

MEMORANDUM

To: NYSDA Members
From: Al O'Connor, New York State Defenders Association
Date: December 14, 2004
Re: Rockefeller Drug Law Reform (A.11895)

Today, Governor Pataki plans to sign the Rockefeller Drug Law reform bill passed by the Legislature last week. Some of the bill's provisions will go into effect immediately; others will become effective in 30 days, on January 13, 2005. Here is a summary of the bill, along with a few comments on how it might affect pending cases. The complete text of the bill can be found at the Assembly and Senate websites (www.assembly.state.ny.us) (www.senate.state.ny.us).

Class A Drug Offenses

Weights Doubled for Possession Offenses

The bill doubles the weight threshold for the Class A-1 felony of criminal possession of a controlled substance in the first degree (Penal Law § 220.21) from four to eight ounces, and for the Class A-II felony of criminal possession of a controlled substance in the second degree (Penal Law § 220.18) from two to four ounces. But the weight thresholds for sale offenses remain the same. These changes are effective immediately and should therefore apply to pending cases. If the weight is less than the newly prescribed amounts, pending A-1 and A-II possession indictments should be reduced accordingly.

Revised Sentencing Scheme

The reform bill calls for determinate sentences for all drug offenses. For offenses committed on or after January 13, 2005, and perhaps crimes committed earlier (see last section below), Class A felony convictions will be punishable as follows.

Class A-1 Drug Offenses

Determinate Sentence Range

First Felony Offense

Between 8 and 20 years

Second Felony (prior non-violent)

Between 12 and 24 years

Second Felony (prior violent)

Between 15 and 30 years

Plus 5 years post-release supervision (all cases)

Class A-11 Drug Offenses

Determinate Sentence Range

First Felony Offense	Between 3 and 10 years
Second Felony (prior non-violent)	Between 6 and 14 years
Second Felony (prior violent)	Between 8 and 17 years

Plus 5 years post-release supervision (all cases)

Class A-I Felony Convictions - Right to Petition For Resentencing

Inmates currently serving A-I felony sentences for drug offenses may petition for resentencing under the new determinate scheme beginning January 13, 2005. The bill grants these inmates a right to assigned counsel to prepare the resentencing application and to advocate for a determinate sentence under the new scheme. Counsel fees for such representation will be a county charge. Whenever possible, the application will be assigned to the original sentencing judge. Otherwise, it will be randomly assigned to a new judge.

The court "may consider any facts or circumstances relevant to the imposition of a new sentence" including the inmate's institutional record. Because the bill provides that no new pre-sentence report shall be ordered, it will fall to defense counsel to independently investigate and present facts supporting resentencing. The court "shall offer an opportunity for a hearing and bring the applicant before it." The court may also conduct a hearing to "determinate any controverted issue of fact relevant to the issue of sentencing." Unless "substantial justice dictates" that the application be denied, the court must offer the inmate a determinate sentence as an alternative to the 15 to 25 year to life sentence he or she is now serving. The inmate has the option to accept or reject the new determinate sentence. But in either case, he or she has the right to appeal from a determinate sentence so offered or imposed on the ground that it is harsh and excessive.

There are reportedly 446 inmates who are eligible for resentencing under this reform. As of September 30, 2004, they were serving sentences from the city of New York and 27 counties (Albany, Broome, Cayuga, Chemung, Columbia, Dutchess, Erie, Fulton, Jefferson, Monroe, Nassau, Oneida, Onondaga, Ontario, Orange, Putnam, Rockland, Schenectady, Seneca, Steuben, Suffolk, Sullivan, Tioga, Tompkins, Ulster, Wayne, Westchester).

Revised Sentencing Scheme – Class B through E level drug and marijuana offenses

Lower level felony drug and marijuana offenses will also be punishable by determinate sentences. For offenses committed on or after January 13, 2005, and perhaps earlier (see last section below), the new scheme will be as follows.

First Felony Offender

Determinate Sentence Range

Class B	Between 1 and 9 years
Class B (sale in or near school grounds)	Between 2 and 9 years
Class C (imprisonment not mandatory)	Between 1 and 5 ½ years

Class D (imprisonment not mandatory) Between 1 and 2 ½ years
Class E (imprisonment not mandatory) Between 1 and 1 ½ years

Plus post-release supervision

Class B or C – Between 1 and 2 years
Class D or E - 1 year

Second Felony Offender (prior non-violent) Determinate Sentence Range

Class B Between 3 ½ and 12 years
Class C Between 2 and 8 years
Class D Between 1 ½ and 4 years
Class E Between 1 ½ and 2 years

Plus post-release supervision

Class B or C – Between 1 ½ and 3 years
Class D or E - Between 1 and 2 years

Second Felony Offender (prior violent) Determinate Sentence Range

Class B Between 6 and 15 years
Class C Between 3 ½ and 9 years
Class D Between 2 ½ and 4 ½ years
Class E Between 2 and 2 ½ years

Plus post-release supervision

Class B or C – Between 1 ½ and 3 years
Class D or E - Between 1 and 2 years

Good Time and Merit Time Reductions

Determinate Sentences - All drug offenders serving determinate sentences will be eligible for a standard 1/7th reduction of the term as good time. They will also be eligible for an additional 1/7th reduction as merit time. To earn merit time, drug offenders will be required to participate in assigned work and treatment programs, and obtain a.) a GED, or b.) an alcohol and substance abuse certificate, or c.) a vocational trade certificate, or d.) perform 400 hours in a community work crew.

Indeterminate Sentences - Class A-I drug offenders serving indeterminate sentences may continue to earn up to 1/3 off their minimum terms as merit time, and Class A-II through E drug offenders may continue to earn up to 1/6th off their minimum terms. The bill includes a bonus 1/6th merit time allowance for Class A-II through E felony offenders who committed the offense prior to January 13, 2005, and received an indeterminate term. By participating in two or more

of the above-listed programs, they will be eligible for an additional 1/6th merit time allowance, or a total of 1/3 off their minimum terms.

Early Termination of Parole – Indeterminate Sentences

The bill provides for mandatory early termination of parole after three years of unrevoked supervision for persons serving indeterminate sentences for Class A-I and A-II felony drug offenses, and after two years for all other drug offenses. This section of the bill becomes effective on February 12, 2005.

Expanded CASAT and Judicial Placements

Under current law, certain non-violent inmates are eligible for the Comprehensive Alcohol and Substance Abuse Treatment program (CASAT) when they are within two years of initial parole eligibility or conditional release (indeterminate and determinate sentences). After six months of prison-based treatment, they are eligible for work release and community-based treatment for an additional 18 months. The Department of Correctional Services selects inmates for participation in the CASAT program.

For drug offenses, the reform bill advances the eligibility date to inmates within 2 years and 6 months of their anticipated parole or conditional release date (giving advance credit for available good time and merit time credits). Second felony Class B drug offenders serving determinate sentences, however, must serve a minimum of 18 months (jail time and prison time) before transfer to a residential treatment program. The bill also authorizes judges to select defendants at the time of sentence for future participation in the CASAT program, a change that becomes effective today (December 14, 2004).

SHOCK and Willard Drug Treatment Program

No real substantive changes were made to the eligibility criteria for SHOCK. The statute (Correction Law § 865) has been amended to accommodate the new determinate sentencing scheme. Drug offenders with determinate sentences, who are under 40 and have never been previously committed to DOCS, and who will become eligible for conditional release within 3 years may participate in SHOCK. However, second felony Class B drug offenders are ineligible for the program, even if they are within the three-year time frame at the time of DOCS reception. (The new minimum determinate sentence in this category is 3 ½ years.)

Under the new determinate sentencing scheme, the Willard program will continue to be available to clients convicted of Class E felony drug offenses and, with the consent of the district attorney, Class D felony drug offenses. The law has been clarified to eliminate the confusing restriction on Willard eligibility for defendants who are “subject to an undischarged term of imprisonment.” This language was never intended to mean defendants who were on parole at the time of the instant offense. The amended statute makes clear that only those defendants who are in state prison or “awaiting delivery” to DOCS for another offense are ineligible for Willard placement.

These changes become effective January 13, 2005 and apply to offenses committed on or after that date.

Lifetime Probation Sentences for Material Assistance

The period of probation supervision for Class B first felony offenders who offer material assistance in the prosecution of drug offenses has been reduced to 25 years (from life). For Class A-II and second felony Class B offenders the probation term remains life. This change goes into effect on January 13, 2005.

Plea Restrictions

CPL § 220.10 (5) (a)(ii) has been amended to authorize a plea to a Class B drug offense from an indictment charging a Class A-I drug offense. This provision probably is effective on January 13, 2005. The bill has an apparent drafting error and actually says the thirteenth (13th) day (not the 30th day) after the Governor's signature.

Effective Date of New Sentencing Scheme

The language and structure of the reform bill suggests that determinate sentences will be available only for offenses committed on or after the effective date of the new sentencing provisions, 30 days after the Governor's signature, or January 13, 2005. These changes are included in sections 35 and 36 of the bill, which become effective "on the thirtieth day after it shall have become a law . . . and shall apply to crimes committed on or after the effective date thereof." Moreover, the bill includes provisions specifically designed to benefit defendants whose crimes were committed prior to that date and who receive indeterminate terms. For example, Class A-I offenders will automatically be eligible for resentencing on January 13, 2005. All other drug offenders will be eligible to earn merit time equal to 1/3 of their minimum indeterminate terms, as well as early termination of parole after two or three years of unrevoked supervision.

On the other hand, to the extent that a current client may substantially benefit from the new determinate sentencing options, you may wish to cite People v. Behlog, 74 N.Y.2d 237 (1989), as authority for applying the new scheme to offenses committed prior to January 13, 2005. In Behlog, the Court of Appeals held that 1985 amendments increasing the dollar amounts of the larceny statutes were "ameliorative" and could be applied to offenses committed prior to the effective date of the legislation. "The rationale for this exception is that by mitigating the punishment the Legislature is necessarily presumed – absent some evidence to the contrary – to have determined that the lesser penalty sufficiently serves the legitimate demands of the criminal law. Imposing a harsher penalty in such circumstances would serve no valid penological purpose" (at 240).

If you have any questions about the bill, please call me at the Backup Center (518) 465-3524.