offenders who meet the statutory criteria for probation should be placed on probation. If probation is allowed to be used for other than its intended purpose, any investments or improvements made will likely fail.

According to Task Force member and New York City Department of Probation Commissioner Martin Horn, in New York City probation is often a "default" plea. The vast majority of dispositions in New York City are resolved by plea agreements.[18] Plea agreements with a promise of probation are made and the sentence imposed without benefit of a pre-sentence investigation ("PSI"). Often, these pleas result from a perception that the People's case is weak or from a desire to spare a fragile or vulnerable complainant the trauma of testifying at trial. The decision to accept a plea in these instances, where probation is promised as an inducement to the defendant, frequently has little to do with the defendant's history or likelihood of success on probation.

It is common in New York City for the Probation Department to receive, without a PSI, persons placed on probation with prior criminal histories indicative of a likely probation failure. These include persons with numerous prior convictions, prior probation failures, and even prior parole failures when subsequently charged with a new misdemeanor. This situation most often occurs when: (1) a Youthful Offender probationer is also sentenced to probation as an "adult;" and (2) the additional probation sentence is a misdemeanor, since there is no limit on the number of times an individual can be sentenced to misdemeanor probation. Commissioner Horn questions why the courts and the district attorneys believe that an additional concurrent sentence

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[18]According to the NYS Division of Criminal Justice Services, in 2005, out of 104,998 arrests statewide, only 1866 (1.8%) were disposed of by verdict after trial. In New York City, the comparable numbers are 57,099 felony arrests and only 981 verdicts after trial (1.7%). Notably, fully half of all verdicts in the State are in the courts in New York City.

of probation will somehow rehabilitate a current probationer who is in violation of their probation sentence based upon a rearrest.

The Task Force is aware of the inexorable demand to plea bargain, especially in the courts of New York City. However, for proper use of probation, there must be a faithful compliance with the standards set forth in law.

Penal Law section 65.00(1)(a) sets forth the criteria for placing a defendant on probation. It states, in relevant part, that "the court may sentence a person to...probation...if the court, *having regard to the nature and circumstances of the crime and to the history, character and condition of the defendant,* is of the opinion that:

i. Institutional confinement for the term authorized by law of the defendant is or may not be necessary *for the protection of the public*;
ii. The defendant is in need of guidance, training, or other assistance *which, in his case, can be effectively administered through probation supervision*; and
iii. Such disposition is not inconsistent with the ends of justice."[19]

Additionally, with respect to weapons offenses, section 70.02(2)(c) of the Penal Law provides, in relevant part, as follows:

> Except as provided in subdivision six of section 60.05, the sentence imposed upon a person who stands convicted of the class D violent felony offenses of criminal possession of a weapon in the third degree... must be a sentence to a determinate period of imprisonment, or, in the alternative, a definite sentence of imprisonment for a period of no less than one year, except that: (i) the court may impose any other sentence...if the court having regard to the nature and circumstances of the crime and to the history and character of the defendant, finds on the record that such sentence would be unduly harsh and that the alternative sentence would be consistent with public safety and does not deprecate the seriousness of the crime.[20]

Too often defendants are sentenced to probation who clearly cannot meet these tests. On occasion, weapons offenders are placed on probation without the requisite finding on the record, an illegal sentence that then is referred back to the same district attorney who agreed to the plea, yet without benefit of a PSI.

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[19]Penal Law §65.00 (1)(a) (emphasis supplied).

[20]Penal Law §70.02(2)(c).

The rationale frequently offered is that at least law enforcement officials now have a "hook" on the defendant and if he or she violates the conditions of probation the authorized sentence of imprisonment can be imposed. Unfortunately, Commissioner Horn asserts, that is not how it works in practice. The delays in calendaring a probation violation by themselves argue against this as a strategy. Moreover, these defendants often abscond. New York City data indicate that where a violation of probation is proven or pled to in felony probation cases, including intensive supervision probation cases, the disposition most often is restoration to probation or, less frequently, a sentence to local jail time. Commitment to state prison is hardly ever imposed.

Penal Law section 65.10 sets forth the conditions of probation. These must include conditions reasonably necessary to ensure the defendant will lead a law-abiding life or assist him or her to do so.[21] The conditions may include a requirement that the defendant "[w]ork faithfully at a suitable employment"[22] and "[s]upport his [or her] dependents."[23] The standard conditions adopted for use in the City of New York by the Unified Court System require a probationer to work. Nonetheless, persons are placed on probation who are legally ineligible to work. Courts should not place an adult on probation without the benefit of a PSI and should consider requiring the defendant to show proof of citizenship or a work visa in order to receive a sentence of probation.

Evidence-based practices, caseload standards, and a rehabilitative orientation all presuppose that the right people are placed on probation. As long as probation is used for individuals who demonstrably are not good candidates for probation, investments in probation will not result in substantial improvements in public safety.

F. Conclusion

The Task Force strongly recommends a reversal of this State's two decade-long policy of decreasing state reimbursement and urges an immediate increase in reimbursement for local county probation departments. Counties and probation departments have struggled to deal with significant declines in resources. This has negatively affected the ability of probation departments to do their jobs and to protect public safety to their maximum ability. Increased resources will allow these departments to have smaller and more manageable caseloads, improved essential services at the community level, and the ability to invest in important and state-of-the art information systems and supervision technology. The proposed phased-in increase of $75 million is a small investment with significant financial and potential public safety benefits; the State should include the first phase of the increase in the upcoming 2008 State budget.

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[21] Penal Law §65.10(1).

[22] Penal Law §65.10(2)(c).

[23] Penal Law §65.10(2)(f).

IV. TOWARD A NEW VISION OF STATEWIDE PROBATION FUNDING AND OVERSIGHT: TRANSFERRING THE STATE DIVISION OF PROBATION AND CORRECTIONAL ALTERNATIVES TO THE JUDICIARY AND CREATING A NEWLY EMPOWERED STATE PROBATION COMMISSION

A. Background

The Division of Probation and Correctional Alternatives ("DPCA") is an Executive Branch agency established under Article 12 of the Executive Law and headed by a State Director appointed by the Governor. Pursuant to sections 240 and 243 of that Article, the Director of DPCA has "sole charge of the administration of...[DPCA]," and exercises "general supervision over the utilization of correctional alternative programs throughout the state" and

> over the administration of probation services throughout the state, including probation in family courts...He shall endeavor to secure the effective application of the probation system and the enforcement of the probation laws and the laws relating to family courts throughout the state. After consultation with the state probation commission, he shall adopt general rules which shall regulate methods and procedure in the administration of probation services...and the most efficient enforcement of the probation laws throughout the state...He shall keep himself informed as to the work of all probation officers and shall from time to time inquire into and report upon their conduct and efficiency. He may investigate the work of any probation bureau or probation officer and shall have access to all records and probation offices. He may issue subpoenas to compel the attendance of witnesses or the production of books and papers. He may administer oaths and examine persons under oath. He may recommend to the appropriate authorities the removal of any probation officer.[24]

Pursuant to Executive Law sections 245 and 246, DPCA is charged with "conduct[ing] training programs for city, county and state probation personnel" and, with the advice of the State Probation Commission, administering the program of state aid to county probation departments. In accordance with the latter section,

> [f]unds appropriated to...[DPCA] for distribution as state aid to county probation services and to the probation services of New York city shall be distributed by the division in accordance with the provisions of this section, and rules adopted by the director after consultation with the state probation commission...State aid shall be granted to the city of New York and the respective counties outside the city of New York only to the extent of

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[24]Executive Law §243(1).

> reimbursing fifty per centum of the approved expenditures incurred by the county or city in maintaining and improving local probation services. It shall not include expenditures for capital additions or improvements, or for debt service costs for capital improvements. State aid shall be granted by the director after consultation with the state probation commission, provided the respective counties or the city of New York conform to standards relating to the administration of probation services as adopted by the director after consultation with the state probation commission.[25]

DPCA was created in 1985, when the Legislature abolished the former Division of Probation and transferred the functions, powers, obligations, and duties of the former State Director of Probation and the Division of Probation to the State Director of Probation and Correctional Alternatives and DPCA. It further transferred the functions, powers, obligations, and duties possessed by the Commissioner of the Division of Criminal Justice Services (DCJS) relating to alternatives to incarceration programming delineated in Article 13-A of the Executive Law to the State Director and DPCA. Article 13-A, commonly referred to as the Classifications/Alternatives to Incarceration Law, governs alternatives to incarceration service plans and establishes the means by which an interested jurisdiction with a DPCA-approved "local alternatives to incarceration service plan" may obtain enhanced state funding and utilize certain housing classification categories within their local correctional facilities.

The overriding purpose of these 1985 legislative changes was to "enable [s]tate government to facilitate the integration of probation and other alternative punishments by consolidating oversight of non-incarcerative sanctions" in a new statewide oversight agency. The merger with respect to alternative to incarceration programming was intended to "improve the coordination of alternative punishments at the local level and facilitate [s]tate monitoring and evaluation of these programs."

Sharply reduced funding of DPCA State Operations over the years has had a severe impact upon both its staff and the services it provides. In Fiscal Year ("FY")1985-1986, DPCA's State Operations budget was $4.2 million. It was increased the following year to $4.7 million, which supported approximately 100 positions. By 1990 DPCA had a total of 112 positions with 62 positions in its central office in Albany and 50 positions assigned to four area offices located in Albany, Buffalo, Syracuse, and New York City.

From 1990 to 1994, however, DPCA's staffing level was reduced by 44 positions, and by FY 1994-1995 DPCA's State Operations funded budget was $4 million. A total of 36 positions remained in the central office and 32 positions in the area offices. The reduction in central office positions was primarily centered on the agency's policy

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[25]Executive Law §246.

analyses and research functions. Also, it was during this period that DPCA consolidated its Buffalo and Syracuse area offices into one office headquartered in Syracuse.

Conditions deteriorated even further, and by FY 1996-1997 DPCA's State Operations funded budget was reduced to $1.7 million, which provided support for only 26 positions. At that time, most of the agency's administrative functions (finance, personnel, payroll) were absorbed by DCJS through the "host agency" arrangement. As a result of these staffing reductions, all of DPCA's area offices were closed.

From FY 1998-1999 to FY 2003-2004, DPCA's budget in this area remained relatively constant in dollar value and ranged from approximately $2 million to $2.4 million. Since those amounts do not take into account negotiated salary increases and other cost of living increases during this period, the budget has supported even fewer agency positions.

In FY 2006-2007, DPCA's State Operations budget was $1.95 million and authorized 24 positions. In addition there are four administrative/fiscal positions that are funded through DCJS State Operations funds, and DPCA also has four positions funded from grant sources.

The closing of area offices and the above-noted staffing reductions have severely limited DPCA's service and oversight capacity. While much continues to be accomplished through self-certification by county probation departments, random case audits of community correction agencies, and professional practice reviews, more staff resources are needed to ensure that county probation departments and community correction service providers meet state regulatory standards and implement evidence-based programming. Recent statutory changes relating to DNA collection, sex offender registration, longer terms of probation supervision for sex offenders, domestic violence reform and Persons in Need of Supervision have increased the complexity of and demand for probation services and the importance of DPCA's role in ensuring the quality of services delivered throughout New York State. Existing staffing levels limit DPCA's capacity to monitor compliance with applicable state laws, rules and regulations, perform audits, offer technical assistance to probation departments, and expand and facilitate the introduction of new initiatives to improve service delivery and practices.

B. A Better Approach

The drastic cuts in state reimbursement to local probation departments over the years, as described in detail in the preceding section of this Report, combined with the dramatic reductions in funding to the sole state agency charged with overseeing the State's probation system, have created a crisis in probation in New York. The Task Force has great concern that unless this trend is halted and critical state resources are restored to local probation departments and to DPCA, the crisis will only worsen. The

Task Force believes this will be the case, moreover, notwithstanding the near-heroic efforts of county probation officers, probation directors and DPCA to continue to provide quality services to the courts, victims, offenders and the myriad criminal justice agencies that depend on probation every day.

The Task Force has concluded that the major reason for this decimation of probation funding is of a structural nature – that discretionary State Executive Branch funding for what is viewed as a local service, provided by local governments, will always be precarious because the State Executive Branch will assume that local governments will make up the difference if state funding is cut. By and large, however, local governments have not made up that difference, perhaps because probation is perceived as a service primarily benefitting the State Judiciary.

If probation in this State were more closely aligned with the Judiciary – with responsibility for state reimbursement funding to local probation departments and for statewide probation oversight actually transferred to the Judicial Branch – the long, relentless erosion of state resources for probation would finally end. This is because the courts are the direct beneficiaries of well-funded, adequately staffed probation departments. As detailed elsewhere in this Report, the criminal courts depend on local probation departments to inform their sentencing determinations in tens of thousands of criminal cases every year; and they depend on local probation departments, when a probation sentence is imposed, to ensure that the offender will be properly supervised by well-trained professionals with the necessary tools to assist the offender in leading a law abiding life long after the probation sentence has ended. Likewise, the Family Court relies heavily on local probation departments to enable it to assist children and promote public safety through intensive and enhanced supervision, alternatives to detention and diversion services.

After careful consideration of this issue, consultation with state and national experts in the field of probation, review of probation systems in sister states and reflection on the testimony provided at its public hearings, the Task Force agrees that the solution to the problem of inadequate state funding of probation in New York lies, at least in part, in shifting responsibility for state funding and oversight of probation from the Executive to the Judicial Branch of state government. This conclusion is prompted not only by the fact that the Judiciary stands to benefit the most from a well-funded local probation system and thus would have the greatest interest in ensuring this goal, but also by the recognition that the Judiciary has had extraordinary success in recent years in securing state funding for its own operations and programs.

C. Recommendation

Accordingly, the Task Force recommends the creation within the Judiciary of a new Office of Probation and Correctional Alternatives, to replace and assume the full responsibilities of the existing Division of Probation and Correctional Alternatives.

Under the Task Force's proposal, only the budgetary and oversight functions of DPCA would be housed in the Judiciary (in the Office of Court Administration), leaving actual probation service delivery within local government control. As under the existing system, each county and the City of New York would continue to appoint a Probation Director (or Commissioner) who, in turn, would appoint probation officers and other staff, and all local probation department employees would continue to be county employees. Assuming current DPCA authority under existing statutory provisions described above (Executive Law Article 12), the new Office of Probation and Correctional Alternatives within OCA would be responsible for distributing state reimbursement funding to local probation departments, and would be responsible for probation officer training throughout the State. In addition, in cooperation with a newly constituted and newly empowered State Probation Commission, which would also be housed in the Judiciary (*see* discussion, *infra*.), the newly-created office would assist in promulgating and enforcing rules and regulations governing the practice of probation in the State.

The Task Force evaluated the suggestion that the *entire* probation function be transferred either to the State Judicial Branch or the State Executive Branch, but for a number of reasons ultimately rejected that idea as unwise and unrealistic. The Task Force concluded that retaining local control over probation service delivery, and in particular over the hiring and firing of probation directors and officers, and over county-specific probation practices and policies, is critical to the effective operation of a probation system. In addition, the concern was expressed that, if such a centralized state probation system were housed entirely in the Judiciary, with all probation personnel as state-paid court system employees, the argument could be made that a conflict of interest, or at least the appearance of a conflict of interest, would arise in the prosecution by probation officers of violations of probation. Under such a system, both the "prosecutor" of the probation violation (the probation officer) and the institution charged with adjudicating the violation would be part of the same governmental entity. Finally, state assumption of the entire fiscal responsibility for probation, thereby relieving the counties of all financial responsibility for probation services, would impose extraordinary new fiscal burdens on the State.

D. New State Probation Commission

Currently acting as essentially an advisory board, the New York State Probation Commission lacks authority and credibility to shape probation policy in New York. Under existing section 242 of the Executive Law, the Probation Commission consists of the DPCA Director, who serves as Chair of the Commission, the Chief Administrative Judge and five other members, all of whom serve without compensation, selected as follows: (a) three members are appointed by the Governor "from among persons who, as members of the community, have demonstrated an interest and involvement in the field of probation, to hold office at the pleasure of the [G]overnor and until their successors are appointed;" and (b) two members are appointed by the Governor "from among the

probation administrators and probation officers actually employed in the field of probation in this State who have demonstrated by work in a statewide professional association, concerned generally with probation affairs throughout the State, outstanding service to the field of probation, to hold office at the pleasure of the Governor and until their successors are appointed." Pursuant to section 242, the duties of the Probation Commissioners "shall be to attend the meetings of [the Commission]... and to consider all matters relating to probation in the state, within the jurisdiction of... [DPCA] and to advise and consult with the [D]irector in regard thereto." Under current law, the Commission has no rule-making authority.

To complement the proposed transfer of DPCA's funding and oversight responsibilities to the Judiciary, the Task Force further recommends that state law be amended to establish within the Judiciary a reconstituted and newly empowered Probation Commission, as described below.

1. **Membership**

The Probation Commission would be comprised of seven members, all of whom would serve for a fixed term of three years and be uncompensated. They would include:

- A Chairperson, appointed by the Chief Judge, who would be a probation administrator or probation officer actually employed in the field of probation in this State, or retired from such employment, and who has demonstrated by work in a statewide professional association or body, concerned generally with probation affairs throughout the State, outstanding service to the field of probation;

- A sitting judge, appointed by the Chief Judge;

- A faculty member of a criminal justice department within an accredited New York State college or university, appointed by the Chief Judge, and who has demonstrated by virtue of individual research and publications, a sound understanding and support for implementation of those programs and services that demonstrate "best practice" with regard to recidivism reduction;

- Two members, appointed by the Governor from among the probation administrators and probation officers actually employed in the field of probation in this State, or retired from such employment, and who have demonstrated by work in a statewide professional association or body, concerned generally with probation affairs throughout the State, outstanding service to the field of probation;

- One member, appointed by the Majority Leader of the Senate, who shall be a current or former elected district attorney in the State;

- One member, appointed by the Speaker of the Assembly, who shall be an attorney with a record of service as a criminal defense attorney in the State.

The Probation Commission would be assisted by an Advisory Board. The Advisory Board's membership would include representatives of the state's chiefs of police, sheriffs, probation administrators, probation officers, prosecutors and public defenders, all of whom would be appointed by the Commission. The Advisory Board would also include representatives of the Division of Parole, Department of Correctional Services, Office of Alcoholism and Substance Abuse Services, Office for the Prevention of Domestic Violence, Office of Temporary and Disability Assistance, Office of Children and Family Services and Division of Criminal Justice Services, all of whom would be designated by the chief executives of their respective agencies. The Advisory Board would advise the Probation Commission on matters relating to promulgation of administrative rules.

2. Powers and Duties

The Probation Commission would make recommendations to the Chief Judge on all administrative rules relating to the delivery of probation services. The Chief Judge would possess sole authority to promulgate such rules. All current Probation rules, as appearing in Title 9 NYCRR Subtitle H, would be incorporated into the Rules of the Chief Judge, and could be modified only after consultation with the Probation Commission.

New or revised rules could be considered by the Commission upon its own initiative or upon submission by the Chief Judge or the Judiciary's Office of Probation and Correctional Alternatives. Proposed rules would be distributed to the Advisory Board for comment prior to promulgation. Except in an exigent circumstance where a matter of public safety was clearly demonstrated, no rule could be promulgated prior to a period of six months' review including publication and opportunity for public comment to the Commission. The Commission could hold hearings on proposed rules.

Appointments to key executive positions within the Judiciary's Office of Probation and Correctional Alternatives would be made in consultation with the Probation Commission.

3. Probation Standards

During its first year of service, the Probation Commission would develop and recommend to the Chief Judge minimum workload standards for:

- Probation supervision (adult and juvenile)
- Predispositional investigations and reports
- Presentence investigations and reports

4. Probation Commission Support and Operating Standards

The Probation Commission would receive support from the Director of the Judiciary's Office of Probation and Correctional Alternatives and other Office of Court Administration staff. This support would include legal research and assistance in drafting rules. The Office of Probation and Correctional Alternatives would maintain all records of the Probation Commission, and would implement and enforce new and revised rules.

The Probation Commission would adopt by-laws, including quorum and voting requirements, similar to those practiced by the New York State Commission of Correction, meet at least bi-monthly and conduct statewide hearings from time to time to ensure effective communication with probation officials, judges, prosecutors and legal practitioners and other stakeholders.

V. PROPOSALS FOR IMPROVING THE QUALITY AND DELIVERY OF DAY-TO-DAY PROBATION SERVICES IN NEW YORK

A. Expanding Pretrial Services

A common public perception of the role of probation is that its services are generally limited to the later pre-sentence and post-sentence stages of a criminal prosecution. Yet, one of probation's critical contributions to the effective administration of criminal justice in New York State is the operation by many local probation departments of so-called "pre-trial service" programs. These programs focus on the initial court appearance and arraignment of the accused and are intended to provide judges with an alternative to the use of bail or other forms of surety and ensure the defendant's appearance in court. As noted in the overview to the "Pretrial Release Services Standards" issued by DPCA in 2003, "[j]ail population patterns in New York State reveal that a large majority of those admitted are pretrial detainees, most of whom are confined (for fewer than ten days) for want of relatively low bail. Such...practices often reveal an unnecessary, inefficient and inequitable use of confinement...Research indicates that non-financial conditions can be as effective as money bail in ensuring the appearance in court of selected populations of defendants."

Pretrial service programs typically perform a number of functions. They collect, verify and submit to the court information about newly arrested defendants and available release options for use by judges in deciding what, if any, conditions are to be set for a defendant's release prior to trial. They supervise defendants released from custody during the pretrial period by monitoring their compliance with release conditions. And they provide programs such as failure-to-appear units that reach out immediately to get defendants to return to court, and bail-expediting programs that contact family and friends immediately after the arraignment so that bail can be promptly posted, thereby eliminating the need for continued detention and helping to ensure the defendant's future court appearances. In addition, these programs work with the court to assist persons who cannot communicate in written or spoken English, thereby helping to ensure the equal, timely, and just administration of the laws governing pretrial release.

In New York State, the locus of pretrial service programs varies. In jurisdictions with larger populations such as New York City, Monroe County, and Westchester County, and in some smaller counties, pretrial services are contracted for and provided by not-for-profit organizations such as the New York City Criminal Justice Agency. In most jurisdictions, however, these programs are operated within local probation departments. At this time, less than 10 counties in the State do not have a functioning pretrial services program.

As reflected in the public hearing testimony, probation departments that are given responsibility for pretrial services need to be adequately staffed, trained in the

proper role and practices of pretrial services, and provided with the necessary technology to assist in productivity and data-collection support to substantiate and audit the program. With proper staffing and access to appropriate resources, these pretrial service programs can help jurisdictions minimize unnecessary pretrial detention, reduce jail crowding, increase public safety and ensure that defendants appear for scheduled court dates.

The Task Force finds that pretrial service programs play a critical role in the criminal justice process by assisting courts in their release determinations and minimizing the use of unnecessary pretrial confinement. In accordance with national standards for pretrial services issued by both the American Bar Association and the National Association of Pretrial Service Agencies, the Task Force believes that every jurisdiction in New York State should have access to a properly funded and adequately staffed pretrial services program.

Recommendation

Assuming increased levels of state reimbursement funding are made available to local probation departments as proposed in Sections III and IV of this Report, the Task Force recommends the establishment of a pretrial services program in every probation department that currently lacks such a program and has no separate pretrial services agency in the county it serves.

B. Pre-sentence Investigations and Reports

The probation officer prepares a pre-sentence report ("PSR") during the period between the defendant's conviction and sentencing, after he or she has completed the pre-sentence investigation ("PSI"). Probation departments in New York prepared approximately 130,000 PSRs in 2005. Although preparation of a PSR is not required in all cases (*see* discussion *infra*), as a general rule a court may not pronounce sentence until it has received a PSR.[26]

The importance of the pre-sentence report cannot be overemphasized. The New York Court of Appeals has described the PSR as possibly "the single most important document at both the sentencing and correctional levels of the criminal process."[27] As John Carway, Director of Probation in Nassau County, remarked at the Task Force's hearings, the PSR "is probably the most visible product that we have ... Judges see it, DAs see it, defense attorneys see it, even probationers and the

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[26]CPL §390.20(1).

[27]*People v Hicks*, 98 NY2d 185, 189 (2002).

defendants see it ... [yet it becomes] one of the first casualties when the funding isn't there."

In addition to its use in connection with the sentencing process, the PSR is used by other state criminal justice agencies. For example, corrections authorities rely on PSRs in making prison placement and program service determinations, and parole authorities rely on PSRs in their release determinations. At the Task Force hearings, Anthony Annucci, Deputy Commissioner and Counsel to the NYS Department of Corrections ("DOCS"), addressed the importance of PSRs in the corrections process:

> If for whatever reason the pre-sentence report were to be eliminated from the documents that come with an inmate it would, in effect, be like asking a driver to drive blindfolded ... [The PSR is critical to] our core mission ... to take every individual, provide a place of confinement and programs of treatment that are designed to allow that individual to leave prison as a law abiding citizen.

Jonathan Gradess, Director of the NYS Defenders Association, echoed this view:

> The [PSR] is the most powerful piece of criminal justice paper in this system next to the criminal history report ... When a prisoner is received, it decides the housing of that prisoner, and it decides the programming of that prisoner. It is the document that is thereafter used when risk assessments are made along the way. It's a document that is front and center for the decision of work release or other questions along the continuum of DOCS processes. It's the only thing that the parole commissioners care about, the only one they ask about, and the only thing they read if they read anything at all .... When a parolee is on the street, that's the document that governs their supervision.

PSRs are also forwarded to other agencies, such as the State Office of Mental Health and the U.S. Bureau of Immigration and Customs Enforcement ("ICE"). The State Office of Mental Health uses the PSR in deciding whether to pursue civil confinement for individuals who are mentally ill and in need of involuntary care and treatment. ICE relies on PSRs because foreign-born inmates may be deported if convicted of an offense deemed an "aggravated felony."

1. Legal Background

The scope and content of pre-sentence investigations and pre-sentence reports are prescribed in New York's Criminal Procedure Law ("CPL"). The CPL describes the PSI process as "the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality ... the defendant's social history, employment history, family situation, economic status, education and personal habits ... [and] any other matter which the agency conducting the investigation deems relevant to the question of the sentence,

and must include any matter the court directs to be included."[28] The PSI may also include a review of the mental and physical condition of the defendant, and the court, in certain cases, may even order a defendant to undergo a thorough mental or physical examination at a designated facility for a period not to exceed 30 days.[29]

DPCA's rules governing PSIs elaborate on the CPL requirements by identifying sources of information and types of conduct that the probation department must investigate with regard to a defendant's criminal history (*e.g.*, arrests, convictions, dispositions, DNA database and sex offender registration, orders of protection and deportations).[30] DPCA's rules also identify other factors to be investigated, including gang relationships, driving record, chemical dependency, community and neighborhood environment and access to weapons.[31] The rules require an in-person interview with the offender, unless the defendant is not accessible for an in-person interview as a result of incarceration or other exigent circumstances.[32]

With regard to the PSR, CPL section 390.30(3) provides that "[t]he report of the presentence investigation must contain an analysis of as much of the information gathered in the investigation as the agency that conducted the investigation deems relevant to the question of sentence. The report must also include any other information that the court directs to be included," and must contain a victim impact statement, unless it appears that such information would be of no relevance to the recommendation or court disposition. The victim impact statement must include an analysis of the victim's version of the offense, the extent of injury or economic loss, the victim's views regarding the disposition and the amount of restitution or reparation sought. DPCA's rules emphasize that the objectives of a PSR are (1) "to provide the court with relevant and reliable information, in a succinct, analytical presentation for decision-making," and (2) to provide public agencies that are entitled to access to PSRs "with information for immediate and future decision-making purposes with respect to placement/incarceration, services and program delivery."[33] The rules further provide that "[t]he probation investigative and reporting processes shall be impartial, fair, factual, analytical, pertinent, and relevant to the objective of the report. The investigating probation officer shall distinguish between fact and professional assessment, and between their own observations and those from other sources. The

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[28]CPL §390.30(1).

[29]CPL §390.30(2).

[30]*See* 9 NYCRR §350.6(a)(1).

[31]*See* 9 NYCRR § 350.6(a)(2).

[32]9 NYCRR §350.6(c)(2).

[33]9 NYCRR §350.3.

source of all relevant information shall be reported."[34] The rules also require that the probation officer advise the victim of his or her right to seek restitution or reparation, and attempt to secure from the victim, or from the victim's family, a victim impact statement.[35]

2. Waiver of the PSR

The CPL prescribes when a PSI and PSR are required and the circumstances in which they may be waived. CPL section 390.20 provides that the court must order a PSI for all felony convictions; however, if an incarcerative sentence will not be imposed, the court may waive the PSI/PSR upon consent of the prosecutor and defense counsel. In addition, the court may waive the PSI/PSR if a PSR has been prepared in the preceding 12 months, or where a sentence of probation is being revoked. For misdemeanor convictions, in general the court is not required to order a PSI and PSR, unless (1) a sentence of probation is to be imposed and the prosecutor and defense counsel do not consent to waiver, (2) a sentence of imprisonment greater than 90 days is to be imposed, or (3) consecutive sentences of imprisonment with terms aggregating more than 90 days are to be imposed. Courts are also required to order a PSI and PSR upon the conviction of an offender who is eligible for youthful offender treatment.[36]

The Task Force evaluated whether the waiver provisions of the CPL should be expanded. Proponents of expanding the waiver provisions argue that this would reduce the workload of overburdened probation officers so that they can devote more time to supervision of offenders. At the Task Force hearings, however, probation directors, probation officers, prosecutors and defense counsel all emphasized the importance of PSRs not only to sentencing decisions but also to decisions made by DOCS and Parole. It was also pointed out that the information provided in PSRs is helpful to probation officers in their day-to-day dealings with probationers. Indeed, probation officials who testified at the hearings supported statutory amendments to *eliminate* waivers of the PSR whenever a probation sentence is to be imposed.

Stephen Pittari, Director of the Legal Aid Society of Westchester County, voiced his strong opposition to waiving the PSR. He related his experience years ago under the former Code of Criminal Procedure which permitted judges to impose sentence without the requirement of a PSI or PSR. He recalled how, all too often, felonies were reduced to misdemeanors and defendants were sentenced to a year in jail without any consideration to the alternative of a probation sentence. He viewed the changes in the

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[34] 9 NYCRR §350.5.

[35] 9 NYCRR §350.6(c).

[36] CPL §720.20.

CPL requiring a PSI and PSR in most cases as a welcome advance both for his clients and for society.

By contrast, in its meetings with administrative and supervising judges from across the State, the Task Force heard opposition to eliminating the option to waive the PSR in all cases. The judges strongly expressed their concerns that such a change would undermine the courts' ability to obtain speedy dispositions of minor criminal cases. Most of the judges, however, agreed that the PSR is a critical sentencing tool and that waivers of PSRs should be the exception, not the rule.

3. Timeliness and Accuracy of PSRs

Throughout the hearings, the Task Force heard that while probation departments are striving to maintain the timeliness and quality of their PSRs, budget cuts and consequent loss of staff have necessarily caused PSRs to be less complete and more inaccurate. The loss of probation officers has also caused delays in the "turnaround time" for PSRs, from an optimal period of 30 days from the date of conviction to from five to six weeks in many counties. Due to extensive budget cuts, the delay in Erie County can be as long as four to six months. These delays have fiscal implications for the counties because detained defendants who are awaiting sentence remain that much longer in county jails.[37]

Probation officers were candid regarding their inability to prepare thorough, accurate and timely PSRs in the face of the ever-increasing demands being placed upon them. For example, a probation officer in Erie County testified that parole officers told her that at one time Erie County had the best PSRs in the State. However, given her current volume of probationers and PSIs, she is convinced she now includes inaccurate facts in PSRs. Indeed, this probation officer advises defendants to review the reports, and if they contain inaccurate information to be sure that their attorneys make note of it on the record at the sentencing proceeding.

In theory, safeguards exist to prevent a violation of a "defendant's due process right not to be punished on the basis of false information."[38] For example, absent waiver by the parties, the probation department must submit the PSR to the court no later than 24 hours in advance of the sentencing date. The court, in turn, is required to make the PSR available for examination and copying by defense counsel (or by defendant, if appearing *pro se*).[39] Although the 24-hour notice requirement is

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[37]For example, in Erie County it reportedly costs $104 per day to detain a defendant in the county jail.

[38]*Hili v Sciarrotta*, 140 F3d 210, 213 (2d Cir 1998).

[39]*See* CPL §390.50(2); 9 NYCRR §350.10.

straightforward, defense attorneys maintain that frequently they are not provided timely access to the PSR. Defense attorneys are routinely denied the right to review the PSR 24 hours in advance of sentence and are often denied a short adjournment of the sentencing (as little as 30 minutes) to review the PSR for accuracy. In Queens County, defense attorneys are not even provided a copy of the PSR (contrary to the provisions of the CPL), and must review it in the presence of the court clerk. Task Force member and New York City Probation Commissioner Martin Horn has maintained that his department does file PSRs with the court 24 hours in advance of the sentencing proceeding, and cannot explain the courts' failure to make copies available to defense counsel on a timely basis. In any event, regardless of where the blame lies, denial of sufficient time for defense counsel to review the accuracy of the report with his or her client clearly is a serious concern.

Defense counsel's critical need for sufficient time to review the PSR was emphasized by everyone who spoke on the subject at the Task Force's hearings. Stephen Pittari, the Westchester Legal Aid Society Director, emphasized that use of the 24-hour period to verify the information in the PSR is essential because of case law that precludes a defendant from seeking to correct the information after sentence has been imposed.[40] Although defense attorneys are trained to bring factual inaccuracies to the attention of the court on the record at the time of sentence, some lawyers are less than diligent in conferring with their clients to identify errors and following up by advising the court on the record during the sentencing of the inaccuracies uncovered. For example, Jonathan Gradess explained that some defense lawyers, especially in plea bargained-cases, do not appreciate the importance of the PSR and its implications beyond sentence, and thus often do not carefully review it.

In addition, appellate counsel report that, all too often, lapses and inaccuracies in PSRs are not noted in the trial court record. Barbara J. Davies, Supervising Attorney of the Appeals Unit for the Legal Aid Bureau of Buffalo, explained that, in preparing an appellate argument that a sentence is unduly harsh and excessive – a frequently-raised issue in a criminal appeal – appellate counsel relies to an enormous extent on the information contained in the PSR, usually their only source of information about the client's background, childhood and current family situation, physical and psychological disabilities and educational and work history. Ms. Davies commented that, ideally, every trial court attorney would prepare his or her own sentencing memorandum for submission to the trial judge. Most, however, lack the time and resources to perform extensive research. Ms. Davies stated that "without access to information contained in the presentence report, our ability to provide effective appellate representation to our clients would be severely compromised." When she receives complaints from her

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[40]Courts have repeatedly found defendants to be precluded from seeking to have inaccuracies in a PSR corrected subsequent to the imposition of the sentences (*see, e.g., Matter of Cox v New York State Div. of Parole*, 11 AD3d 766, 768 [2004], *lv denied* 4 NY3d 703 [2005]; *Matter of Gayle v Lewis*, 212 AD2d 919 [1995], *lv denied* 86 NY2d 701 [1995]).

clients about inaccurate information in the PSR, it is too late, as corrections must be made at the trial court level. Ms. Davies concluded that it is "extremely rare" to find a conscientious defense attorney actually scrutinizing the PSR and asking the judge to make the required changes to correct inaccuracies.

When inaccuracies in PSRs are addressed, the approaches vary. Task Force member and former Judge Phylis Skloot Bamberger explained that when PSRs are referred back to probation departments for correction, the sentencing date must be adjourned until a corrected copy is submitted to the court. Task Force member Judge John Brunetti explained his method of correcting PSRs, which is to make handwritten changes to the report during the sentencing proceeding so that a corrected copy of the report is sent with the defendant to the correctional facility. It is Judge Brunetti's view that making a stenographic record of the inaccuracies is essentially worthless since that record only occasionally makes it into the state prisoner's file. This was confirmed by DOCS Deputy Commissioner and Counsel Anthony Annucci, who testified that if the sentencing minutes do not arrive at the DOCS reception center with the defendant, and if the court later mails the sentencing minutes, the minutes may ultimately find their way into the inmate's file, but only on a "hit or miss" basis.

Judge Brunetti's approach is the exception rather than the rule, as the usual practice with regard to correcting inaccuracies is simply to note them on the record at sentencing with the expectation that the sentencing minutes will ultimately make it to the correct DOCS facility and into the correct inmate's file. Yet, because sentencing minutes are not immediately transcribed and attached to the PSR at the conclusion of the sentencing proceeding, and often do not contain a NYSID number needed for DOCS to connect the minutes with the proper case file, the likelihood that the sentencing minutes will ever make it to the inmate's DOCS file is remote. Accordingly, the critical determinations for which DOCS and Parole rely heavily on the PSR may be based on inaccuracies contained in the original, uncorrected PSR.

It is apparent that current procedures for reviewing and correcting PSRs should be modified to provide an opportunity for more meaningful review and a process for incorporating corrections made at sentencing into the body of the PSR. In addition, more should be done at the outset to ensure that the information in PSRs is accurate.

4. Interim Supervision and Pre-Plea Investigations

Pursuant to CPL section 390.30(6), "in any case where the court determines that a defendant is eligible for a sentence of probation, the court, after consultation with the prosecutor and upon consent of the defendant, may adjourn the sentencing to a specified date and order that the defendant be placed on interim probation supervision." The judge may adjourn the sentencing date for a maximum period of one year from the date the judgment of conviction is entered. John Desmond, Suffolk County's Director of Probation, testified that Suffolk County currently has 700 defendants on interim

probation for whom he does not conduct PSIs. As a result, in roughly half of these cases the probation officer must return to court to obtain additional special conditions of probation, such as drug, alcohol or psychiatric treatment, for previously undisclosed needs. This additional burden on the court could be avoided if an investigation had been conducted initially.

A court may order a pre-plea investigation, which is similar to a PSI but conducted prior to the plea of guilty. Pursuant to DPCA's rules, a probation department must conduct a pre-plea investigation only upon court order and written authorization from the defendant, defense counsel and the prosecutor. The authorization must include assurance that probation department personnel will not be called to testify regarding information they acquired and that such information may not be used in any subsequent trial. The rules also provide that the pre-plea investigation and report may substitute for a PSI and PSR unless the court orders that the report be updated or the probation department has learned of other relevant information, in which case an addendum will be attached to the pre-plea report.

Marsha Weissman, Executive Director of the Center for Community Alternatives, urged that more be done at the "front end" of the plea-bargaining process to provide reliable information to the judge and ensure that the agreed-upon sentence is appropriate and effective. By contrast, Claudia Schultz, Deputy Administrator of Erie County's Assigned Counsel Program, maintained that mandating pre-plea investigations would further drain already limited resources available to probation. She preferred concentrating resources on reducing probation caseloads so that probation officers will have sufficient time to adequately supervise their probationers. In her view, pre-plea investigations are not needed because the adversarial system provides the court with sufficient information about the case to ensure an appropriate disposition.

5. The Future of PSIs and PSRs

Some have suggested that recent legislation adding to the "general purpose[s]" of the Penal Law the defendant's "successful and productive reentry and reintegration into society" has major implications for PSIs and PSRs.[41] The amendment represents an opportunity and a challenge with respect to the future of PSRs which currently focus on the defendant's criminal history, social circumstances and victim information. The PSR then looks at the defendant's needs and risks, which results in a sentencing recommendation of probation or incarceration. Under the new Penal Law provision, the issue of community reintegration will require an understanding that the community must play an active role in sharing probation's public safety responsibility.

Under this view, the PSR must now address factors such as whether the community will conclude that the sentence serves the goals of reintegration, how public

[41] *See* Penal Law §1.05(6).

safety can be best protected both now and in the future through development of a reintegration plan for the defendant, and what type of sentence should be imposed (not simply the "in or out" decision, but the length of incarceration). PSRs have traditionally focused primarily on an analysis of offender behavior, whereas under the new law PSRs will continue to consider offender behavior, but within the context of how to advance the goal of community reentry and reintegration. For defendants who are recommended for probation, the PSR must concentrate more on the elements of an individual plan for a community-based sentence: programs, resources, services, accountability measures and supervision to return defendants to the community quickly. Also, where prison is recommended, the PSR will need to address how the length of sentence will affect community reintegration and what issues must be resolved during incarceration so that reentry is effective.

If the amended purpose of the Penal Law, to facilitate "successful and productive reentry and reintegration" into society of an offender, is to be achieved, probation must be retooled. Probation officers must be trained on how to collect and evaluate data to determine which sentences promote less recidivism and which sentences promote employment and family stability, and PSRs will have to include information on the collateral consequences of conviction. Provided that adequate resources are available, the Penal Law amendment will lead to PSRs that better inform judicial decisions about what will work for the defendant and what is likely to promote his or her reintegration back into society.

Oregon has added public safety through reentry and reintegration to its sentencing goals, and has shifted to an evidence-based analysis of which sentences are working with which defendants and under what circumstances. This approach uses the public safety function of probation to reduce recidivism and to move offenders off the criminal track. In 2002, judges in Multnomah County, Oregon requested that their county probation department include information in PSRs addressing how the recommended sentence will likely reduce recidivism. That experiment became the statewide approach when Oregon in 2005 amended its laws to require that PSRs in felony convictions provide "an analysis of what disposition is most likely to reduce the offender's criminal conduct, explain why that disposition would have that effect and provide an assessment of the availability to the offender of any relevant programs or treatment in or out of custody, whether provided by the department or another entity."[42] Pursuant to the statute, the Oregon Department of Corrections was required to "[e]stablish a uniform presentence form."[43] (A copy of Oregon's PSR form and the PSI format overview are attached as Appendices E and F, respectively.) As a result, the Oregon PSR now includes a mandatory section entitled "Criminal Risk Factors." In that section, the probation officer must assess the defendant with regard to ten criminal risk

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[42]ORS § 144.791(3)(a).

[43]ORS §144.791(3)(c).

factors (attitudes/values, associates/companions, mental health, substance abuse, education/employment, housing, community functions, medical/physical health, financial and leisure/recreation), and provide a "summary of the relevant factors that are contributing most to the offender's criminal behavior, recommended strategy to reduce recidivism (*e.g.*, needs), and the availability of relevant programming in the community and in custody to work on these factors" (PSI Format Overview at 3-4).

6. Recommendations

a. Given the heavy reliance on the PSR by correctional and parole authorities in making critical post-sentencing determinations, the CPL's PSI/PSR waiver provisions should not be expanded. Moreover, because the PSR provides valuable information for probation officers in their supervision of probationers, the Task Force should further analyze the feasibility of limiting statutory authority to waive the PSI/PSR only to cases in which neither incarceration nor probation is imposed.

b. The CPL should be amended to require that probation departments submit four copies of the PSR to the court, either in electronic form or hard copy, 72 hours in advance of the sentencing date so that the PSR can be available to defense counsel and prosecutors with sufficient time for meaningful review.

c. Uniform procedures should be adopted to ensure that all corrections to the PSR made at or before sentencing are incorporated into the "final" PSR that accompanies the defendant to prison or jail. In addition, CPL section 380.70 should be amended to require that the sentencing minutes specify the defendant's NYSID number and be immediately transcribed and transmitted to DOCS along with the inmate (the current provision requires only that a certified copy "be delivered to the person in charge of the institution to which the defendant has been delivered within thirty days from the date such sentence was imposed").

d. Once the chronic under-funding of probation departments is systemically addressed, the CPL should be amended to require that PSRs be completed and submitted to the court within a fixed time period, such as 30 days from the date of conviction.

e. As the Task Force works with the National Institute of Corrections to assess the possible benefits of shifting probation in New York to a true evidence-based approach, the Task Force should further analyze whether (i) the use of pre-plea investigations should be increased and (ii) New York's PSR should be expanded to include information similar to that required in Oregon.

C. Post-Sentencing Issues

During hearings held by the Task Force and meetings of the Task Force with administrative and supervising criminal court judges, participants raised issues about what happens to a probationer after the sentence is imposed. The discussions focused on two primary issues: What, if any, should be the court's involvement in the supervision of the probationer, and what procedures are appropriate if a change in probation status is requested by probation authorities. Lurking behind these two questions is the appropriate use of intermediate or graduated sanctions, that is, conditions of probation enhanced beyond those imposed at the time of sentence but short of revocation.

1. Increased Judicial Involvement in the Supervision Process

The Criminal Procedure Law states that a probationer is in the legal custody of the court that imposes the probation sentence until the period is terminated or expires,[44] and that the probation department serving the sentencing court has the duty of supervising the defendant during the period of custody.[45] The statute authorizes judicial intervention during the probation period in four instances: to modify or enlarge the conditions of probation;[46] to order at any time that a probationer appear before the court;[47] to issue a warrant to arrest the probationer and bring the probationer to court without unnecessary delay based on reasonable grounds to believe that a condition of the sentence has been violated;[48] and, finally, to issue a search order authorizing a search of the probationer, the probationer's premises or any real or personal property that the probationer owns or possesses if there is reasonable cause to believe that the probationer has violated the conditions of probation.[49]

Notably, while the statute limits the issuance of warrants and search orders to cases in which the finding of reasonable cause exists, the statute does not require such a finding for the issuance of a notice to appear or a modification of the conditions of probation.

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[44]CPL §410.50.

[45]CPL §410.50(2).

[46]CPL §410.20.

[47]CPL §410.40(1).

[48]CPL §410.40(2).

[49]CPL §410.50(3).

The import of the statute is that the judge's involvement is permissible whether there is a formal declaration of delinquency based on reasonable cause to believe that a condition of sentence is violated,[50] or because the judge's attention is appropriate to the circumstances and the judge asks the probationer to appear for modification of conditions or for admonition for an incipient problem. For example, a change of circumstance such as illness, marriage, the birth of a child, the death of a parent, may make compliance with a probation condition impossible or overly difficult and require a modification. Because, under the CPL, the judge and the probation officer exercise complementary functions and because the judge is likely to learn of the need for judicial intervention from the probation officer, it is implicit that the judge as well as the probation officer are essential participants in the supervisory process. The Task Force received very compelling arguments from Brooklyn Supreme Court Justice Abraham Gerges in favor of close involvement of the sentencing judge in selected cases of probation.

The importance of the judge's participation in the supervision process is demonstrated by specialty courts in which the judge is expected to be involved in monitoring the defendant's progress in the structured programming intended to change behavior. Indeed, judicial involvement is essential to the purpose of specialized courts. Just as the judge in a specialty court emphasizes to the defendant the importance of following the conditions of the release afforded to him or her, the activities of the judge serve to impress on the probationer the importance of the conditions of probation, the need for compliance, and the results of non-compliance.

The intervention of the court also prevents unnecessary filing of violations of probation with the consequent risk of revocation in cases in which enhanced conditions would satisfy the need for a sanction for a violation.[51] A probation officer does not have the power to impose an enhancement, but the probation officer has the obligation to suggest graduated sanctions.[52] As noted, the CPL includes the procedure for ordering the probationer to appear before the court for consideration and imposition of an enhancement so that the rule fits neatly with the statute.

At conferences with the administrative and supervising judges, the issue of judicial involvement in the supervision process was raised. Discussion focused, in particular, on whether there should be frequent appearances required of probationers before the sentencing court for appropriate praise or criticism by the judge. Some judges felt that such judicial involvement was without legal authority because, once the sentence was imposed, jurisdiction of the matter passed to the probation department

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[50] CPL §410.30.

[51] *See* Taxman, *Graduated Sanctions*, 79(2) Prison Journal 182 (1999).

[52] 9 NYCRR §352.1(d),(e).

and the court reentered the picture only if there was a filing of a violation of probation. Further, the judges opposed to judicial intervention voiced their opinion that it increased a judge's already heavy workload unnecessarily; that probation officers have the responsibility to supervise; and that supervision was the realm of the experts not the judges. Finally, the judges stated that probation officers know when to file a notice of violation of probation and judicial involvement would, without that notice, be an insult to the probation officials. These judges would decline involvement, even if asked by a probation officer, because a courtroom appearance by the probationer would necessitate the presence of defense counsel, further increasing the court's work.

Other judges voiced their opinion that although a judge's involvement in all cases could be helpful, the task, given the number of probationers, was impossible to undertake. Those judges and others suggested that since judicial intervention may increase the likelihood that a probationer successfully completes his or her sentence of probation, it should be undertaken, but only selectively, so as not to overwhelm the court.

Recommendation

The relevant statutes as well as the purpose of probation make legal and sensible a policy of judicial intervention during a term of probation to the extent appropriate in a particular case. The policy for judicial intervention and when it occurs should be uniform in the jurisdiction, as should the circumstances under which revocation is ordered.[53]

2. Timeliness of Probation Revocation Procedures

During the testimony there was reference to the delays in initiating probation revocation proceedings and in their resolution. Judges complained that they are not informed of violations, misconduct or impending problems or that there are long delays before they are informed so that a crisis situation often arises because of a serious violation. Judges also are concerned that probation violation cases are not treated as "cases" under the Office of Court Administration's "standards and goals" and, for purposes of assessing an individual judge's performance, are not counted as pending cases. In such circumstances, it is unlikely that a violation proceeding will be given priority if some other matter or trial is scheduled before the court. Further, often there is inadequate security and a shortage of court facilities for a revocation proceeding. Probation officials reported that there were inappropriate time lapses between requests for warrants and the issuance of warrants, in the scheduling of cases for revocation proceedings, and in decisions after those hearings.

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[53] *See* Taxman, *supra.*

Under the Criminal Procedure Law, a probation officer can apply for a warrant for the arrest of a probationer or may take a probationer into custody without a warrant based on probable cause that the probationer has violated a condition of sentence.[54] The probationer must be brought forthwith, "without unnecessary delay," to the court that imposed the sentence. The probationer can be detained or released on bail or recognizance to attend a hearing.[55] The probationer is entitled to a hearing promptly after the declaration of delinquency is filed, or the probationer has been remanded, or has been released on bail.[56] At the conclusion of the hearing, the judge may revoke, continue, or modify the sentence,[57] but there is no time period within which a hearing must be held, or a decision rendered.

Pursuant to the Criminal Procedure Law, if at any time during the period of probation the court has reasonable cause to believe that the probationer has violated a condition of the sentence, the court can file a declaration of delinquency and "promptly take reasonable and appropriate action to cause the defendant to appear" before the court to make a final determination concerning the alleged violation.[58] The same due process considerations require a "prompt" hearing when the sentencing court initiates the violation proceeding.

Supplementing the statute is 9 NYCRR section 352.1, which states that in the absence of a court directive, the probation department must notify the court of a new conviction, absconder status, or a significant violation of a technical condition of probation within seven days of the department's knowledge. However, no time period within which the proceeding must be held is specified.

The Appellate Division, Second Department, in *People v Horvath*[59] wrote that the terms "promptly," and "without unnecessary delay," although not defined, "must be interpreted in a way that conforms with fundamental principles of due process" prohibiting an unreasonable delay in conducting a revocation hearing. The First Department has held that there is a timeliness requirement for the processing of notices

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[54]CPL §§410.40(1); 410.50(4).

[55]CPL §410.60.

[56]CPL §410.70(1).

[57]CPL §410.70.

[58]CPL §410.30.

[59]825 NYS2d 757 (2006).

of violation.[60] But the Court in *Horvath* also noted that the probation time stops running from the issuance of the declaration of delinquency, and an unreasonable delay that would improperly prolong the period of probation is improper.

Experts in the delivery of probation services have explained that uniform and prompt attention to violations of conditions of probation help to ensure that the probationer understands the seriousness of the probation sanction and that probation is not a mere slap on the wrist. Prompt process is said to have the additional beneficial effect of encouraging the probationer's respect for the system.[61]

Recommendations

a. In light of the judicial interpretation of the statutory language, the importance of timely proceedings, and the general concern about the effectiveness of probation, the Task Force recommends that time periods be administratively established for the filing of a notice of violation for which the probation department is seeking a judicial reprimand, enhancement or modification of conditions, or revocation of probation.

b. In addition, the Task Force recommends that a time period within which the violation hearing must be scheduled and held and the decision made also be set administratively. Ideally, the hearing should be scheduled within five business days of the violative act. Different circumstances in each county and judicial district require flexibility, however, and it is appropriate for the judges of a district to set time periods in coordination with the local probation department supervisors.[62] Probation proceedings should be calendared within the time set by the standards.

c. Finally, all calendared cases should be treated as "cases" governed by the "standards and goals" set by the Office of Court Administration so that

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[60] *People v Jacks*, 235 AD2d 247, *lv denied* 89 NY2d 1036 (1997); *see also People v Oquenda*, 178 Misc2d 1031 (1998).

[61] *See* Taxman, *supra*.

[62] As an example of such flexibility, the Administrative Judge in Bronx County has designated a special part, "Part X – Violation of Probation and Trial," for disposition of all probation violations within that county. Under the plan, one judge presides over the part for an extended period which tends to bring efficiency, a measure of reliable standards and some degree of predictability for adjudicating violations. There is no prohibition against such a plan being replicated in other counties, and it is basically a matter of whether individual sentencing judges prefer to retain ultimate review authority.

judges are credited with a disposition and the proper staff and facilities can be assigned to the proceedings.

D. The Use of Automated Kiosks for Supervising Low-Risk Probationers

New York City's Reporting system with "kiosks" ("Reporting Track") monitors New York City adult probationers who have been determined to be at low risk for re-arrest or violent behavior. With the technological support of automated kiosks and a sound risk assessment process, a small number of probation officers can supervise the majority of probationers who are classified as not violent, allowing the New York City Probation Department (department") to concentrate its resources on those probationers who need close monitoring and supervision. Currently, there are over 20,000 individuals in the Reporting Track. The total adult caseload in New York City is over 30,000 persons.

1. History

The Reporting Track was developed out of necessity in the mid-1990's when the department was faced with serious budget cuts and the loss of one third of its work force. At the time, most probation officers had caseloads of 150 – 200 probationers of whom 75% were felons. The predicted loss of staff would increase this number to 350. It was obvious that the department would have to come up with a new way of doing business.

The department decided, as a matter of policy, to focus its limited resources on those probationers who represented the greatest risk of violent recidivism. To supervise the remaining probationers, automation was considered, which led to the idea of using kiosks. It was a groundbreaking concept at the time, and required the development of a computerized central case management system that would accept data from the kiosks. In 1995, the first kiosks went into operation, and proved to be successful and effective. By 2002, the Reporting Track had become an integral part of the department's re-engineering initiative brought on again by a 20% budget reduction, and the system was upgraded to accommodate more interactive features and reports.

The cost of each kiosk is relatively low, not much more than the cost of a desktop computer, and the devices are installed in each of the department's five probation offices throughout the City (*i.e.*, one office in each county). Each of the five probation offices is situated near the criminal courts of the county and has at least four kiosks. According to the department, client flow has not been a problem, with probationers typically moving "in and out" of the kiosk location in less than 10 minutes.

2. Risk Assessment and Operation

When a defendant is sentenced to probation, the department administers a risk assessment instrument to determine the appropriate level of supervision. This instrument, which was designed in-house with the aid of experts in the corrections field, is focused on determining the risk of violent recidivism. The risk assessment instrument uses a scoring system which considers age, nature of the offense, past criminal history, number of victims injured and Youthful Offender status.

Probationers are assigned to three types of caseload: "Reporting Track," the subject of this discussion; "High Risk" for probationers with a risk assessment suggesting high risk of arrest for a new Violent Felony Offense; and "Special Offender Unit" ("SOU") for probationers who, despite a low risk assessment score, require close supervision.

If found to be not at risk for violent recidivism (defined as arrest for a violent felony offense), the probationer is assigned to the Reporting Track and enrolled in the kiosk system by a scan of the right hand. The unique hand geometry of every probationer is recorded for later use as an identifier each time the probationer reports. The probationer also attends an orientation session where the rules of probation and the Reporting Track are explained. Probationers deemed appropriate for the Reporting Track are assigned for the first 90 days to a stabilization caseload. During that period a probation officer works with the probationer to help find work, meet special conditions such as community service, drug treatment enrollment or testing and, if restitution is ordered, to establish a payment schedule and make a first payment. Thereafter, he or she is required to report once a month to the kiosk. Probation staff is available for anyone needing assistance with employment or other needs or information and officers routinely handle requests for early discharge,[63] certificates of relief, travel permissions and other matters. The probationer is directed to report monthly during the week in which their birth date occurs to the probation office where the kiosk is located.

When reporting, the probationer is asked by the kiosk to identify himself or herself by means of the hand geometry and a unique PIN. The kiosk then asks the probationer a series of questions similar to those traditionally asked of probationers (*e.g.* residence, employment, problems). The probationer confirms the home address, the address and name of the employer, and is offered an opportunity to meet with a probation officer if he or she so desires.

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[63] It is the policy of the department to submit a request to the court for early discharge from probation as allowed by statute when the probationer has completed one half the term of the probation sentence without violation. Historically, courts deny the discharge over 75% of the time. The department nevertheless continues supervising the case in the Reporting Track.

Kiosks function as automated probation officers and are central to the Reporting Track's organization. They take each probationer's monthly report, issue receipts and relay messages and instructions as needed. Information entered by the probationer during a kiosk session is downloaded into the department's case management system. If a probationer has been rearrested, is scheduled for a drug test, has entered an inconsistent address, or if any other anomalous situation occurs, the kiosk sends an alert to probation staff, who will then interview the probationer and resolve the situation. The kiosks also retain a record of the probationer's reporting and alert history that can serve as documentation in any reports to court.

Their most important administrative function, however, is the monthly report that makes it possible for department staff to keep track of misconduct and respond to it immediately. The Failure to Report ("FTR") lists every probationer who did not appear that month, including the number of previous FTRs. Individual letters instructing the probationer to report immediately are sent within six days. This has been an effective response, since over 90% of the probationers who failed to report once have resumed reporting by the fourth month. Other misconduct such as refusing a drug test, failing to report for kiosk enrollment, or walking out after an alert are also noted in these reports. By listing the name, date and specific nature of the misconduct, the reports enable probation staff to take corrective action.

If the court has imposed a special condition (*e.g.*, a drug program, restitution or community service) or if the department determines that there are special needs, during the stabilization phase when a probationer is assigned to a probation officer for 90 days, staff will make the appropriate referrals and monitor the probationer's compliance with special conditions. The department tries to get special conditions such as community service and payment of fines completed during the stabilization phase. These probationers report to the kiosk and the probation officer once a week during this period. At any time a probationer may be reassigned to the stabilization track if staff believes the probationer is in need of firmer guidance or assistance as for example in response to a positive urine test for drugs, intelligence information or an arrest or skipped reports.

The ratio of probationers to probation officers in the Reporting Track is currently 500:1. This includes probationers who are in stabilization (which make up about 30% of the Reporting Track population) as well as the remaining probationers in the "pool" who are eligible for information and assistance upon request. Compared to the ratio of 65:1 for the high-risk tracks, these numbers represent a significant savings in cost, time and personnel.

All this has been made possible not only with the use of automation, but by the kiosk attendant, a support staff position employed by the department. These individuals enroll probationers in the system, assist them if questions arise during check-in, instruct drug test candidates and notify the probation officer of the day of any

alerts or special situations. Their compensation is less than that of professional staff and represents a significant, cost effective saving.

Within the Reporting Track, attention is given to those who need it. The majority of probationers who are compliant and have no issues to discuss are not required to wait until their assigned probation officer is free to document that fact. The kiosk can record this information far more efficiently and less expensively than a probation officer, without compromising the department's mission of promoting safety in the community and delivering services to those probationers who need them.

Probationers in the Reporting Track are subject to random drug testing, a computerized system which selects probationers to be tested. If the test is positive, the probationer is referred to a drug program through the department's Resource Development Unit. Attendance is mandatory and, if the probationer does not cooperate, a violation of probation is filed.

When a probationer is arrested, the case management system is alerted through a connection to DPCA's internet-based "Integrated Probationer Registrant System." If the arrest is for a felony, the case is immediately assigned to a probation officer for follow up and preparation of a violation of probation report. In addition, when the probationer reports, the kiosk sends an alert to the kiosk attendant. If the case has not been already assigned, the on duty probation officer interviews the probationer and determines the appropriate course of action according to department guidelines. There may be an admonishment, an administrative hearing, or a violation of probation.

Since assignment to the Reporting Track is based on a low risk for violent recidivism, it is expected that the arrest rates for subsequent violent offenses would be lower than other tracks and the statistics bear this out. Below is a chart that indicates the number of arrests for violent offenses as a percentage of the Reporting Track population for September 2006. The data make clear that the Reporting Track probationers have a significantly lower arrest rate than other probationers. The relative arrest rates are monitored monthly as a means of continually validating the risk assessment instrument.

Track	Arrests for violent offenses	Population of Supervision Level	% of the track population arrested for violent offenses
SOU	21	3111	0.7%
High Risk	65	6197	1%
Reporting	105	20466	0.5%

The value of the Risk Assessment instrument is also reflected in the department's "Probationers in Good Standing" measure. "Good standing" is defined as no arrests, a good reporting record, and no pending violations of probation. The following chart reflects these numbers for September 2006.

Track	% in "Good Standing"
SOU	65%
High Risk	30%
Reporting	88%

3. Summary

Born out of necessity because of a budget crisis, the Reporting Track has become central to the New York City Probation Department's mission to provide appropriate supervision and services to all probationers, while concentrating its resources on those individuals who represent the greatest danger to the community. It has evolved into a unique combination of human resources and technology. Utilizing these two assets, the department has been able to respond either to misconduct or requests for assistance and information with equal effectiveness.

4. Recommendation

The Task Force recommends exploring the broader use of automated kiosks in other jurisdictions around the State to supervise low-risk probationers.

E. Alternative Procedures for the Prompt Temporary Detention of Probation Violators

Both probation officers and parole officers are peace officers and exercise identical powers relative to executing warrants of arrest with respect to those they supervise who are alleged to have committed a criminal offense. Unlike parole officers, however, current law does not provide probation officers with the ability to detain probationers who violate technical conditions of their probation sentence. Although, as previously noted, probation officers can take into custody without a warrant and search a probationer where there is reasonable cause to believe that the individual has violated probation conditions, current law requires that the probationer "forthwith be brought before the court that imposed the sentence."[64] At times, however, courts are not readily available, and there exists no statutory authority for the officer to bring the probationer

[64] CPL §410.60.

to jail to be temporarily detained pending a court appearance. The ability of the probation officer to detain a probation violator can be especially critical where the officer is supervising an offender convicted of a sex offense and/or domestic violence crime and the officer learns of or witnesses a significant technical violation during the evening or early morning hours.

Recommendation

Accordingly, the Task Force recommends that, in the interest of public and victim safety, and consistent with efforts to promote greater offender accountability, the Criminal Procedure Law be amended to allow a probation officer, in cases where the alleged probation violator has been taken into custody but the sentencing court is not available, to bring the probationer before an alternate criminal court for the issuance of a bail order or other securing order authorizing the continued temporary detention of the probationer pending an appearance before the sentencing court.[65]

F. Complete Transfer of Jurisdiction in Intrastate Transfer Cases

Under current law, the sentencing court may execute a complete transfer of a probation case from one county to another within the State, or may retain its powers and duties with respect to a probationer who is being supervised in another jurisdiction. Those powers are enumerated in CPL sections 410.20 (Modification or Enlargement of Conditions), 410.30 (Declaration of Delinquency), 410.40 (Notice to Appear, Warrant), 410.50(3) (Search Order), and 410.60 (Appearance Before Court). All supervision of intrastate transfer cases is performed by the probation department in the receiving jurisdiction. Even in cases where the sending court has retained jurisdiction, it is the responsibility of the receiving probation department to initiate violation proceedings in the receiving court if there is reasonable cause to believe that a probationer has violated a condition of his or her sentence. In such instances, the receiving court may transfer the case back to the sentencing court or may conduct a violation of probation hearing and continue or modify the sentence, if appropriate. However, if the sending court has retained its powers and duties over the case, the court in the receiving jurisdiction may not revoke the sentence of probation. Instead, if the court in the receiving jurisdiction sustains the violation and chooses not to continue or modify the sentence, the receiving court must return the probationer to the sending jurisdiction for further legal action.

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[65] *See, e.g.*, CPL §410.40(2). Initially, the Task Force considered a proposal to amend the CPL to establish that, when the sentencing court is not available, a probation director or other designated probation official shall have the legal authority to issue a "detainer warrant" authorizing the temporary detention of the alleged probation violator in a local jail pending an appearance before the sentencing judge. That proposal was narrowly rejected by a vote of the Task Force members. As an alternative, a majority of the members approved this "alternate criminal court" proposal.

An ancillary problem arises when attempting to identify which court handles intrastate transfers in the receiving jurisdiction. While current law provides that felony cases are transferred to the superior court within the jurisdiction of the receiving probation department,[66] there is no clear designation with respect to misdemeanor cases. The statute provides that "the probation department that serves the sentencing court shall consult with the probation department to which supervision will be transferred and recommend the appropriate local criminal court to receive the case."[67] Uncertainty arises when the receiving county has multiple local criminal courts.

The existing statutory scheme, which allows the sending court to retain certain jurisdiction, has led to considerable confusion in the handling and reporting of cases and duplication of efforts between the sending and receiving jurisdictions. This, in turn, has resulted in the unnecessary expenditure of resources, delaying a timely response by the supervising probation department, and interfering with the prompt administration of justice. Probation officers from the receiving jurisdiction may be subpoenaed to testify at violation hearings conducted by the sentencing court, often requiring them to travel long distances and detracting from their ability to supervise their own already high caseloads and pursue additional responsibilities associated with offender accountability.

Recommendation

The Task Force approved, by a narrow majority vote of its members, a proposal to amend the Criminal Procedure Law to require the sending court to relinquish complete jurisdiction of intrastate probation transfer cases. This would clarify and strengthen the authority of the receiving jurisdiction and ensure that the courts in the receiving jurisdiction are not constrained in their ability to properly administer such cases. It would also enhance the ability of the county probation department which is actually providing supervision to encourage adherence to probation conditions and determine appropriate dispositions in the event of noncompliance.

G. Improving the Delivery of Probation Services to Adolescent Offenders and Juveniles in the Criminal Courts

The prosecution of adolescents in the adult criminal court system presents challenges at all phases of the proceedings. The adult criminal court is precisely that – a system created to address the punishment, confinement and rehabilitation of adults. As such, in contrast with the New York State Family Court, the systems intrinsically involved with children – education, foster care, adolescent mental health – are not legislatively recognized in criminal court proceedings. This places a particular burden

[66] CPL §410.80(2)(b).

[67] *Id.*

on the probation system which must supervise these adolescents who present different issues than the adult population.

Only thirteen states in the country consider adolescents under the age of 18 to be adults for the purpose of criminal prosecution. Only three states set original adult court jurisdiction at the age of 16. New York is one of these three states. Children as young as thirteen can be tried in adult court for second degree murder. Children aged 14 and 15 are prosecuted in adult court for legislatively delineated violent felonies. The United States Supreme Court recently recognized that social science research confirms that "'a lack of maturity and an underdeveloped sense of responsibility are found in youth more than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'"[68] The Court noted that youths have less control over their own environment. The Court further recognized that "almost every state prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." In fact, New York sets the age of majority for most civil purposes at age 18.

The Court's finding and the legislative recognition of age in many circumstances are well supported by medical and social science research that adolescents are developmentally different from adults. Developmental psychologists have long recognized that adolescence is a period of major development in many areas including the development of cognitive skills. During the teenage years, youths begin to develop the abilities to abstract, and to think of the possible, including alternative possibilities. These cognitive capacities progressively become ingrained in an adolescent's thought process. However, this development rarely follows a straight line during adolescence, as periods of progress alternate with periods of regression. In recognition of this development, one psychologist has noted that, "[d]uring the time these processes are developing, it doesn't make sense to ask the average adolescent to think or act like the average adult, because he or she can't – any more than a six-year-old can learn calculus." Adolescence is a time when the gradual transition to developing into a self-governing, autonomous individual begins. Nevertheless, adolescents remain emotionally dependent on other people, specifically their parents or caretakers, peers, and society throughout this development process. They are less capable of independent, self-directed action than adults who have achieved a greater sense of identity and autonomy.

The juvenile probation system has historically been based on a model that recognizes the developmental growth of adolescents and the interdependence of adolescents on adults and systems. However, the adult probation system is not always equipped to address these concerns, in terms of training and programming capacity. As a result, missed opportunities exist in the provision of rehabilitative services to

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[68] *Roper v Simmons*, 543 US 551, 569 (2005), quoting *Johnson v Texas*, 509 US 350, 367 (1993).

adolescents prosecuted in the adult court system. In the 2006 State of the Judiciary, Chief Judge Kaye reminds us that probation is intended to "help [individuals] reclaim their lives and become productive citizens." In order to effectuate that goal for adolescents, their probation system needs different expertise, supervision, and other resources than an adult system provides. The Family Court probation department, with its unique experience and insight into the developmental needs of adolescents, will be more effective than adult probation. It is suggested that youths under the age of eighteen receive probation supervision based on the juvenile service provision model, since the needs of the adolescent population are the same regardless of the locus of the prosecution.

The American Probation and Parole Association emphasizes the importance of classification of probationers to an effective system of probation, both because the community's law enforcement needs are best addressed if a clear system of classification is available and because the individual probationer benefits from a tailored program of supervision and education.[69] All adolescents should be categorized together for the purposes of data collection and program assignment, regardless of their charges.

The American Probation and Parole Association is particularly concerned with probationers' social associations. This concern provides a key example of an area in which adolescents will benefit particularly from placement in a specialized probation program. Youth probation can be particularly effective in helping adolescents to develop positive associations through its internal programs and through the adolescents' own relationships within their schools, families, peer groups and communities.

A great deal of research has been done in the area of effective programming for court-involved adolescents. Evidence-based practices have been developed and are available for replication.[70] Social science research has demonstrated that there are multiple factors that put young people at risk of becoming delinquent and multiple factors that protect or buffer them from the consequences of exposure to risks. Risk factors associated with the commission of crime exist in four areas within which youths interact: peer group, family, school, and community. Protective factors, which reduce the impact of a risk or change the way a person responds to it, fall into three basic categories: an individual's innate characteristics, bonding (attachment and integration)

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[69] *Toward A Reinvented Future For Probation* by the American Probation and Parole Association, available at http://www2.courtinfo.ca.gov/probation/documents/adult_part3.pdf.

[70] http://www.ojjdp.ncjrs.org.

and healthy beliefs and clear standards of behavior.[71] The Office of Juvenile Justice and Delinquency Prevention (OJJDP) recommends that a "juvenile's risks and needs must be identified and matched to the intervention...While a youth's instant offense may be a useful indicator of his or her potential risk to the community, it is not a good indicator of what kind of programming is required to change the individual's behavior. Programs must incorporate a comprehensive array of interventions and services of sufficient duration to address entrenched problem behavior patterns...Research has also shown that community groups must be engaged to create and support prosocial community activities in which youth can succeed."[72]

1. Need for Individualized and Thorough Assessment

Individualized assessment is essential because court-involved youths exhibit different problems and pose different degrees of threat to the community. The probation officer should identify and assess the following information:

- Level of risk to the community: Which factors associated with supervision and control – such as negative peer relations, parental supervision and control, school issues – pose the greatest risk for continued criminal activity?
- What victim issues can be addressed? What is the relationship between the victim and the probationer? What is the probationer's understanding of the harm caused?
- What behavior problems, thinking errors, or skill deficits contributed to the criminal behavior? What mental health or substance abuse problems or learning disabilities might interfere with learning? What types of intervention/services are available to address concerns?
- What are the probationer's strengths and assets? How can they be built upon to increase bonding and attachment to prosocial activities and institutions?

2. Individualized and Meaningful Probation Supervision

In addition to the traditional supervision plan goals of community safety and offender accountability, the supervision plan should build on the probationer's strengths, develop life-, learning- and work-skills, encourage bonding and attachment to productive community groups and activities, and provide opportunities to actively practice new skills. Departments should have access to a range of rehabilitation and

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[71] Kurlychek, Torbet, Bozynski, *Focus on Accountability: Best Practices for Juvenile Court and Probation,* U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, JAIBG Bulletin (August 1999).

[72] *Id.*

skill development services including: conflict resolution/anger management classes, tutoring, mentoring programs, cognitive interventions, counseling, treatment programs for specific problems, parent education, skills training, and family therapy.

"Practical rehabilitation," defined as measures aimed at helping young people change and grow into law-abiding, productive adults is one of the most important goals of the justice system for adolescents. Rehabilitation can be achieved through: (a) building skills, or developing competencies, necessary to live as responsible, contributing members of a community, such as personal hygiene, cooking, cleaning, managing money, developing inter- and intra-personal skills, developing academic and vocational skills; (b) cognitive development: learning how to make fundamental changes in the way youths think, make decisions or solve problems; (c) referral for treatment services for serious problems such as substance abuse, mental illness, and learning disabilities. Adolescent probationers should receive services that focus on their strengths and be encouraged to participate meaningfully in their community. This translates into providing opportunities to work in the community to make a positive contribution in an area that is also of interest to the probationer. This can bring about lasting changes in how young people feel about themselves and their role in the community.

The probation officer facilitates participation in the supervision plan, oversees the risk management component, monitors offender performance and enforces compliance while serving as a mature role model and a resource to the juvenile and the family. A positive interpersonal relationship between the probation officer and the youth is critical to effective supervision. Probation supervision is much more likely to succeed if the youth buys into the relationship with the probation officer. This is more likely to occur where the probation officer views his or her role, in addition to monitoring and enforcement, as one of constructive facilitation – accentuating the positive, nurturing, leading, encouraging, and correcting.

Significantly, when the probationer is not in compliance, the probation officer must determine whether the juvenile is unable or unwilling to comply. An assessment must be made whether the probationer lacks fundamental skills, making compliance difficult or impossible. If the probationer is found to be unable to comply, the plan must be reformulated to address the known deficiencies. On the other hand, if failure to comply is found to be willful, the probation officer must decide the best way to motivate the juvenile by holding the youth accountable for his or her behavior while engaging him or her to make the needed changes.[73]

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[73] *Id.* at 80.

3. Mental Illness and Substance Abuse

Youths in the court system experience substantially higher rates of mental health disorders than youths in the general population. Diagnosable mental health disorders found in youths meet the formal criteria for any of the disorders listed in the Diagnostic and Statistical Manual of Mental Disorders: Fourth Edition, DSM-IV-TR. The terms "serious mental health disorder" and "serious emotional disturbance (SED)" are used to identify youths experiencing more severe conditions that substantially interfere with their functioning. Research has found that most youths in the juvenile justice system qualify for at least one diagnosis, and it is estimated that at least one out of every five youths in the juvenile justice system has serious mental health problems, and that as many as 80% of the delinquent population have less serious, but diagnosable mental disorders.[74]

It has been estimated that approximately half of all adolescents receiving mental health services in the general population are reported as having a dual diagnosis. Among the juvenile justice system population, the rates may be even higher. Many adolescents use drugs and alcohol to self medicate their diagnosed or undiagnosed symptoms.

Experts suggest that cross-system collaboration must form the basis for all solutions for court-involved mentally ill youths at all points in the proceedings. Coordinated service provision across the court system, mental health and substance abuse service systems have been found to reduce incarceration and improve offender access to mental health services. One of the major obstacles in recognizing and treating youths with mental health disorders in the court system is the lack of screening and assessment. Probation departments should make use of a reliable, valid and easy to use screening tool such as the Massachusetts Youth Screening Instrument ("MAYSI-2")[75] which is an inventory of questions that has been normed and tested on a number of juvenile justice populations and is currently in use in a number of jurisdictions throughout the country. A mental health treatment plan should be developed and implemented by qualified, trained mental health staff. The probation officer should monitor compliance and work with the treatment team in formulating a service plan so that the youth's diagnosis is considered in other service referrals and probation requirements.

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[74]Cocozza and Skowyra, *Youth With Mental Health Disorders: Issues and Emerging Responses*, Juvenile Justice Journal, Volume VII, Number 1 (2000).

[75]Grisso and Barnum, *The Massachusetts Youth Screening Instrument: Second Version.* University of Massachusetts Medical School (January 2001).

4. Education

A substantial proportion of young people who are involved with the juvenile and adult justice system have education-related disabilities, and are eligible for special education and related services under the Federal Individuals with Disabilities Education Act ("IDEA"). Court-involved youths are much more likely to have learning or emotional disabilities than the general public school population. While nearly 9% of public school students have disabilities making them eligible for special education services, a conservative preliminary estimate of the prevalence of youths with known disabling conditions in juvenile corrections is 32%.[76] There is a clear connection between educational failure and delinquency: 80% of all crimes are committed by people who drop out of school. A disproportionately large number of court-involved youths are performing far below grade level in math and reading.[77]

Research firmly establishes that education is a critical component of rehabilitation of delinquent youths. In New York, a child's history of school-related problems is a critical factor in whether that child will be prosecuted, placed in detention, or incarcerated. Regular school attendance is a mandatory condition of probation, parole, and conditional release for many court-involved youths. Many of the barriers to accessing educational services stem from 1) the failure to properly identify and address learning disabilities and mental health needs, 2) obstacles to re-enrolling students in school when they leave detention, incarceration or placement, and 3) the lack of programs to address needs of students with poor literacy skills. Undetected disabilities often are inter-related with mental health diagnoses and can provide the explanation for impulsive behavior, the inability to anticipate consequences, difficulty in listening or understanding and having a low frustration tolerance. Moreover, characteristics of educational disabilities, such as poorly developed reasoning ability, inappropriate affect and inattention, are often misinterpreted as hostility and lack of cooperation.

Proper identification of a disability can lead to appropriate school placement and referrals to services and programs. Additionally, supervision methods need to be modified when supervising adolescents with learning disabilities such as providing basic and simple instructions, seeking feedback from the youth as to whether they understand directions or instructions, keeping sessions short and repeating information

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[76]Quinn, Rutherford, and Leone, *Students with Disabilities in Correctional Facilities*, The ERIC Clearinghouse on Disabilities and Gifted Education, Council for Exceptional Children (December 2001).

[77]1999 statistics from the New York City Department of Juvenile Justice demonstrated that the youths held in secure detention, who were an average age of fifteen, had the following skill levels: 90% read below the seventh grade level; 83% had math skills below the seventh grade level; and 25% read below the fourth grade level.

frequently, rehearsing and practice tasks with the adolescent rather than just explaining what to do, modeling appropriate social behaviors, providing positive reinforcement as frequently as possible, setting realistic goals and make allowances for the extra amount of time the youth will require to make progress.[78]

5. Sex Offenders

Research of juvenile sex offenders supports the recommendation that assessment must distinguish between calculated and repetitive offending and youthful exploration or indiscretion. Individualized assessments are essential for sorting out the motivation behind the offense, the dynamics of victim selection and level of deviance. A clinical assessment is necessary in order to distinguish severe pathology from youthful exploration and problem sexual behavior.

Additionally, there are serious concerns over adult sex offender treatment being applied to many juveniles who, while exhibiting inappropriate sexual behavior, do not fit the profile or serious pathology for which the treatment is designed. Extension of adult models of treatment to juveniles is inappropriate and may provide excessive treatment or the wrong treatment, and may reinforce deviant identity formation rather than shaping healthy identity development.

Experts suggest that juvenile sex offenders typically present antisocial attitudes and behaviors frequently found in the general delinquent population and as such, sex offender programs for adolescents should be based on a holistic model, treating all the issues the youth presents. It is further suggested that probation officers should receive training in order to understand the dynamics unique to juvenile sex offenders, the signs of relapse and other contributing factors that lead them to offend and how to monitor and develop effective case plans. It is also important that probation officers develop the skills to assess available treatment programs, so that adolescents are referred only to appropriate, effective programs.

6. Girls

While many of the issues faced by girls charged with crimes or delinquency are shared by boys, several areas of concern affect girls in particular. Most of the girls who enter the juvenile justice or criminal justice systems have experienced sexual, emotional and/or physical abuse in their past, suffer from mental health problems and/or are substance abusers. One, or any combination of these factors can contribute to the conduct that leads to criminal or delinquency proceedings. Indeed, research

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[78]Griffin and Torbet, *Desktop Guide to Good Juvenile Probation Practice*, at 127, National Center for Juvenile Justice (June 2002).

indicates that abuse (sexual, emotional and/or physical) may be the most significant underlying cause of high-risk behaviors leading to delinquency in girls.[79] Victimization can lead to an increase in violent behavior, substance abuse and other self-harming behaviors, poor self esteem, early sexual activity and prostitution.[80]

In fact, the National Mental Health Association estimates that more than 70% of incarcerated girls nationwide report sexual and physical abuse. Due to repeated exposure to trauma and violence, up to 50% of incarcerated girls in the juvenile justice system fit the criteria for a diagnosis of post traumatic stress disorder (PTSD) as well.[81] The extent of mental health problems among girls in the juvenile and criminal justice systems is staggering. Almost 70% of girls in the juvenile justice system have histories of physical abuse, compared to the approximately 20% rate of physical abuse for teenage females in the general population.[82] A 1997 study of boys and girls in juvenile justice facilities found that 84% of girls needed mental health assistance, compared to 27% of boys.[83] It is certain that many of these mental health issues stem from the histories of abuse so many of the girls have endured. Yet the juvenile and criminal justice systems traditionally focus on the girls' actions instead of the trauma they have endured and how that trauma might be related to the behavior for which they are charged.

The combination of past victimization and mental health problems also leads many girls to abuse drugs, often as a form of self-medication. In addition, the low self-esteem that many of these girls experience leads them to develop unhealthy and demeaning relationships and to associate with peer groups that encourage self-harming behavior. Girls who are commercially sexually exploited fit this profile. Experts recognize that there is a distinct difference between how girls cope with past violence and how boys tend to cope with similar histories. Girls internalize violence much more than boys, often manifesting it by self-mutilation. The characteristics of the detention

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[79] *Adolescent Girls with Co-Occurring Disorders in the Juvenile Justice System* at 3, The National GAINS Center for People with Co-Occurring Disorders in the Justice System (December 1997).

[80] *Id.*

[81] *Mental Health and Adolescent Girls in the Justice System*, National Mental Health Association (1999).

[82] Schaffner, *Female Juvenile Delinquency: Sexual Solutions, Gender Bias, and Juvenile Justice,* 9 Hastings Womens LJ, 4 (1998).

[83] *Adolescent Girls with Co-Occurring Disorders in the Juvenile Justice System*, at 5 (GAINS Center, December 1997). In New York City Fiscal Year 2006, the NYC Department of Juvenile Justice reports that 68% of children admitted to DJJ facilities required mental health services (Mayor's Management Report).

environment (*e.g.,* seclusion, staff insensitivity, and loss of privacy) all too frequently add to the loss of control and negativity that the girls feel, magnifying their inability to cope with life stressors, and increasing the risk of self-mutilating and suicidal behaviors.

As more girls are arrested, it has become ever more apparent to those who work with them in this context that there is a very high level of untreated or under-treated mental illness, emotional problems, poor family support, abuse, neglect, substance abuse, and homelessness in this population. When these issues are not addressed adequately, teenage girls may end up running away, joining gangs, missing or failing school, or acting out in anti-social ways in order to create the bonds with other young people that they hope will replicate the love and family support that is often missing from their lives. In response, there must be service coordination between the court system, probation and child protective services to address these girls' needs. Additionally, specific programming for adolescent females which are rooted in the experience of girls and incorporate an understanding of female development, including differences in the way girls interact with their peers, families and communities.

7. Training and Staff Development

It is recognized that many of the suggestions herein will require initial training in various areas of need presented by adolescents and ongoing staff development to keep probation officers current in their knowledge of the literature and effective practices. This training should be sought from practitioners in the fields of concern: mental health, substance abuse treatment, family systems, adolescent development, sex offender treatment, education and vocational training. The cost and the time required to seek and implement training programs will surely be recouped in improved relationships and outcomes with adolescent probationers and their families. This, in turn, will lead to safer communities in the long run.

8. Conclusion and Recommendations for Further Examination

Currently, adolescents are either under the supervision of Family Court probation or adult court probation depending on their age. Generally, youths under 16 years of age adjudicated delinquent in the Family Court are under the jurisdiction of Family Court probation. However, certain youths 14 and 15 years of age, prosecuted in the adult criminal court pursuant to "The Juvenile Offender Law," and 16-18 year olds are subject to adult criminal court probation. In this context, two broad issues emerge for consideration. The first is whether all offenders under 16 years of age regardless of situs of prosecution, *i.e.*, in adult or Family Court, should be supervised by Family Court probation officers. The second issue is how the structure and approach of "adult" court probation can be modified to address the special needs and developmental differences of all adolescent offenders under 19 years of age. These issues should be added to the overall evaluation of probationary services provided to youths under the jurisdiction of Family Court.

VI. TOPICS FOR FUTURE TASK FORCE CONSIDERATION

The following topics are of critical importance to the future of probation in New York, were the subject of many discussions at Task Force meetings and are considered to be appropriate for further inquiry and study.

A. Strengthening the Involvement of Victims and Survivors in the Work of Probation

The mission of probation is to reduce victimization, promote public safety, and hold offenders accountable to the courts and to society. Probation at its best is strategically positioned to work with both the victim and the offender. The justice system does an incomplete job if it sanctions the offender but ignores the victim. It is therefore vital that all aspects of the justice system, including probation, focus on victim services – making victims a priority.

As a result of being victimized, individuals have many informational needs. They are thrust into a system that they do not understand. They generally do not know how the system works, what they can expect from the system, how it will hold the offender accountable, how the victim will be restored through the restitution process, and what services are available in the community to address their needs. Probation can answer these questions and thereby assist victims to successfully navigate the justice system.

Probation officers collect approximately 15,000 victim impact statements each year and incorporate them into their investigations and reports to the courts. They collect nearly $18 million each year in victim restitution and oversee its orderly and lawful disbursement to victims of crime. Probation's work with individual victims and the community is restorative. By valuing and empowering victims through their statements, referring them to appropriate services, collecting and disbursing restitution, and conducting victim impact panels, probation seeks to support victims.

It is important that victims be the consumers and clients of probation services rather than adversaries. Victims who have been appropriately treated by the probation system can also assist other victims by educating the public about the mission of probation. Probation-supported involvement by victims in their own cases can have a therapeutic benefit to them. Finally, providing services to victims can assist in the development of interagency collaborative efforts that ultimately strengthen the entire justice system. The same type of collaborative efforts that enhance services to offenders can also enhance services to victims.

The Task Force applauds efforts by the Division of Probation and Correctional Alternative's "Crime Victim and Probation Work Group" in reexamining probation's role *vis a vis* victims and working toward a clear and consistent policy to review how probation can better serve, protect and assist survivors of crime. In convening this

workgroup, DPCA has brought together probation administrators, crime victim advocates, the courts, treatment providers and other state agencies to develop a comprehensive plan to improve services to crime victims. It will review many areas including victim impact statements and outreach, victim restitution and payments, victim advocate services, orders of protection, special offender populations (DWI, sex offender, domestic violence), intrastate and interstate transfers and victim notification and safety, to name a few.

The Task Force plans to work in collaboration with the DPCA Workgroup to find ways to expand and enhance the provision of services to victims by probation departments throughout the State.

B. Enhancing the Delivery of Probation Services in the Family Courts

The Task Force has concluded that a thorough analysis of the state of probation services in New York State must include a discussion of Family Court services, since these services constitute up to 40% of a probation department's work. Nearly one third of the state's 3,150 probation officers work with juvenile delinquents, Persons in Need of Supervision ("PINS") and families. In many ways, probation's work in the Family Courts throughout New York State is the most challenging of its responsibilities. Probation officers handle 85,000 matters each year, commonly referred to as "Family Court Intakes," involving juvenile delinquency, PINS, support, paternity, adoption, custody, visitation, family offenses and related matters. They assess, provide counseling and services and divert a large majority of these cases from the court. Thus, probation officers are essentially the gate-keepers to Family Court and without their work, the court processes would quickly become overwhelmed.

In addition, probation officers prepare 18,000 pre-dispositional investigations and reports for the Family Courts each year. Their investigations range in complexity from what may appear as a simple status offense or truancy – often a signal of greater family dysfunction – to the most complex of custody investigations. In all cases, the Family Court judge relies on the experienced and substantive work of the investigating probation officer. And lastly, probation officers supervise 24,000 probationers sentenced to supervision through the Family Courts. In doing so, probation officers work with school officials, police officers, detention and residential placement facilities and their staffs, hospitals and pediatric forensic professionals, county attorneys, defense counsel and law guardians.

The Family Court probation function is one of the most complex and diversified services of any court-related function. It is also one of the most important because the research has informed us that many young offenders will not return to the criminal justice system if there is proper intervention. Accordingly, knowing which probationers

must be targeted for services and which offenders should be diverted from the system and services is of paramount importance.

In January 2007, the Task Force received a letter from the Family Court Advisory and Rules Committee established by Chief Administrative Judge conveying its members' concerns regarding the acute need for an enhancement of resources for probation in the Family Courts. This advisory committee is particularly concerned about the probation monitoring of PINS and juvenile delinquent youth in an effort to reduce the use of detention and costly out-of-home placements.

The Task Force believes there should be further exploration of this critical area of probation practice in the State and recommends that additional members be invited to participate on the Task Force who have specific experience and knowledge in the field of juvenile probation services and the needs of adolescents.

The following issues relating to Family Court probation practice are among the topics that should be considered:

- The role of the police in the diversion process.
- The significance of intake/diversion.
- How to effectuate reduction in the numbers of youths placed with the Office of Children and Family Services on delinquency cases.
- The role of probation departments in PINS, adoption, visitation and custody proceedings.
- Effective service provision and programming for adolescents.
- Training needs in the areas of child and adolescent development, family systems, child and adolescent mental health issues, educational needs, substance abuse, girls issues, collateral systems such as child protective, mental health, school.
- Effective service provision for adolescents, up to age 19, prosecuted in the adult criminal court system.
- Resource allocation to effectively meet the needs of children and adolescents involved in the court system.
- The effective use of assessment tools to develop service provision plans for children and adolescents.
- The importance of coordination with other service providers and agencies integrally involved with court-involved youths.
- The need for strength based evaluation of youths in order to effectively create supervision plans including education (including literacy), job training and placement, independent living skills, development of pro-social peer groups and involvement in their communities.
- Training and development of effective methods of addressing substance abuse.

- Training and development of effective programming for sex offenders.
- Caseload issues.

C. Incorporating Evidence-Based Practices Into Probation

In an attachment to a December 2006 Technical Assistance Report to the Task Force (*see* Appendix G), the National Institute of Corrections described how evidenced-based practices and procedures can be applied successfully in the criminal justice context to reduce recidivism and promote public safety. As stated in the report, evidenced-based practices and procedures mean "the adoption of scientifically derived public policy. Practically speaking, it...[requires] restructuring the way we do business in our jails and prisons – as well as in probation and parole and in other parts of the criminal justice system – so that our organizational structures and cultures enable rather than hinder the implementation of programs and services that are known to work in reducing criminal behavior."

A number of states, in moving towards the implementation of evidence-based practices, have recognized the tremendous return on investment that inures to their states through the successful adoption of these practices. At least one state has actually undertaken an economic analysis looking at the short-term and long-term fiscal savings to state and local governments if evidence-based practices are implemented. In 2005, the Washington State Legislature directed the Washington State Institute for Public Policy (the "Institute") to report on whether there were evidence-based options that could "reduce the future need for prison beds, ... save money for state and local taxpayers ... [and] contribute to lower crime rates."[84] In its October 2006 Report, the relevant portion of which is attached as Appendix H, the Institute conducts a systematic review of the evaluations that have been conducted on evidence-based programs found elsewhere and concludes that "if Washington successfully implements a moderate-to-aggressive portfolio of evidence-based options, a significant level of future prison construction can be avoided, taxpayers can save about two billion dollars, and crime rates can be reduced."[85]

In a recent memorandum to the Task Force, which is summarized below, DPCA reported that it has been working collaboratively with local probation departments throughout New York State in a long-term effort aimed at transforming the State's current probation system into one designed to reduce recidivism through effective implementation of evidence-based practices and procedures.

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[84]Aos, Miller, and Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates,* Olympia: Washington State Institute for Public Policy, at 1 (October 2006).

[85]*Id.*

1. Developing the Tools

DPCA began the work of transforming the probation system in New York State in the late 1990's with the initial development and implementation of actuarial juvenile and adult risk and need assessment instruments. The Youth Assessment and Screening Instrument ("YASI") for Family Court cases and the Correctional Offender Management for Profiling of Alternative Sanctions ("COMPAS") for criminal court cases, both proprietary programs, were designed to assess individual offenders to determine their level of risk for recidivism and to identify their criminogenic needs. Today, YASI is being utilized in 49 counties across New York State, while COMPAS is being utilized in 26 counties and has been revised to make it more compatible with probation practice in New York. The use of validated risk and need assessment instruments serves as the cornerstone of evidence-based practice.

2. Changing the Culture

Embracing evidence-based practice means changing organizational culture both at the state and local levels. It requires a change in approach; rather than relying solely on professional judgment, a probation officer is required to use actuarial tools to identify criminogenic risk areas predictive of future crimes. Seasoned probation officers tend to trust their intuition more than actuarial tools, so trust and confidence must be built over time.

To compliment the new actuarial tools, DPCA's initial focus has been on training. State staff has been afforded training in evidence-based practices and cognitive behavioral interventions and will continue to receive training as time and funding permit. DPCA has also established an internal workgroup that meets on a regular basis to discuss issues related to the implementation of evidence-based practices in probation.

Since the initial implementation of YASI in 2000, the software roll-out has been accompanied by high quality training from DPCA's consultant Orbis Partners. This training promotes an understanding of the research literature regarding evidence-based practice principles, and the utilization of scientifically supported effective practices throughout probation work. Similar training has been provided to counties utilizing the COMPAS instrument. In 2005, DPCA's Fundamentals of Probation Practice ("FPP") curriculum for new probation officers was totally revamped to incorporate the evidence-based practice principles. In 2006, a new orientation course for probation supervisors was developed to expose supervisors to what is now being taught in the FPP course so they can support the new ideas as trainees bring them back to the local environment. This new curriculum has been very well received by new officers and supervisors alike, and is a key accomplishment in beginning the transformation of the probation culture in New York State. The training now offered to new probation officers and probation supervisors emphasizes skill-building approaches and the use of motivational interviewing by probation officers to assist offenders in changing their behavior.

Counties utilizing YASI receive reinforcement through technical assistance, coaching and booster training sessions as they shift their organizational practice from a traditional approach to one that is evidence-based.

Probation leadership in New York has received training in evidence-based practices and cognitive behavioral programs, and probation directors across the State have attended workshops by leading experts in the field such as Dr. Faye Taxman, Dr. Edward Latessa and Steve Aos.

DPCA has also implemented a system of measured outcomes for probation and alternative to incarceration/community correction programs that serve offenders. The agency has implemented a system of performance-based contracting to include specific milestones and the achievement of outcomes for reimbursement. Performance-based contracting ensures that programs are focused on offender achievement and program completion assisted by the use of evidence-based practices.

3. The Future of Evidence-Based Practice in Probation in New York State

While DPCA has laid the foundation for evidence-based practice and many local probation departments have begun to build on that foundation, much remains to be accomplished in this area. In order to determine the suitability of evidence-based practices in New York, the Task Force recommends that the following objectives be pursued by DPCA:

a. Full utilization of risk and needs assessments across all counties – This will become achievable as the modified NY COMPAS is rolled out in 2007. A higher level of integration into daily probation practice will occur when effective risk assessment instruments are integrated into the automated probation case management system called CASELOAD EXPLORER.

b. Changing Supervision Expectations – Current DPCA Rules and Regulations regarding the supervision of offenders concentrate on the number and not necessarily the quality of offender contacts. They fall short in reinforcing the critical role probation officers can play in guiding offenders to change behavior and addressing the criminogenic needs that drive criminal behavior. The implementation and use of fully validated actuarial risk and need assessment instruments will assist probation officers in identifying the highest risk probationers and will drive the need to re-examine the supervision rules and regulations that drive professional practice.

c. Continued Culture Change – While most probation professionals in New York State embrace the ideas behind evidence-based practice, the shift from traditional practice to evidence-based is an ongoing process. Probation

departments will need extensive assistance from DPCA to make this shift successful. Significant training needs still exist and departments will require technical assistance in evidence-based system and program development. DPCA must increase its internal capacity to deliver the training and technical assistance required. The Task Force recommends the development of "Evidence-Based Practices Training and Implementation Teams for Community Corrections" within DPCA to achieve this goal. These teams would assist local departments in developing and building the capacity to effectively integrate evidence-based principles into daily practice.

d. Expansion of Cognitive Behavioral Programming – Once risk is determined and criminogenic needs are identified, it is essential to have skill-based behavioral change programs available to match offender attributes and responsivity. These services would need to be developed both within probation departments and by other third party providers.

4. Conclusion

The building blocks of evidence-based practice and policies are now in place in New York State. But extinguishing criminogenic behavior takes time. Since implementation of evidence-based practices would involve a number of critical factors (*e.g.*, caseload size), further implementation of evidence-based practices and policies and their seamless integration into probation practice will require time, training, resources and most importantly, the continued leadership of state and local probation professionals.