JUSTICE STRATEGIES
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A GUIDE TO ROCKEFELLER DRUG REFORM: UNDERSTANDING THE NEW LEGISLATION

By Alan Rosenthal

Introduction

On December 14, 2004, Governor Pataki signed into law the Rockefeller Drug Law Reform bill (A.11895) (S.7802) which was approved by the legislature on December 7, 2004. This legislation makes several significant changes that will affect sentencing in drug cases in the future. Other aspects of the legislation will affect those already serving sentences for drug convictions.

I. Determinate Sentencing

All convictions for felony drug offenses that result in a state prison sentence will be determinate sentences. No longer will any felony drug offender be sentenced to an indeterminate sentence. The determinate sentences will be in the range for each class of felony as set out in the attached sentencing chart. The sentencing range for each class of drug felony is different than the determinate sentencing scheme for violent felonies. One of the notable changes is the creation of a one year determinate sentence for some classes and categories of felony drug offenses to be served in state prison. These one year determinate sentences should not be confused with definite sentences which are served in local jails. Determinate sentencing will apply to all drug offenses committed after January 13, 2005. Arguably, under case law, because the Rockefeller Drug reform legislation is ameliorative in nature, the new sentencing scheme will apply to crimes committed prior to the effective date of January 13, 2005.

II. Categories of Drug Offenders

Three categories of drug offenders have been created in each class of felony drug offense. Previously, a defendant was sentenced for a felony drug offense either as a first felony offender or as a second felony offender. The three categories under the new legislation are first felony

offender, second felony offender with a prior non-violent felony conviction, and second felony offender with a prior violent felony conviction. Each category has its own sentence range.

III. **Post-release Supervision**

For every determinate sentence there is a period or range of post-release supervision that is required. The period of post-release supervision differs by class and category of offense. The periods of post-release supervision are set out in the attached sentencing chart. The periods of post-release supervision are different for drug offenses than for violent offenses.

IV. **Life Sentence**

Life sentences have been eliminated for A-I and A-II drug felonies.

V. **Weight Threshold for A-I and A-II**

The weight threshold for class A-I and A-II drug felony possession of heroin, cocaine and some other narcotic drugs have been doubled. The increase in the quantity for an A-I felony goes from 4 ounces to 8 ounces and for an A-II felony it goes from 2 ounces to 4 ounces. The weight threshold only applies to possession and not to sale or attempted sale, and only to narcotic drugs, not to other drugs. Penal Law §220.21 and §220.18 have been amended to create this change. These changes are effective December 14, 2004.

VI. **Resentencing Provisions for A-I Drug Felonies**

Any person in the custody of the Department of Correctional Services convicted of an A-I felony offense defined in Article 220 of the Penal Law serving a sentence of 15 - 25 to life may apply to be resentenced in accordance with the new determinate sentencing scheme provided for by new Penal Law §70.71.

The application must be referred for determination to the judge who imposed the original sentence. If the original sentencing judge is still a judge of a court of competent jurisdiction, but such court is not the court in which the sentence was imposed, then the application must be randomly assigned to another judge of the court in which the original sentence was imposed. Provision is made, under such circumstances, to allow the District Attorney and the applicant to agree to refer the resentencing to the original sentencing judge.

Upon the application for resentencing, the court may consider any facts or circumstances relevant to the imposition of a new sentence which can be submitted by the applicant or the District Attorney. The Court may consider the institutional record of the applicant but shall not

order a new pre-sentence investigation and report. Nothing in the new law prohibits the defendant from submitting a new pre-sentence memorandum containing any and all mitigation. Best practice suggests that this should be done. The court cannot "entertain" any matter challenging the underlying basis of the conviction.

The new legislation provides specific procedures to be taken by the court upon the application. The court may conduct a hearing to determine whether the applicant qualifies for resentencing and to resolve any controverted issue of fact. After reviewing the submissions and the findings of fact, the court must, "unless substantial justice dictates that the application be denied ... specify and inform such person of the term of the determinate sentence of imprisonment it would impose upon such conviction, as authorized for a Class A-I felony by and in accordance with Penal Law §70.71" (new determinate sentences). The defendant shall then be given the option to withdraw the application or proceed with resentencing for the specified determinate sentence. An appeal may be taken from a denial of resentencing or from the term of the new sentence.

VII. **Alternative Definite Sentence**

For a person convicted for a first time class C, D, or E felony drug offense the court may impose a definite sentence of imprisonment of one year or less.

VIII. **Merit Time**

Eligibility for merit time has been established for the new determinate sentences for drug offenders and the scheme for merit time has been expanded for all indeterminate sentences for drug offenders.

A. **Determinate Sentences**

All drug offenders who are sentenced to a determinate sentence will be eligible to earn merit time in the amount of 1/7th off the determinate sentence, thereby making them eligible for conditional release earlier. (This is in addition to their eligibility to earn 1/7th "good time" credit as is provided for all persons serving a determinate sentence). Note that this merit time does not apply to persons sentenced to a determinate sentence for a violent felony offense.

In order to earn merit time, a drug offender will be required to fulfill the requirements of Correction Law §803, as in the past for others previously eligible for merit time, on an indeterminate sentence. He or she must successfully participate in the work and treatment program assigned pursuant to Correction Law §805 and accomplish one of the following:

- Obtain a GED
- Obtain and ASAT certificate

- Obtain a vocational trade certificate following at least six months of vocational programming
- Perform at least 400 hours of service as part of a community work crew

There are other rules pertaining to eligibility and withholding of merit time contained in Correction Law §803.

B. **Indeterminate Sentences**

As provided for under a change in merit time law enacted in 2003, any person serving a sentence of 15 - 25 to life is eligible to receive merit time of 1/3 off their minimum term, if their conviction was for an A-I drug felony offense defined in Article 220 of the Penal Law.

All class A-II, B, C, D, and E felony drug offenders serving indeterminate sentences were previously eligible for merit time of up to 1/6th off their minimum terms and that will continue. However, there will be two changes. First, merit time will apply to an indeterminate sentence with a minimum of one year or more. Previously, the minimum was required to be more than one year. Second, the legislation provides for "additional merit time allowance" not to exceed 1/6th of the minimum term for those persons meeting the eligibility requirements who committed a felony drug offense (A-II through E) prior to January 13, 2005 and received an indeterminate sentence. This "additional merit time" is earned by accomplishing two of the objectives listed in Correction Law §803 (listed above) or accomplishing one of the objectives and successfully maintaining employment while in a work release program for a period of not less than 3 months.

IX. **CASAT Order at Sentencing**

When a judge imposes a sentence on a person convicted of a controlled substance or marijuana offense, the court may, at the time of sentencing, issue an order directing that the Department of Correctional Services enroll the defendant in the Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program in an Alcohol and Substance Abuse Correctional Annex. The defendant must move for such an order. The defendant must satisfy the statutory eligibility criteria for participation in the program. (New Penal Law §60.04).

X. **CASAT Eligibility Expedited**

Under previous law, a non-violent drug offender became eligible to enter the CASAT program when he or she was within 2 years of initial parole eligibility. In the CASAT program, the participants first spend six months in prison-based treatment and then are eligible for community-based treatment for an additional 18 months. This has the effect of granting such person an early supervised release.

The new law expedites the eligibility date for the program by six months, thereby allowing a person to qualify for this early release program six months sooner than under the

former law. By moving the eligibility date back, a person is now eligible for CASAT when they are within 2 years and 6 months of parole or conditional release. Correction Law §851 is amended by adding subdivision 2-b, which specifies how the 2 years and 6 months eligibility date is to be calculated. "The Commissioner shall consider and include credit for all potential credits including but not limited to merit time and good behavior allowance."

There is one exception created for second felony class B drug offenders serving determinate sentences. They are required to have served a minimum of 18 months on their sentence (jail and prison time) before becoming eligible to transfer to a residential treatment program.

XI. Early Termination of Parole

A. Indeterminate Sentence

Under the Rockefeller Drug Law reform, all persons on parole for a felony offense defined in Article 220 of the Penal law must be granted termination of their sentence after 2 years of unrevoked parole, if they are serving an indeterminate sentence, except that a person serving a sentence for a class A felony defined in Article 220 must be granted termination after 3 years of unrevoked parole. This provision applies retroactively. (New subdivision 3-a added to Executive Law §259-j).

B. Determinate Sentence

Any person serving a determinate sentence imposed for a crime other than a violent felony offense may be granted a discharge prior to the expiration of the full maximum term if they have been unrevoked on parole or conditional release for at least 3 consecutive years, if the parole board is "satisfied that an absolute discharge from parole or conditional release is in the best interests of society." (Executive Law §259-j).

Note that no discharge shall be granted unless the parole board is satisfied that the parolee, otherwise financially able to comply with an order of restitution and the payment of any mandatory surcharge, sex offender registration fee, or DNA databank fee previously imposed by a court of competent jurisdiction, has made a good faith effort to comply.

XII. Lifetime Probation for Material Assistance

A class B first felony drug offender may be sentenced to probation for a term of 25 years (previously it was life probation) if they provide material assistance in the prosecution of a drug offense. The recommendation of the DA is required. For class A-II first or second felony controlled substance offenders and class B second felony drug offenders, the period of probation remains the same as under previous law - life. The change goes into effect January 13, 2005.

XIII. **Plea Restriction Changed**

After indictment for a class A felony defined in Penal Law Article 220, or an attempt thereof, any plea must be or must include a plea of guilty to a class B felony. Previously, a defendant indicted for a Class A-I drug offense was required to plead to no less than a class A-II, except that Y.O. eligible defendants could be allowed to plead to a class B felony for purposes of a Y.O. adjudication. The Y.O. requirement for an A-I to be allowed to plead down to a B felony has been removed. Any A-I indicted drug offender is now eligible for a reduced plea to a class B felony. [CPL §220.10(f)(a)(I)].

XIV. **Shock**

The new law provides for a person serving a determinate sentence for a drug offense to be eligible for the shock incarceration program. All of the other eligibility requirements under the previous law remain the same. There is one exception. Second felony class B drug offenders are ineligible for the shock program, even if they are within 3 years of conditional release at the time of DOCS reception. (Correction Law §865). As in the past, people are ineligible who are sentenced for a violent felony offense, A-I, manslaughter 2 and a number of other offenses listed in the statute.

XV. **Parole Supervision Sentence (Willard)**

A person sentenced to a new determinate sentence for a class D or E drug offense is eligible for a parole supervision sentence provided that they are a second felony offender and the prior was not a class A, B or a violent felony. For a D felony the consent of the DA is required.

A clarification in the statute has been made by this bill, in order to eliminate the confusion caused by the wording that made a defendant ineligible for a parole supervision sentence who is "subject to an undischarged term of imprisonment." This language has been eliminated and the statute makes it clear that the defendants eliminated for eligibility are those in the custody of the Department of Correctional Service or those awaiting delivery thereto, not a defendant who is currently on parole and who committed a new crime. [Penal Law §70.06(7)].

XVI. **Effective Date and Retroactivity**

The language of the Rockefeller Reform bill seems to apply the new determinate sentencing scheme to offenses committed on or after the effective date, January 13, 2005, which is 30 days after Governor Pataki signed the bill.

The language of the legislation notwithstanding, People v. Behlog, 74 N.Y.2d 237 (1989) stands for the proposition that "ameliorative" amendments to a statute reducing the punishment

for a particular crime are to be applied retroactively. "...[T]he law is settled that the lesser penalty may be meted out in all cases decided after the effective date of the enactment, even though the underlying act may have been committed before that date. 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 the harsher penalty in such circumstances would serve no valid penological purpose."

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