To: Criminal Defense Attorneys
From: Al O'Connor, New York State Defenders Association
Re: Rockefeller Drug Law Reform bill
Date: April 8, 2009

The Legislature has enacted historic revisions to the Rockefeller Drug Laws as part of the 2009-2010 budget. Governor Paterson signed the law (Chap. 56) on April 7th. Many of the changes are effective immediately, and apply to pending cases where sentence was not pronounced before April 7, 2009. Here is a summary of the highlights of the reform legislation.

1. **New Sentencing Laws for Drug Crimes (Effective immediately)**

First Felony Drug & Marijuana Offenses

Class B: Imprisonment is no longer mandatory – Probation, a split sentence, a definite jail term, and a state prison term between 1 and 9 years (with post-release supervision) are now authorized sentences. If imposing a state prison sentence, the court may order the defendant be directly placed in the Willard drug treatment program as part of a sentence of parole supervision (*see* CPL § 410.91). The court may also order the client directly placed in the SHOCK incarceration program. Note: a separate section of the bill (Part L) increases the maximum age for SHOCK placement to 50 (from 40).

Class C, D and E: Imprisonment will continue to be discretionary, not mandatory. All non-incarcerative dispositions are authorized (e.g., probation, split sentences) and local jail terms. The sentencing court may order the client directly placed in the SHOCK incarceration program. The legislation does not authorize a Willard parole supervision sentence for these clients because courts have many other sentencing options. (The Legislature has reserved Willard for first time Class B drug offenders, and certain second felony Class C, D and E offenders).

Second Felony Offenders (with non-violent prior felony conviction)

Class B: Imprisonment *is* required unless the client is diverted for drug or alcohol treatment pursuant to new section 216 of the Criminal Procedure Law, which authorizes diversion in the court's discretion (*i.e.*, without D.A. consent) following an alcohol and substance abuse evaluation (*see* below). Although the judicial diversion option will be available for clients who committed crimes prior to the effective date of the legislation, it does not go into effect for six months. Therefore, adjournments will be necessary for current clients who wish to avail themselves of the diversion option. Interim probation supervision is one way to secure the necessary adjournment. A

separate section of the bill (Part O) authorizes sentence credit for time served on interim probation against a sentence of probation.

The minimum state prison sentence for Class B second felony drug offenders (with a prior non-violent felony) is reduced to 2 years (from 3 ½). The maximum is unchanged at 12. Therefore, Class B second felony offenders (prior non-violent) who are not judicially diverted to treatment and are eligible for release within 3 years are SHOCK eligible, and may be directly placed in the program by the court provided they otherwise meet eligibility requirements [age, no prior DOCS commitments, no exclusion convictions – *see* Corr. Law § 865 (1)].

Class C, D and E: Imprisonment is not required – all non-incarcerative dispositions are authorized, including judicial diversion pursuant to CPL § 216. In addition, Willard placement (without DA consent), and judicial SHOCK placement are available sentencing options.

Rolling SHOCK admissions for longer sentences

A separate section of Chapter 56 (Part L) authorizes rolling admissions to SHOCK when otherwise eligible inmates serving longer terms of imprisonment are within 3 years of parole or conditional release eligibility. Rolling SHOCK admission is also available by direct judicial placement when a sentencing court, while imposing a longer sentence that precludes immediate SHOCK placement, directs DOCS to place the defendant in the program when he or she is within 3 years of conditional release eligibility.

Optional state prison sentences for second felony offenders (prior non-violent felony)

Class C – 1 ½ (reduced from 2) to 8 years – plus PRS
Class D – 1 ½ to 4 years (unchanged) – plus PRS
Class E – 1 ½ - 2 (unchanged) – plus PRS

Second Felony Offenders (with prior violent felony)

The ameliorative sentencing changes are unavailable to clients who are second felony offenders with a predicate violent felony conviction. They still face mandatory imprisonment, and will continue to be governed by Penal Law § 70.70 (4):

Class B – 6 - 15 years – plus PRS (categorical ineligibility for SHOCK)
Class C – 3 ½ – 9 years – plus PRS
Class D – 2 ½ - 4 ½ years – plus PRS
Class E – 2 – 2 ½ years – plus PRS

SHOCK eligibility for certain Class C, D and E offenses – including judicial placement - if the client otherwise meets eligibility requirements – *i.e.*, release eligible within 3 years, no prior DOCS commitments, no exclusion convictions – *see* Corr. Law § 865 (1)

2. <u>DA consent eliminated for all Willard-eligible offenses</u> (Effective immediately)

The bill repeals CPL § 410.91 (4), which required D.A. consent to a Willard parole supervision sentence for certain Class D felony convictions. It also expands this sentencing option to Class B first felony drug offenders, and second felony Class C, D, and E offenders (prior non-violent).[1] Without consent of the D.A., courts may sentence clients convicted of the following crimes to Willard:

Criminal mischief in the second and third degrees
Grand larceny in the fourth degree (P.L. § 155.30 except subdivisions 7 and 11)
Grand larceny in the third degree (except firearms)
Unauthorized use of a vehicle in the second degree
Criminal possession of a stolen property in the third and fourth degrees (except firearms)
Forgery in the second degree
Criminal possession of forged instrument in the second degree
Unlawfully using slugs in the first degree
Burglary in the third degree

First time Class B drug offenders, and second felony Class C, D and E drug & marijuana offenders (prior non-violent).

3. <u>Judicial Diversion Program</u> (Effective 6 months from date of enactment)

The centerpiece of the bill is authorization for a court to divert most drug and marijuana offenders with an identified alcohol or substance abuse problem to treatment. It provides that courts may divert drug offenders (Class B through E), *including second felony drug offenders,* to in-patient or out patient treatment programs in lieu of prison *without consent of the D.A.* Courts may also order judicial diversion for clients charged with Willard eligible crimes (*see* CPL § 410.91).

Excluded from diversion eligibility are: 1.) second felony drug offenders with predicate violent felony offense convictions; 2.) clients with a conviction for a merit time ineligible offense within the preceding 10 years (generally sex and homicide offenses, *see* Corr. Law § 803 (1) (d)(ii); 3.) clients with a Class A felony drug conviction within the

[1] Also excluded from Willard eligibility are clients with prior violent felony convictions, whether or not qualifying as a predicate felony convictions, prior Class A felony convictions, and prior Class B non-drug convictions.

preceding 10 years; 4.) clients who have ever been adjudicated a second violent felony offender or a persistent violent felony offender. Also ineligible for diversion are clients currently charged with a violent felony offense, or a merit time ineligible offense, for which imprisonment is mandatory upon conviction, while such charge is pending. However, the court may order diversion in any of the above situations with consent of the D.A.

After ordering and receiving an alcohol and substance abuse evaluation, the court must make findings with respect to whether:

a. the defendant is statutorily eligible for diversion
b. the defendant has a history of alcohol or substance abuse or dependence;
c. such alcohol or substance abuse or dependence is a contributing factor to the defendant's criminal behavior;
d. the defendant's participation in judicial diversion could effectively address such abuse or dependence; and
e. institutional confinement of the defendant is or may not be necessary for the protection of the public.

Generally, a guilty plea will be required for judicial diversion, but the court may, in exceptional circumstances, where the plea is "likely to result in severe collateral consequences," order diversion without a guilty plea, and may do so in any case with consent of the D.A. The court will have a range of options upon the client's successful completion of the diversion program, including allowing the defendant to withdraw a guilty plea and dismissing the indictment, or substituting a misdemeanor conviction in lieu of the felony. The court will also have a range of options when a client is unsuccessful in the diversion program, including imposing a state prison sentence for the crime of conviction or a lesser offense. The legislation directs courts to consider that "persons who ultimately successfully complete a drug treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse" and to consider using a "system of graduated and appropriate responses or sanctions."

4. <u>Conditional sealing of records upon completion of judicial diversion or similar drug treatment program</u> (Effective: 60 days from enactment)

The legislation authorizes courts to conditionally seal records of drug, marijuana and Willard-eligible non-drug crimes (*see* CPL §410.91) upon a defendant's successful completion of a judicial diversion program, DTAP or similar substance abuse treatment program. Sealing authority will also extend to up to three of the client's prior misdemeanor drug or marijuana convictions. A new arrest for a crime will effectively unseal these records unless the criminal action terminates in the defendant's favor pursuant to CPL § 160.50 or results in a non-criminal disposition pursuant to CPL § 160.55.

5. **<u>Resentencing of inmates convicted and sentenced to indeterminate terms under former law</u> (Most provisions effective 6 months from enactment)**

The bill authorizes discretionary resentencing of inmates who were convicted of Class B drug offenses committed prior to January 13, 2005, and sentenced to indeterminate terms under the old sentencing law. Inmates serving indeterminate terms with maximum terms of "more than 3 years" (*e.g.*, 2 – 4 years) may petition the sentencing court for resentencing under the new determinate sentencing scheme. As part of the application, the inmate may also move for resentencing on any Class C, D, or E drug or marijuana convictions "which were imposed by the sentencing court at the same time or were included in the same order of commitment as such class B felony." The resentencing procedure will be governed by the same rules included in the 2004 Drug Law Reform Act. Inmates will have the immediate right to appointed counsel to prepare and file the petition, and the right to appeal from adverse determinations.

Exclusions: Inmates who are serving time for or have been convicted within the preceding 10 years, as measured from the date of the resentencing application, of a violent felony, or a merit-time ineligible offense [*see* Corr. Law § 803 (1) (d) (ii)], or who were ever adjudicated a second violent felony offender or a persistent violent felony offender, are ineligible for resentencing.

6. **<u>New Crimes</u> (Effective November 1, 2009)**

The legislation enacts new crimes and enhanced sentencing for sale of a controlled substance by an adult (over age 21) to a child (under age 17), and for so-called drug kingpins. The "kingpin" statute applies to directors and profiteers of controlled substance organizations. The monetary threshold for criminal liability is set at $75,000 over the course of 6 months or one year, depending on the defendant's role in the organization. (Bill sections 28 and 29).