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ONE YEAR LATER

NEW YORK'S EXPERIENCE WITH

DRUG LAW REFORM

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A Report by the Legal Aid Society

ONE YEAR LATER
A REVIEW OF
NEW YORK'S EXPERIENCE WITH DRUG LAW REFORM
A REPORT BY THE LEGAL AID SOCIETY

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THE DRUG LAW REFORM ACT OF 2004

Introduction

One year ago, on December 14, 2004, Governor Pataki signed into law The Drug Law Reform Act of 2004 (DLRA).¹ The law reformed the draconian Rockefeller Laws, which were among the most punitive in the nation. They were so harsh that leaders of both parties in the legislature agreed that the New York drug laws were in need of reform. Even former legislative leaders who had sponsored the Rockefeller Laws in the 1970s called for their reform.

The Rockefeller Laws required a sentence of 15 years to life for a first time conviction of a sale of two ounces or possession of four ounces of a contraband drug. The sentencing court was given no discretion to adjust the length of the sentence to the degree of involvement of the offender in a drug enterprise or his or her prior criminal record. In case after case judges decried the unfairness of the law as they were forced to impose mandatory sentences.

Drug Law Reform in New York State had long been a priority of a diverse group of organizations and individuals meeting together as “Real Reform New York.”² This coalition included former prisoners who had been incarcerated under the laws, drug treatment providers, legal advocacy groups, and such other organizations as Drug Policy Alliance, Drop the Rock!,³ NY Mothers of the Disappeared,⁴ Seven Neighborhood

¹ L. 2004, Ch. 738.

² See www.realreformny.org.

³ See www.droptherock.org.

⁴ See www.nymom.org.

Action Partnership, and many others. The need for reform was supported by research demonstrating that drug treatment was far more cost effective than incarceration at reducing drug addiction.⁵ By showing a multitude of individual examples of the unfairness of the drug laws, the advocacy groups gradually changed the opinions of many New Yorkers as to the effectiveness of incarceration as a solution to the drug problem. At the time of passage of the DLRA, a majority of New Yorkers had come to favor drug law reform.⁶

This report, issued on the first anniversary of the DLRA, reviews the objectives of the law, evaluates its performance over the past year, and discusses some of the issues the DLRA did not reach but which should be addressed in the coming legislative session.

⁵ Rydell, C.P. & Everingham, S.S., *Controlling Cocaine*, Prepared for the Office of National Drug Control Policy and the United States Army (Santa Monica, CA: Drug Policy Research Center, RAND Corporation, 1994), p. xvi.; National Clearinghouse for Alcohol and Drug Information, U.S. Dept. Of Health and Human Services, *National Treatment Improvement Evaluation Study - Costs of Treatment*, <http://www.health.org/govstudy/f027/costs.aspx>.

⁶ Seventy-nine percent of New Yorkers favored restoring sentencing discretion to judges in drug cases. Richard Perez-Pena and Marjorie Connelly, *Pataki viewed favorably in Poll, Despite Qualms About Economy*, New York Times, October 18, 2002, at A1.

THE DLRA AND ITS LIMITATIONS

A. Accomplishments

The DLRA changed New York law in a number of ways. For all drug offenders who commit crimes after the new law's effective date, it replaced the old indeterminate sentencing system, in which sentences had a minimum and a maximum term, with determinate sentences that run for one flat period of time.⁷ For most drug offenders, the minimum possible term of the new determinate sentences is shorter than the previous indeterminate ones. For example, the minimum sentence for a person convicted of an A-I felony who had no prior felony convictions is now eight years instead of 15 years to life under the old law. The new system, however, also allows the sentencing judge in such an A-I case to impose a sentence as high as 20 years. For offenders with a prior violent felony offense, the sentence range is actually greater than under the old law.

The most immediate effect of new law was on those already serving the most serious drug offenses. This group, which initially included 473 people convicted of the A-I drug crimes, was permitted to apply to be re-sentenced in accordance with the terms of the new determinate sentences.⁸ And for those serving lesser sentences, it permitted an increase in "merit time" for those who qualified for this program, thereby allowing some prisoners to be considered for release at an earlier time.⁹ The law also required the Division of Parole to terminate the sentences of some drug offenders on parole who met

⁷ After considerable division in the lower courts, the Appellate Division First Department recently ruled that the new sentences available under the DLRA should not be applied to cases in which the crime had been committed before the effective date of the statute but the sentence was imposed after. People v. Nelson, New York Law Journal, October 3, 2005, p. 26, col. 4 (1st Dept.).

⁹ Id., section 30.

certain conditions.¹⁰

The DLRA also expanded the number of prisoners eligible for prison-based drug treatment. It did this by increasing eligibility for the state prison Comprehensive Alcohol and Substance Abuse Treatment program (CASAT) by lengthening the eligibility date to within 30 months of the prisoner's earliest possible release from prison.¹¹ Eligibility had previously been set at 24 months. The Department of Correctional Services (DOCS) was directed to count all possible good time and merit time in this computation.¹² The new law also allowed judges for the first time to sentence people directly into prison based drug treatment (CASAT).¹³ Prior to this DOCS had exclusive control over admission to this program.

B. Shortcomings

Many drug law reform advocates were critical of the DLRA because it fell short of achieving important goals of the drug law reform movement. While it did eliminate some of the harshest of the old mandatory sentences, it still required judges to sentence people to prison in situations where the judge thought placement into a drug treatment program was more appropriate. The new law also failed to provide any additional money for treatment programs. It appeared as if the legislature has responded only to the criticism that the mandatory sentences were too long, but it was unprepared to act on the growing realization that less expensive, safer, and more effective treatment alternatives to prison were available.

¹⁰ Id., section 38, amending Executive Law 259-j.

¹¹ Id., sections 1 and 2, amending Correction Law 2 (18).

¹² Id., section 3, amending Correction Law 851.

¹³ Id., section 20, amending Penal Law 60.04.

Another flaw in the DLRA was that the vast majority of people serving sentences below the level of an A-I felony were not permitted to seek a new sentence in accordance with the reformed sentencing scheme. The Legislature has since somewhat expanded the number of people eligible to apply for new sentences by enabling some of the prisoners serving A-II drug felony sentences to apply for re-sentencing. The bill became effective on October 29, 2005¹⁴ and it should apply to at least 550 people. Even after this change, the very limited retroactive application of the DLRA meant that many prisoners were still left serving overly long old law sentences even though the new sentence range envisioned that a shorter period of incarceration was appropriate.

The debate in the legislature over the DLRA reflected a wide range of opinion. Some thought it went too far and opposed it. Some opposed it on the ground that the failure to allow any further judicial discretion in sentencing meant it did not go far enough. Senator Thomas Duane explained his opposition as follows: “I can’t believe after all this time this is what ends up on our desks. Everybody stays in jail. New, newly convicted people, no – no chance to go into treatment. Off to jail. We should be ashamed of ourselves. Rockefeller drug law reform? Hah. I don’t think so.”¹⁵

Senate Majority Leader Joseph Bruno recognized the limited nature of the DLRA and acknowledged that the legislature needed to return to the subject of drug law reform. “What I’m saying to all of you is something you already know. There is more to be done. And we’re going to get there, and we’re going to do it. Because the bottom line really is to help people, help people. . . And let’s resolve that we’re going to go on and continue to talk on how we can create alternatives for nonviolent drug offenders and for other

¹⁴ L.2005, ch. 643.

¹⁵ Senate Debates, December 7, 2004, p. 6289.

offenders.”¹⁶

In the final vote the DLRA passed the Assembly by a vote of 94 to 43 and the Senate by a vote of 53 to six. When he signed the DLRA into law, Governor Pataki expressed relief that the harsh sentences of the old law had been ameliorated: “Hundreds of non-violent offenders serving unduly long sentences will have an opportunity to be immediately reunited with their families. With the signing of this law today, these offenders will be given another chance to lead a productive life free of drugs and crime.”¹⁷

¹⁶ Id at 6311, 6312.

¹⁷ Governor’s Press Release, December 14, 2004.

THE PAST YEAR'S EXPERIENCE WITH THE DLRA

The Governor's expectation that hundreds of prisoners serving unduly long sentences would be immediately reunited with their families was not fulfilled. Re-sentencing has been a far slower process, with fewer people being released from prison than anticipated. According to DOCS, only about half, or 270 of the 473 people serving A-I felony sentences, have been re-sentenced.¹⁸ Of those 270 people, only 142 have actually been released from prison.¹⁹

While many parties are accountable for the delay in moving cases, prosecution opposition has been the primary reason for continued incarceration in many cases. The DLRA allows for a wide range of sentences to be imposed by a judge upon re-sentencing. For instance, a person with no prior felony conviction could receive a sentence as low as 8 years but as high as 20 years. Prosecutors in some counties consistently argue for sentences nearer to the maximum. Consequently, release rates vary widely as to county, reflecting differing prosecutorial approaches. In Brooklyn, 50 percent of the people originally eligible to be re-sentenced have now been released from prison. In Manhattan, only 30 percent have been released, while in Monroe County the figure is 34 percent.²⁰

The overall impact of the DLRA on the prison population is more difficult to ascertain. On January 1, 2005, there were just over 15,500 drug offenders in state

¹⁸ As reported by telephone by DOCS, Office of Sentence Review, December 1, 2005. This number does not include the relatively small number of cases where the application was denied by the court. In those cases no report of a modification of sentence is made to DOCS.

¹⁹ Id.

²⁰ Data produced by comparing number of prisoners originally eligible to be re-sentenced as reported by the Department of Correctional Services with individual custody status of each A-I eligible prisoner as reported on the DOCS website. _ 7 _

prison²¹ while on October 31, 2005, there were 14,476 such offenders²² indicating a reduction of about 900 prisoners during 2005. It is difficult to attribute the drop in drug offenders to the DLRA, however, since that population had been decreasing even under the old law.²³ The 900 prisoner reduction this year continues this downward trend at about the same rate as before the enactment of the DLRA.

The DLRA's goal of expanding eligibility for drug treatment inside state prison has been thwarted by DOCS' questionable interpretation of the law. The law expanded eligibility into CASAT to prisoners within 30 months of their earliest release date, and it directed DOCS to count "all potential credits and reductions including but not limited to merit time and good behavior allowances."²⁴ DOCS, however, still does not include the merit time credit that was added by the DLRA when computing eligibility for CASAT. The result is a reduction in the number of otherwise eligible prisoners and unnecessary delay in the provision of treatment.

Similarly, DOCS has not fully implemented the provision of the DLRA that allows judges to sentence people directly into the CASAT program.²⁵ Rather than considering it as a judicial order, DOCS considers the judge's order of placement to be a recommendation subject to approval by DOCS. We have seen a number of prisoners ordered by a court to be placed into CASAT only to have them rejected by DOCS. The law clearly states, however, that the judge can "order" the criminal defendant into the

²¹ The Correctional Association of New York, *Drop the Rock: Repeal the Rockefeller Drug Laws*, February 2005.

²² As reported by The Correctional Association of New York, November 14, 2005.

²³ The Correctional Association of New York, *Trends In New York State Prison Commitments*, February 2005

²⁴ Correction Law 851 2-b.

²⁵ Penal Law 60.04 (6), Correction Law 2 (18).

program.²⁶ In this instance, DOCS is refusing to cede the gate-keeping function over this program to the court.

Either an amendment to the DLRA or litigation to enforce the original intent of the Legislature is necessary to accomplish the goal of expanded prisoner eligibility for drug treatment. As we consider next steps in drug law reform, the resistance of DOCS to complying with its legally required role as a provider of drug treatment services should be considered. The creation of additional authority for a court to order treatment based in the community in which the offender resides would offer greater assurance that the offender will actually receive the treatment services ordered by the court.

²⁶ Penal Law 60.04 (6).

NEXT STEPS: ACHIEVING REAL REFORM

At the time the DLRA was enacted, the legislative leadership recognized that the new law, although limited, the best agreement that could be had at the time. Not surprisingly, the law has not produced major changes in the prison population over the course of the past year, and it has resulted in the release of a smaller number of A-I felony offenders than was anticipated.

A. Judicial Discretion in Drug Sentencing

The task facing the Legislature in the next legislative session was succinctly outlined in the New York State Senate bill sponsor memorandum for the DLRA itself: “Now that this important first step has been taken by the legislature, judicial discretion, expanded treatment options and additional sentencing changes should be adapted. Such a comprehensive approach would eliminate the injustices of the Rockefeller laws, place more offenders into drug treatment and, by fighting substance abuse, make our streets, homes and community safer.”²⁷ Whether it was phrased as Assemblyman Aubry’s desire to take a first step and continue the process or Senate Majority Leader Bruno’s recognition of the need to continue to discuss the creation of meaningful alternatives, there was general consensus from both parties that more needed to be done.

Central to the debate is the issue of who should decide the sentence: the prosecutor or the judge. Under the Rockefeller Drug Laws and continuing with the DLRA, the sentencing judge has very little independent authority to place a drug offender into treatment. In view of the prosecutor’s discretion over the initial charge and control over the plea process itself, and the mandatory sentencing law that requires incarceration,

the judge has little say over a placement into a treatment program in most cases. The prosecutor effectively determines who enters a treatment program and who does not. In our adversary system of justice a sentence mechanism as crucial as drug treatment should not be controlled exclusively by one of the parties, but should be equally available to the judge, the one objective person involved in the criminal case.

Both the Legislature and the Governor have introduced proposals over the last five years that would allow the sentencing judge to place an offender into treatment even over the objection of the District Attorney.²⁸ Because these proposals have meant a loss of control for the prosecution, they have been vigorously opposed by the District Attorney's Association. Nevertheless, an increase in the power of the sentencing judge to order treatment instead of prison is a necessary element of any reform.

District Attorney attitudes toward access to treatment may be changing. Traditionally many prosecutors have measured their success by the number of convictions and sentences imposed on felony indictments. By this measure, a successful referral to treatment is not a "win," even though such a referral may be in the best interest of both the criminal defendant and the local community. One indicator of changing attitudes is that upstate communities are increasingly recognizing that drug addiction is a problem all over the state, not just in New York City, and that access to treatment is a good idea for everyone. The coming year should tell whether the recent elections in Tompkins and Nassau Counties of District Attorney candidates favoring increased judicial discretion have modified the prosecutors' position.

²⁸ See e.g. Governor's Program Bill Number 64 introduced in 2003.

B. Increased Funding for Treatment

Increased funding for treatment is indispensable to the success of any reform. Without increased treatment capability, expanding judicial discretion will be meaningless. There will be only increased numbers of people vying for a static number of treatment slots. On this issue the compartmentalized decision-making process in the Legislature – in which the budget is first decided and only then are substantive matters such as drug law reform considered – has been a real impediment. There must be an increase in available resources in the budget before the details of a judicial diversion program are finalized.

C. B Felony Drug Sentence Reform

Further sentencing reform should also be on the legislative agenda. “B” level felonies are the most frequently charged drug offense. They compose about a third of the new drug commitments to state prison each year.²⁹ New York defines a B level drug sale as any sale of a narcotic drug regardless of the quantity involved.³⁰ This broad category sweeps in low-level non-violent offenders along with those who sell larger quantities of narcotics. It is incongruous that a street sale of even a small quantity of a narcotic can be at the same “B” level crime as robbery with a deadly weapon,³¹ or forcible rape.³² B felony drug crimes are punishable by sentences of up to nine years for a first offense and 12 years for a second conviction for a sale of drugs. New York should address the remaining inequities in the most utilized part of the system,

²⁹ New York State Department of Correctional Services, *Characteristics of New Court Commitments 2003*, Chart: Drug Crimes By Felony Class Category and Year Received, 2000-2003, New Court Commitments, p. 54.

³⁰ Penal Law 220.39.

³¹ Penal Law 160.15.

³² Penal Law 130.35.

the B felonies.

Establishing a quantity requirement for the B level sale of a narcotic drug, as is the case for other drugs, would have the valuable effect of removing many of the lowest level street sales from the category of B felonies and thus facilitate greater access to community-based treatment programs for these low level offenders. Sale of a small quantity of narcotics, e.g. two grams, should become a C felony.

We should also adopt retroactive relief that would reduce overlong sentences for those now serving B level drug offenses in state prison. As we have seen, reform has allowed the A-I and some of the A-II offenders to apply to be re-sentenced. But the DLRA did not reach those serving B drug felonies. This has resulted in a disjointed system in which B felons sentenced for street sales under the old law are serving sentences as long as eight and a third to 25 years for a first felony, while those serving time on the more serious A-I cases may now have sentences as low as 8 years. There are over 4,800 B drug felons in the prison system.³³ This large number will make the individual application and hearing process afforded to offenders serving A-I and A-II felony offenses impractical to replicate. Instead, the Legislature should consider some form of automatic sentence reduction system, such as a proportional 30 percent reduction of their minimum and maximum terms. As the experience of the last year has shown, a system of individual applications, rather than across-the-board reductions, produces far fewer actual reductions and releases than envisioned by the legislators.³⁴

³³ As reported by Department of Correctional Services, Division of Program Planning Research and Evaluation, November 16, 2005.

³⁴ The following law students and law graduates provided valuable assistance in the research and preparation of the paper: Jeremy Pfetsch, Florian Feder, and Michele Melnick. A note of appreciation is also due to David Reis who organized Brooklyn Law students to review the custody status of each of the 471 prisoners who were initially eligible to be re-sentenced under the DLRA.