MEMORANDUM

To: **Chief Defenders**

From: **Al O'Connor, New York State Defenders Association**

Date: **October 5, 2005 (Revised October 24th)**

Re: **A-II resentencing law**

A. Introduction

On August 30th, Governor Pataki signed into law an expansion of last year's Drug Law Reform Act (DLRA). The new law (L.2005, chap. 643 – copy enclosed) authorizes discretionary resentencing of Class A-II drug offenders serving indeterminate sentences who are more than 12 months from work release eligibility and "meet the eligibility requirements" for merit time. The law becomes effective sixty days after the Governor's signature on October 29, 2005. By definition, the law excludes A-II offenders who are currently on parole. They remain eligible for early termination of parole after three years of unrevoked supervision under the terms of the 2004 DLRA (L.2004, chap. 738).

With the exception of possible filing deadlines (discussed below), the resentencing procedure is identical to the one specified in the 2004 DLRA for A-I drug offenses. Inmates have a right to assigned counsel to prepare the application, a right to a hearing on contested issues, a right to appeal from the denial of resentencing, and from a determinate sentence offered or actually imposed by the resentencing court. The new alternative determinate sentence ranges under the 2004 DLRA are:

Class A-II Drug Offense	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)

B. Eligibility Criteria

i. More than 3 years from parole eligibility

The bill defines the Class A-II offenders eligible for resentencing by means of shorthand (but awkward) references to work release and merit time. The first involves a temporal component: inmates must be "more than twelve months from being an eligible inmate as that term is defined in subdivision 2 of section 851 of the correction law." Correction Law § 851 (2) addresses work release eligibility and defines an eligible inmate in two ways: as a person 1) "who is eligible for release on parole " or 2) "who will become eligible for release on parole or conditional release within two years." Therefore, inmates are eligible for resentencing when they are more than twelve months from being within two years of parole eligibility. Stated more simply, inmates who are more than three years from their court-imposed minimum terms are eligible.

ii. More than 1 year from parole eligibility?

Although the predominant interpretation of the law is that inmates must be more than three years from parole eligibility to qualify for resentencing, a New York State Assembly memo in support of an identically worded bill (A.8980) suggests a plausible alternative reading of the statute. Referencing the first definition of work release eligibility included in Correction Law § 851 (2), the Assembly memo states that inmates who are "more than twelve months from being eligible for appearance before the parole board" are eligible for A-II resentencing relief. Read in this way, the statute awkwardly defines inmates who are more than three years or more than one year from parole release as eligible for resentencing.

iii. As of When?

The bill does not specify the controlling date for purposes of the eligibility period. Is the eligibility window measured from October 29, 2005, the effective date of the legislation? From the initial filing date of a re-sentencing application? Some other date? Using the effective date of the legislation to define the eligibility pool avoids a race to the courthouse by inmates whose window of opportunity would otherwise expire, and prevents inequities that

might arise from delays in the appointment of counsel, or in the filing process. Because a "statute speaks, not from the time when it was enacted, or when the courts are called on to interpret it, but as of the time it took effect" (McKinney's Cons. Laws of NY, Book 1, Statutes § 93), there is some support for October 29th as the controlling date.

However, the bill sponsor's memo (S.5880) suggests otherwise. It states that Class A-II offenders who are within the eligibility window "at the time of the petition" are eligible for resentencing. Therefore, caution dictates that whenever possible a motion be filed before an inmate might otherwise be time-barred. When a deadline is imminent, a bare bones application should suffice to toll the limitations period.

iii. Statutorily Eligible to Earn Merit Time

The law requires that an inmate "meet the eligibility requirements of paragraph (d) of subdivision 1 of section 803 of the correction law" pertaining to merit time. The bill sponsor's memo makes clear the law "is not intended to require that [inmates] have earned the merit time allowance before they may apply for resentencing . . . ." The merit time reference is only a shorthand way of excluding those A-II offenders who are statutorily ineligible to earn merit time because they are serving sentences for other convictions.

Correction Law § 803 (1)(d) excludes from merit time eligibility inmates serving time for any of the following offenses: *non-drug Class A-I felonies (i.e., murder in the first degree, attempted murder in the first degree, murder in the second degree, arson in the first degree, kidnapping in the first degree, conspiracy in the first degree), a violent felony pursuant to Penal Law § 70.02, a sex offense defined in Penal Law Article 130, incest, sexual performance by a child offenses defined in Penal Law Article 263, manslaughter in the second degree, vehicular manslaughter in the first and second degrees, criminally negligent homicide, and aggravated harassment of an employee by an inmate.*

Therefore, a Class A-II drug offender whose current DOCS commitment also includes a sentence for any of these crimes is ineligible for resentencing. This rule probably applies where the inmate was previously convicted of a merit time ineligible offense but had yet not completed the sentence at the time of

the current Class A-II drug offense commitment. In this situation, the time owed to parole on the prior sentence is generally added to the Class A-II sentence, resulting in merit time ineligibility for all purposes.

iv. Merit Time withholding criteria irrelevant to eligibility

Correction Law § 803 (1)(d) provides that merit time allowances "shall be withheld for any serious disciplinary infraction or upon a judicial determination that the person, while an inmate, commenced or continued a civil action, proceeding or claim that was found to be frivolous . . . " Because the actual earning of merit time is not a prerequisite to relief, it would logically seem the companion criteria for withholding of credit are irrelevant to eligibility. While an inmate's prison disciplinary history is relevant to the court's discretionary decision to grant or deny relief, it does not operate as an eligibility bar.

Unfortunately, DOCS has distributed a list of Class A-II drug offenders and has singled out 65 as ineligible for resentencing because of prison disciplinary infractions. The DOCS is not a party to these resentencing proceedings and its interpretation of the statutory language is certainly not controlling. However, because the list has been distributed to judges and prosecutors, these inmates' names are noted with a single asterisk to alert you to a potential problem in these cases.

If a resentencing court rules the withholding criteria are relevant to eligibility, you might consider challenging the DOCS' interpretation of the statutory term "serious disciplinary infraction" as overbroad. The DOCS' regulations broadly define the term to include, among other things, *cumulative* "receipt of disciplinary sanctions . . . which total 60 or more days of SHU and/or keeplock" (7 NYCRR § 280.2). Thus, under these regulations, several minor disciplinary infractions are the equivalent of a "serious disciplinary infraction," a result arguably not intended by the Legislature. While the regulation has been implicated in a few unsuccessful lawsuits filed by pro se inmates [Matter of La Rocco v. Goord, 15 A.D.3d 809 (3d Dept. 2005); Matter of Scarola v. Goord, 266 A.D.2d 598 (1999)], it apparently has not been challenged as inconsistent with the enabling legislation. *See, e.g.,* Jones v. Berman, 37 N.Y.2d 42, 52-53 (1975).

C. Resentencing Procedure and Rules

As noted, the procedure for adjudicating Class A-II resentencing petitions is identical to the one specified in the 2004 DLRA for Class A-I resentencings. Inmates have a right to assigned counsel to prepare the resentencing application and to advocate for a deteminate sentence under the new scheme. The application must be on notice to the district attorney. Whenever possible, it will be assigned to the original sentencing judge. Otherwise, the application will be randomly assigned to a new judge.

The court may not "entertain any matter challenging the underlying basis of the subject conviction." It is not clear whether this language would preclude a court from resentencing a defendant convicted of a Class A-II possession offense as a Class B felon when the weight of the controlled substance was less than the revised threshold for criminal possession of a controlled substance in the second degree (4 ounces). The amelioration doctrine of People v. Behlog, 74 N.Y.2d 237 (1989), might arguably apply in this situation.

It is clear, however, that a resentencing court has discretion to run a new Class A-II sentence concurrently with another term of imprisonment, even where the original sentencing court imposed consecutive terms. Matter of Murray v. Goord, 1 N.Y.3d 29 (2003) (Last judge in sentencing chain has discretion over consecutive/concurrent determination).

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 stipulates that no new presentence report shall be ordered, it will fall to defense counsel to compile facts supporting resentencing. The court "shall offer an opportunity for a hearing and bring the applicant before it." *See*, People v. Figueroa, 21 A.D.3d 337; 2005 N.Y.App. Div. Lexis 8802 (1st Dept., Aug. 25, 2005) (Statutory directive for a hearing is mandatory). The court may also conduct a hearing to "determine 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 indeterminate one 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 a right to appeal from a determinate sentence so offered or imposed on the ground that it is harsh and excessive. The law also provides that "upon remand to the sentencing court following such appeal the defendant shall be given an opportunity to withdraw an application for resentencing before any resentence is imposed." It logically follows that a defendant has a corresponding right to accept the proposed determinate sentence after an unsuccessful appeal.

D. Comparing Indeterminate and Determinate Class A-II Sentences

i. Good Time and Merit Time Reductions

In many cases, the decision to accept or reject the court's offer will hinge on which sentence will result in the earlier release opportunity. But even if a determinate sentence is longer than the earliest release opportunity under the indeterminate sentence, Class A-II drug offenders with prior felony convictions (especially violent offenses) or extensive misdemeanor records should not discount the singular advantage of a determinate sentence: elimination of the Board of Parole as an obstacle to release.

Estimating the earliest release opportunity involves consideration of good time and merit time credits, coupled with a realistic assessment of whether an inmate is poised to earn these reductions. Eligibility rules differ for indeterminate and determinate sentences:

a. Indeterminate Sentences

1/3 potential reduction for merit time

Class A-II drug offenders serving indeterminate sentences with a maximum of life imprisonment are ineligible for good time credit [Correction Law § 803 (1)].

Under the 2004 DLRA, inmates currently serving Class A-II indeterminate sentences can earn 1/6th off the minimum terms as merit time. To do so, they must 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. Class A-II offenders can also earn a bonus 1/6th merit time allowance, or a total of 1/3 off their minimum terms, by satisfying two or more of the above requirements.

For indeterminate sentences, a merit time allowance results in earlier eligibility for presumptive parole release (see Correction Law § 806), or an earlier appearance before the Board of Parole, but it does not guarantee release. Inmates who are denied discretionary release at a merit board appearance are eligible for reconsideration at the completion of their court-imposed minimum terms.

b. Determinate Sentences

2/7th potential reduction for good time/merit time

Under the 2004 DLRA, drug offenders serving determinate sentences may earn up to 1/7th off their sentences as good time credit. Unlike violent felony offenders who are ineligible for merit time, drug offenders may earn an additional 1/7th off their determinate sentences as merit time credit.

Thus, assuming all good time and merit time credits are earned, a Class A-II offender resentenced to 7 years could earn 2/7th off the sentence in good time and merit time credits and be conditionally released after 5 years. Note that merit time awarded on a determinate sentence results in earlier release without involvement by the Board of Parole.

ii. Parole vs. Post-Release Supervision

Although Class A-II indeterminate terms carry life sentences, the 2004 DLRA provided for mandatory early termination of parole after three years of unrevoked supervision for persons serving indeterminate sentences for Class A-I and A-II indeterminate drug offenses (two years for all other drug offenders). Therefore, unless they are granted discretionary early termination of parole after two years, Class A-II offenders will be under parole supervision for three years. Those who violate parole will obviously be subject to longer supervision terms. By contrast, Class A-II determinate sentences now carry a

5 year period of post-release supervision, which is not subject to the mandatory early termination provision [*see* Executive Law § 259-j (3-a)]. However, Class A-II offenders serving determinate sentences might arguably be eligible for discretionary early termination of post-release supervision after two years (see Executive Law § 259-j).

E. <u>List of A-II Drug Offenders Eligible for Resentencing</u>

Enclosed is a list of Class A-II drug offenders who are apparently eligible for resentencing under the restrictive "more than 3 years from parole eligibility" standard. The names and sentence data were provided by the Department of Correctional Services. The list is probably not exhaustive and should be used only to confirm eligibility, not to exclude inmates from consideration. The DOCS' website (www.docs.state.ny.us) has an inmate look-up function that can be easily used to check conviction and sentence data for inmates who are not listed.

Note that the list includes the names 25 Class A-II drug offenders whose highest count of conviction were Class A-I drug felonies. They are noted with two asterisks. These inmates, eligible for resentencing on the A-I conviction under the 2004 DLRA, may now be resentenced on the A-II counts. In these cases, resentencing on the lesser counts will eliminate another life sentence and obviate the need for release by the Board of Parole.

If you have any questions, please give me a call at the Public Defense Backup Center (518) 465-3524.