

Memorandum of Support

Predicate Waiver
A7715 (Cruz)
February 2022

Brooklyn Defender Services (BDS) strongly supports the immediate passage of [A7715 \(Cruz\)](#), an important sentencing reform bill currently pending before the Legislature. BDS provides multi-disciplinary and client-centered defense practice, representing clients in criminal, family, immigration, and civil legal matters. Our attorneys, social workers, and advocates represent and advocate for nearly 30,000 indigent Brooklyn residents every year.

BDS supports this sentencing reform bill because it is an important step towards reducing the harms of New York's sentencing structure. A7715 provides prosecutors with the ability to consent to a waiver of a defendant's felony predicate status. A defendant could be sentenced as if the crime were the first felony, as opposed to their second or third felony. Under current law, prosecutors and judges are bound by mandatory minimum prison sentences that are increased when a person has a prior felony conviction. This provides greater flexibility for defendants and their attorneys when plea bargaining with prosecutors and will result in plea agreements with fairer sentences.

New York's Felony Predicate Sentencing Enhancements Are Overly Punitive

Sentencing reform should be a top priority for the New York Legislature. Full-scale reform of New York's archaic, overly complicated, and overly restrictive sentencing laws is needed in order to accomplish meaningful criminal justice reform and bring New York in line with other states already engaged in this process. In addition to mandatory minimum sentences, felony predicate sentencing enhancements are some of the most punitive and constraining aspects of our sentencing structure.

Predicate sentencing enhancements in New York require prison sentences without regard to the nature and seriousness of the alleged crime or the prior conviction. They also increase the mandatory minimum and maximum jail sentence a person is facing when charged with a felony offense. These sentencing restrictions apply to virtually all felony offenses but are then systematically enhanced if the person accused has a prior felony conviction. Predicate sentencing enhancements are prescribed by the legislature and neither the prosecution nor the courts can depart from the sentencing ranges. As it currently stands, these restrictions cannot be negotiated as part of a plea agreement. As a result, defendants must rely on prosecutors to make plea offers to lesser offenses or charges, which are incidentally limited by predicate status restrictions. For example, a person who is convicted of an assault in the second degree (Class D felony) is facing



a mandatory minimum sentence of 2 years and a maximum sentence of 7 years. If that same person were to be convicted a second time for the same offense, assault in the second degree, they would face a mandatory minimum prison sentence of 5 years and a maximum of 7 years. Lastly, if this same person were to be convicted a third time of assault in the second degree (within a 10-year period), they would be categorized as a “Mandatory Persistent,” facing a mandatory minimum sentence of 12 years in prison and a maximum of 25 years. These additional levels of predicate sentencing enhancements can result in extremely long, and sometimes mandatory, prison sentences, including a life sentence.

Giving Prosecutors and the Court Discretion to Modify Sentences

Pursuant to the language of **A7715**, a defendant may enter a plea where the predicate status is waived, with the consent of the prosecution and the permission of the court, upon a determination that it is in the interest of justice to do so. Factors include the nature and circumstances of the case, the available evidence, and the history and character of the defendant. The prosecution can consider other mitigating information outside just the facts of the case.

The ability of prosecutors to waive predicate status is a necessary and beneficial tool in the process of plea negotiations. It is, however, only a first step towards sentencing reform. It is crucial that New York continue to engage in meaningful and comprehensive reform in this area, and it is with that caveat that Brooklyn Defender Services supports **A7715**. Because even with the waiver of predicate status, individuals can still face crushing mandatory minimum sentences that often result in unduly harsh and unconstitutionally excessive punishment, disproportionately affecting black and brown New Yorkers within a racially disparate criminal justice system.

We urge the Legislature to immediately pass A7715 (Cruz). Any questions can be directed to Jacqueline Gosdigian, Senior Policy Counsel, Brooklyn Defender