



## DRUG LAW REFORM – HOW DRAMATIC THE IMPACT?

Drug law reform is one of the key issues in the public debate -- and also before the New York State Legislature -- this year. Various proposals to provide an opportunity for offenders to be sent to community-based treatment instead of incarceration have been offered by the Executive, the Legislature and advocates. While differing in scope, all proposals share one feature: they return discretion to judges to sentence certain offenders (the population differs in each proposal) into mandated treatment instead of a prison cell. This provides an opportunity for individuals to receive treatment and perhaps other community supervision and services unavailable under current law. Where these proposals differ dramatically, however, is in the number of offenders potentially eligible for diversion from prison to mandated treatment or other non-incarcerative punishment at the judge's discretion.

This report by the Legal Action Center focuses on this critical issue by examining how many people committed to the Department of Correctional Services (DOCS) in 2000 who committed non-violent crimes and faced mandatory state prison time under current state law would have been *eligible*, under the various reform proposals, for judicial diversion. Whether they actually would have been diverted would have been determined by the judge, who would decide whether the offender was addicted and needed treatment or met other criteria determined by the court.

### EXECUTIVE SUMMARY

**This report examines how many individuals convicted of non-violent crimes and sent to DOCS facilities in 2000 would have been eligible for judicial diversion under each of four sentencing reform proposals: Governor Pataki's bill, the proposal put forth by the Assembly, and two variations on long standing proposals to repeal the sentencing laws.**

#### **In sum:**

- **343 Individuals Committed to DOCS in 2000 May Have Become Eligible for a Non-Incarcerative Sentence Under the Governor's Proposal.**
- **4,872 Individuals Committed to DOCS in 2000 Would Have Become Eligible for a Non-Incarcerative Sentence Under the Assembly's**

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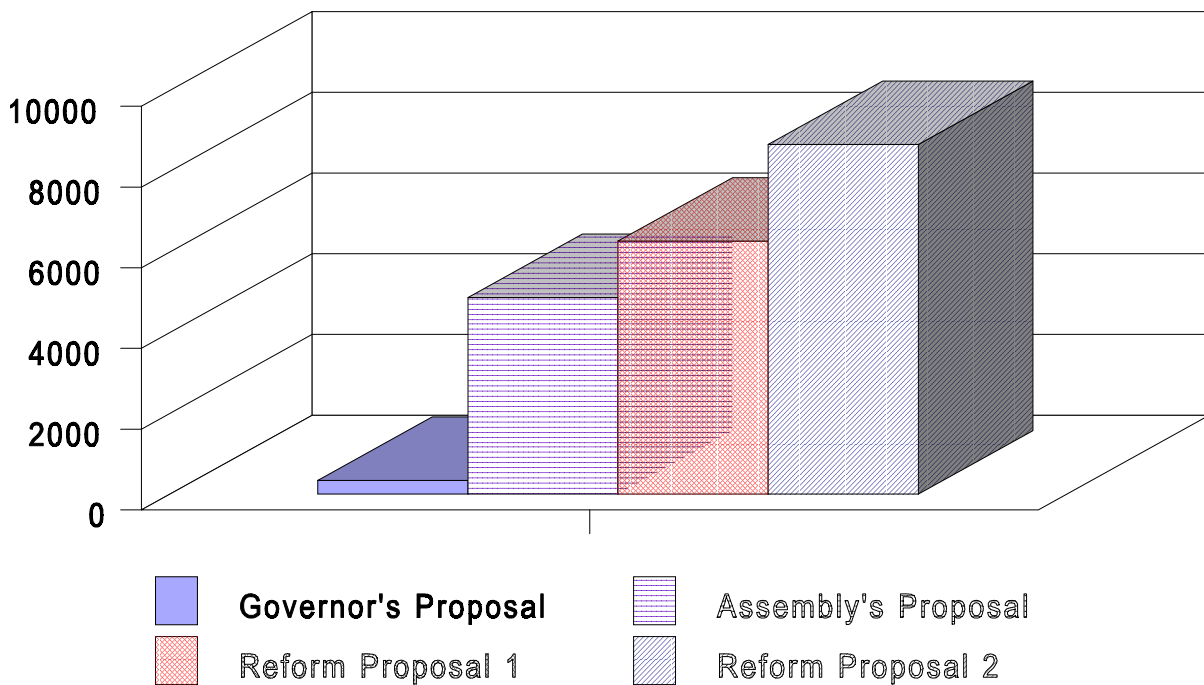
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**Proposal.**

- **6,274 Individuals Convicted of Non-Violent Offenses Committed to DOCs in 2000 Would Have Become Eligible for a Non-Incarcerative Sentence Under a Repeal Proposal Making All Non-Violent Felony Offenders (Excluding Class A Felons) With No Violent Prior Felony Convictions Eligible For Diversion.**
- **8,672 Individuals Convicted of Non-Violent Offenses Committed to DOCs in 2000 Would Have Become Eligible for a Non-Incarcerative Sentence Under a Repeal Proposal Making All Non-Violent Felony Offenders (Excluding Class A Felons) Regardless of the Nature of the Prior Felony Offense(s).**

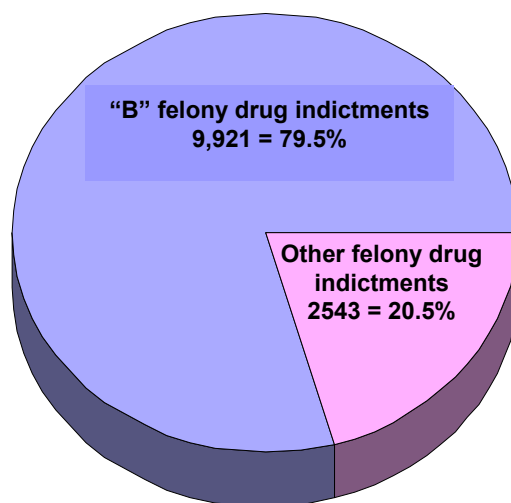
Numbers of Offenders Committed to DOCS in 2000 Eligible for Judicial Diversion Under Various Sentencing Reform Proposals



## BACKGROUND

Under New York's current sentencing laws, individuals facing B felony charges<sup>1</sup> as their first felony offense face mandatory prison time. According to the Felony Processing Preliminary Report for New York State issued by the New York State Division of Criminal Justice Services (DCJS), in 2000, there were 12,464 indictments on felony drug charges, 9,921 or 79.5% of which were class B felony indictments.<sup>2</sup>

**Drug Felony Indictments in New York State in 2000**  
**Total = 12, 464**



Individuals convicted of any second or subsequent felony offenses<sup>3</sup>, regardless of the nature of the offense, also face mandatory prison time. Authority to send any of these second felony offenders or individuals facing B felony charges to treatment or other community supervision and services instead of prison rests solely with the District Attorneys.<sup>4</sup> Judges have no similar authority to mandate these offenders into treatment. As a result of New York's drug laws, tens

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<sup>1</sup>Under New York State law, possession with intent to sell any amount of a narcotic drug is a class B felony.

<sup>2</sup>The 2000 reports are considered preliminary by DCJS because not all jurisdictions completed reporting of dispositions by the mandated file closing date. According to the Felony Processing Final Report for New York State in 1999, there were 15,236 indictments on felony drug charges. 12,515 or 82% of which were class B felony indictments.

<sup>3</sup>Hereafter described as second felony offenders, consistent with New York Penal Law § 70.06.

<sup>4</sup>Under current law, individuals convicted of a second felony offense must be sentenced to prison. The only way they can avoid prison time is if the felony charges against them are dismissed (with the exception of the Willard Program, which allows a narrow category of second felony offender, some with the District Attorney's consent, to get an alternative sentence). Barring an acquittal, District Attorneys must agree to a dismissal before the charges can be dismissed. Thus, currently only District Attorneys have the authority to send individuals facing second felony charges to treatment as a condition of getting the charges dismissed.

of thousands of people convicted of non-violent offenses, many of them addicted,<sup>5</sup> have been mandated into prison with no discretion on the part of judges who might have deemed another sentence more effective or appropriate.

Recognizing that sending appropriate, non-violent addicted offenders to treatment can be effective<sup>6</sup>, the reform proposals introduced by Governor and the Assembly contain provisions returning to judges discretion in sentencing certain felony drug offenders to treatment in lieu of incarceration. There have also been long-standing calls to repeal the mandatory sentencing laws and expand judicial discretion to a broader population.

### **The Governor's Proposal**

The Governor's proposal extends eligibility for judicial diversion to community-based treatment to those second felony offenders who are convicted of class C, D, and E drug possession felonies and who have one prior non-violent felony conviction.<sup>7</sup> The diversion of individuals charged with B felonies, (which includes sale of, or possession with intent to sell any amount of cocaine, heroin or other controlled substance(s)) whether first or second felony offenders, remains under the control of the District Attorneys.<sup>8</sup>

### **The Assembly's Proposal**

The Assembly's reform plan extends eligibility for judicial diversion into community-based treatment to all second felony offenders charged with class B, C, D, and E felony drug possession or sale who have no prior violent felony convictions. First time felony offenders charged with or convicted of class B drug charges, who under current sentencing law face mandatory prison time, would also be eligible for judicial diversion to treatment from prison.

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<sup>5</sup>According to a recent February 2001 report by the New York State Office of Alcoholism and Substance Abuse Services, 70% of all offenders in the custody of DOCS are subsequently identified as substance abusers. 74% of the youth in the custody of the Office of Children and Family Services (OCFS) have a serious alcohol or drug problem.

<sup>6</sup> On January 17, 2001, Governor Pataki introduced the Drug Law Reform Act of 2001 which promised "comprehensive reform of [the] Rockefeller Drug Laws". A stated goal of this proposal was to expand judicial discretion in sentencing certain felony drug offenders, recognizing that "effective treatment for nonviolent offenders can work." On March 13, 2001, Assembly Speaker Sheldon Silver proposed The Drug Law Reform, Drug Treatment, and Crime Reduction Act of 2001, which aimed at reducing drug-related crime by "ordering non-violent drug offender to mandatory drug-treatment programs [and] providing judges with greater sentencing discretion..."

<sup>7</sup>First time felony offenders who are charged with Class C, D, and E drug felonies are currently eligible for diversion.

<sup>8</sup>The Governor's bill continues to allow individuals charged with drug sale offenses to be diverted into treatment with the consent of the District Attorney, and also provides for prosecutor-sponsored drug treatment prison diversion programs or Drug Treatment Alternative to Prison (DTAP) programs. These are programs that are currently in existence and operated by a number of District Attorneys. Because they thus do not provide new opportunities for diversion, they are not discussed in this report.

## **Repeal of the Second Felony Offender Law Proposals**

For many years there have been calls for the repeal of the mandatory sentencing laws so that first time non-violent offenders charged with class B felonies and non-violent second felony offenders (not just those individuals convicted of drug offenses) would be eligible for community supervision. Some supporters would limit diversion to those non-violent second felony offenders whose earlier convictions were also for non-violent felony offenses. Others would open up the pool of eligible offenders to those second felony offenders facing sentencing for non-violent offenses regardless of the nature of their prior felony conviction(s).

### **METHODOLOGY**

In order to determine the numbers of individuals who would have been eligible for judicial diversion, we examined statistics collected by DCJS. We looked at the first felony offender pool committed into DOCS facilities in 2000 convicted of class B non-violent felony offenses. We also looked at the second felony offender pool committed into DOCS facilities in 2000, examining the nature of the current offense (whether they had committed drug or other non-violent offenses), class of offense (whether they had committed B, C, D, or E felony offenses) and nature of prior felony offense(s) (violent or non-violent).

We then calculated the numbers of individuals committed into DOCS in 2000 who fit the category of offenders who are not now but would become eligible for judicial diversion under the various proposals. These numbers represent the total pool of offenders who under current law were required to receive a sentence of incarceration, but under the reform proposals being examined would have been eligible to be sentenced either to prison or to a non-incarcerative punishment at the discretion of the judge. Whether any of these individuals would have actually been diverted would have been determined by the judge, who would determine if the offender was addicted and needed treatment or met other criteria determined by the court.

### **NUMBERS OF INDIVIDUALS WHO WOULD HAVE BECOME ELIGIBLE FOR JUDICIAL DISCRETION UNDER EACH PROPOSAL**

#### **The Governor's Proposal**

In 2000, the following individuals committed to DOCS would have become eligible for judicial diversion under the Governor's proposal:

#### **Second felony offenders committed to DOCS for drug possession with one prior non-violent felony conviction:**

- 99 individuals convicted of class C second felony drug possession.
- 177 individuals convicted of class D second felony drug possession.

- 67 individuals convicted of class E second felony drug possession.

**TOTAL NUMBER OF INDIVIDUALS COMMITTED TO DOCS IN 2000 WHO WOULD HAVE BECOME ELIGIBLE FOR JUDICIAL DIVERSION UNDER THE GOVERNOR'S PROPOSAL: 343** (Fewer than this total of 343 would actually have become eligible for judicial diversion because many individuals convicted of class C, D, and E drug possession convictions are charged with B felonies, offenses over which District Attorneys still retain control under the Governor's proposal.)

### **Assembly's Proposal**

In 2000, the following individuals committed to DOCS would have become eligible for judicial diversion under the Assembly's proposal:

#### **First time offenders convicted of Class B drug offenses:**

- 1,487 individuals were convicted of first felony drug offenses.

**NUMBER OF FIRST FELONY OFFENDERS CONVICTED OF DRUG POSSESSION OR SALE AND COMMITTED TO DOCS IN 2000 WHO WOULD HAVE BECOME ELIGIBLE FOR JUDICIAL DIVERSION UNDER THE ASSEMBLY'S PROPOSAL: 1,487**

#### **Second felony offenders committed to DOCS for drug offenses with no prior violent felony convictions:**

- 563 individuals were convicted of class B second felony drug offenses.
- 1,076 individuals were convicted of class C second felony drug offenses.
- 1,407 individuals were convicted of class D second felony drug offenses.
- 339 individuals were convicted of class E second felony drug offenses.

**NUMBER OF SECOND FELONY OFFENDERS CONVICTED OF DRUG POSSESSION OR SALE AND COMMITTED TO DOCS IN 2000 WHO WOULD HAVE BECOME ELIGIBLE FOR JUDICIAL DIVERSION UNDER THE ASSEMBLY'S PROPOSAL: 3,386**

**TOTAL NUMBER OF FIRST AND SECOND FELONY OFFENDERS WHO WOULD HAVE BECOME ELIGIBLE FOR JUDICIAL DIVERSION UNDER THE ASSEMBLY'S PROPOSAL: 4,872**

**Repeal Proposal 1 – Pool of offenders committed to DOCS who would have become eligible**

for judicial diversion in 2000 includes first time offenders convicted of non-violent class B offenses and second felony offenders convicted of non-violent class B, C, D, and E offenses whose prior felony conviction(s) were for non-violent offenses.

In 2000, the following individuals committed to DOCS would have become eligible for judicial diversion under Repeal Proposal 1:

First time offenders convicted of non-violent Class B offenses:

- 1,487 individuals were convicted of first felony non-violent offenses.

**NUMBER OF FIRST FELONY OFFENDERS CONVICTED OF DRUG POSSESSION OR SALE AND COMMITTED TO DOCS IN 2000 WHO WOULD HAVE BECOME ELIGIBLE FOR JUDICIAL DIVERSION UNDER THE REPEAL PROPOSAL 1: 1,487**

Second felony offenders convicted of non-violent offenses who have no violent prior felony convictions:

- 572 individuals were convicted of non-violent class B felony offenses.
- 1,096 individuals were convicted of non-violent class C felony offenses.
- 1,943 individuals were convicted of non-violent class D felony offenses.
- 1,176 individuals were convicted of non-violent class E felony offenses.

**NUMBER OF SECOND FELONY OFFENDERS CONVICTED OF DRUG POSSESSION OR SALE WITH NO VIOLENT PRIOR FELONY CONVICTIONS AND COMMITTED TO DOCS IN 2000 WHO WOULD HAVE BECOME ELIGIBLE FOR JUDICIAL DIVERSION UNDER THE REPEAL PROPOSAL 1: 4,787**

**TOTAL NUMBER OF FIRST AND SECOND FELONY OFFENDERS CONVICTED OF NON-VIOLENT OFFENSES WITH NO VIOLENT PRIOR FELONY CONVICTIONS COMMITTED TO DOCS IN 2000 WHO WOULD HAVE BECOME ELIGIBLE FOR JUDICIAL DIVERSION UNDER REPEAL PROPOSAL 1: 6,274**

Repeal Proposal 2- – Pool of offenders committed to DOCS in 2000 who would have become eligible for judicial diversion includes first time offenders convicted of non-violent class B offenses and second felony offenders convicted of non-violent class B, C, D, and E offenses regardless of nature of prior felony conviction(s).

First time offenders convicted of non-violent Class B offenses:

- 1,487 individuals were convicted of first felony non-violent offenses.

**NUMBER OF FIRST FELONY OFFENDERS CONVICTED OF DRUG POSSESSION OR SALE AND COMMITTED TO DOCS IN 2000 WHO WOULD HAVE BECOME ELIGIBLE FOR JUDICIAL DIVERSION UNDER THE REPEAL PROPOSAL 2: 1,487**

Second felony offenders convicted of non-violent offenses regardless of nature of prior felony conviction (s):

- 815 individuals were convicted of non-violent class B felony offenses.
- 1,553 individuals were convicted of non-violent class C felony offenses.
- 2,927 individuals were convicted of non-violent class D felony offenses.
- 1,890 individuals were convicted of non-violent class E felony offenses.

**NUMBER OF SECOND FELONY OFFENDERS CONVICTED OF DRUG OFFENSES POSSESSION OR SALE AND COMMITTED TO DOCS IN 2000 WHO WOULD HAVE BECOME ELIGIBLE FOR JUDICIAL DIVERSION UNDER THE REPEAL PROPOSAL 2: 7,185**

**TOTAL NUMBER OF FIRST AND SECOND FELONY OFFENDERS CONVICTED OF NON-VIOLENT OFFENSES REGARDLESS OF NATURE OF PRIOR FELONY CONVICTION(S) COMMITTED TO DOCS IN 2000 WHO WOULD HAVE BECOME ELIGIBLE FOR JUDICIAL DIVERSION UNDER REPEAL PROPOSAL 2: 8,672**

**CONCLUSION**

This study illustrates some of the key differences among the various sentencing reform proposals, including how they address the following questions:

- Over which classes of offenses should judges have discretion (should class B offenses be included)?
- Should people convicted or even charged with sale of or possession with intent to sell small amounts of illegal drugs, many of whom are addicted and sell to earn money to buy their next “fix,” be eligible for judicial diversion to treatment and other community

sanctions?

- Should addicted offenders charged with other non-violent offenses (such as property offenses) be included in the pool of individuals eligible for judicial diversion into treatment?
- Should judicial diversion be limited to addicted offenders or should other offenders be given an opportunity to receive a community-based sanction (such as mandated mental health treatment, community service, electronic monitoring, and restitution)?

These are some of the key issues that will be addressed in the continuing debate over sentencing reform. As this report shows, the numbers of individuals eligible for judicial diversion will vary dramatically depending on the answers to those questions.