

## FELONY SENTENCING IN SUPERIOR COURT

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Whenever a defendant is offered a plea to a lesser charge (or not, in which case he/she must decide whether to plead guilty as charged or go to trial), one question that he/she is very likely to ask is, “what am I looking at?” Beyond satisfying the client’s understandable curiosity about his/her sentence exposure, counsel has both a legal and professional (i.e. ethical) obligation to inform him/her of the full range of punishment possibilities (including any rehabilitative options other than state prison), that accompany the charges in the event of a conviction. (See Rule of Professional Conduct [RPC] 1.4[1][a][b]).

That way, if the defendant decides to cut his/her losses and plead guilty, he/she can proceed with eyes wide open, and the court can be satisfied that the plea has been knowingly, voluntarily and intelligently entered. (People v Harris 61 NY2d 9 [1983], People v Conceicao 26 NY3d 375 [2015]).

That is to say, that the defendant has not only been informed of the rights the he/she is giving up by pleading guilty (Boykin v Alabama 395 US 238 [1969]: e.g. the right to be tried by a jury of his/her peers who must all be satisfied that guilt has been proven beyond a reasonable doubt before there can be a conviction, the right to confront his/her accusers [typically by cross examination], the right to testify and/or call witnesses his/her own behalf), but also has been fully apprised of the potential DIRECT consequences of his/her plea (i.e. the sentence possibilities from probation to prison (including post release supervision [PRS] in the event of a conviction for a Violent Felony Offense [VFO- PL 70.02], People v Catu 4 NY3d 242 [2005], and the immigration consequences (e.g. deportation) if the defendant is not a citizen of this country. (Padilla v Kentucky 559 US 356 [2010]).

There are many variables that can affect the nature and duration of a Superior Court sentence including: the LEVEL or DEGREE of the felony offense (Class E through Class A), the statutory designation of the crime (Violent Felony [VF]-[PL 70.02] or Non-Violent Felony [NVF]-[PL 70.00], the NATURE of the crime, e.g. whether: it is a SEX OFFENSE (PL 70.80[1] or a SEXUALLY MOTIVATED FELONY [SMF][PL 130.91], the crime was committed against a child (e.g. Course of Sexual Conduct Against A Child 1st degree PL 130.75); whether the defendant has a predicate NVF conviction (PL 70.06) or VF felony conviction (PL 70.04), or perhaps qualifies as either a PERSISTENT FELONY OFFENDER (PFO), (PL70.10) or PERSISTENT VIOLENT FELONY OFFENDER (PVFO), (PL 70.08).

In cases of multiple convictions, counsel must consult PL 70.25 to determine whether the sentences must or may run CONSECUTIVELY or CONCURRENTLY. Counsel must also be mindful of the client’s age at the time of the commission of the crime (and the level of offense) to determine whether he/she will be prosecuted (and ultimately sentenced if convicted), as a JUVENILE OFFENDER (JO) [CPL 1.20[42], PL 10.00[18], PL30.00, PL 70.05], a Juvenile

DELINQUENT (JD) whose case will be transferred to Family Court (CPL 722.23, FCA 308.1), an Adolescent Offender (CPL 1.20[44], CPL Art. 722. PL 60.10) or adjudicated a YOUTHFUL OFFENDER (YO) (CPL 720.10, PL 60.02).

In order to ameliorate some of the harsh effects of the Rockefeller Drug Laws, the Drug Law Reform Act (2009), altered the sentencing landscape for FELONY DRUG OFFENDERS in part, by replacing lengthy INDETERMINATE prison sentences with shorter DETERMINATE sentencing options including specified periods of PRS. (PL 70.70, 70.71, 70.45). In evaluating the options available to a client charged with a drug offense (or other eligible offense under CPL 410.91), counsel must be aware of, and where appropriate, take advantage of PAROLE SUPERVISION and JUDICIAL DIVERSION (CPL 216.00). Shock Incarceration (Correction Law 865) can also be an alternative worth pursuing for clients who qualify.

In the realm of DOMESTIC VIOLENCE (DV), the Domestic Violence Survivors Justice Act (2019) has provided judges, in appropriate cases, with the option of imposing more lenient indeterminate sentences (in lieu of lengthy determinative terms) upon defendants (mostly women) who qualify as VICTIMS OF DOMESTIC VIOLENCE (DV) which played a substantial part in the commission of their crimes (PL 60.12).

The types of incarcerative sentences that are available for a felony conviction (depending on which of the above-stated variables apply), include an INDETERMINATE sentence, a DETERMINATE sentence, a DEFINITE sentence (spent in a County Correctional Facility up to one year), and, with Class A-1 Felonies, life without parole.

For purposes of definition, an INDETERMINATE sentence (generally applicable to NVF'S and now DV survivors), is one which imposes a term of imprisonment GREATER THAN ONE YEAR which is expressed in a MINIMUM-TO-MAXIMUM range. Pursuant to PL 70.00 (2), the MAXIMUM depends on the level of offense (e.g. for a Class D NVF [PL70.00[2][d], the maximum would be SEVEN YEARS and the MINIMUM, per PL 70.00([3][b], would be one-third of the maximum (i.e. two and one-third years).

So, a defendant convicted of a Class D NVF with no prior felony or VF convictions, could receive (assuming the judge has rejected the possibility of probation, an alternative definite sentence up to one year in a local correctional facility or a split sentence up to six months in jail followed by five years probation), an INDETERMINATE sentence from either: ONE to THREE YEARS, ONE and ONE-THIRD to FOUR YEARS, TWO to SIX YEARS or TWO and ONE-THIRD to SEVEN YEARS.

Once the defendant has served the minimum, he/she would become eligible for discretionary release to parole. If denied, (and, if rejected again after any future appearances before the Parole Board), the defendant, assuming he/she has earned good-time credit, will be released to parole after serving TWO-THIRDS of the maximum. (So, if the defendant had been sentenced to one to three years, he/she would be parole eligible after one year and released [with good time] to parole at the two-year mark. (Any subsequent parole violations could land him/her back in prison until maximum expiration (i.e at three years).

DETERMINATE sentences (aimed at limiting judicial sentencing discretion and early release to parole), came into existence with the Sentence Reform Act (Jenna's Law) in 1995. Rather than specifying a range of years (with the possibility of release when the minimum is reached), determinate sentences are expressed in WHOLE or HALF YEARS, 6/7ths of which must be served before the defendant is released to an additional term of Post Release Supervision, the durations of which are set forth in PL 70.45.

The Sentence Reform Act was targeted at Violent Felony Offenses (VFO'S) (PL70.02) but, as noted above, determinate sentences have since come to apply to Felony Drug Offenses. (FDO) (PL 70.70, 70.71)

As with indeterminate sentences, the duration of a determinate sentence is determined by the level/degree of the offense. So, for example, a defendant who is convicted of Class D VF offense (PL 70.02[1][c]), with no PF or PVF convictions, and assuming the defendant does not otherwise qualify for a definite sentence (PL70.02 [4][b][c]), must be sentenced, per PL 70.02(3) (c) to anywhere between two and seven years (i.e. 2 or 2and1/2, or 3 or 3 and1/2 etc up to 7years). If the defendant got the maximum 7 years, he/she she would be released at the 6-year point, and would then have to serve anywhere between one and one-half to three years of PRS (PL 70.45[2][e]), depending upon the judge's determination.

As set forth in PL 70.45(1), if a defendant is found to have violated the conditions of PRS, he/she will be subject to a further period of imprisonment up to the balance of the remaining period of PRS not to exceed five years (which can be imposed for higher grade VF'S). So, if the defendant received 3 years of PRS and violated his/her conditions at two years, he/she could be returned to prison for the remaining year of PRS. (A felony sex offender [FSO] per PL 70.80 on PRS may be subject to a further period of imprisonment up to the balance of the remaining period of PRS (which is generally MUCH LONGER for FSO'S. For example, a Class D VFSD per PL70.80[1][b] is subject to PRS of anywhere between 3 and 10 years. (PL70.45 [2-a][d]).

#### INDETERMINATE SENTENCES:

CPL 70.00(1): Except as provided in CPL 70.80(4)(5)[Felony Sex Offenses], a sentence of imprisonment for a FELONY (EXCLUDING drug [PL221] and Marijuana [PL221] cases), SHALL be an indeterminate sentence.

Per CPL 70.00(3) and (2), the minimum (which must be at least one year and no more than ONE/THIRD of the maximum per CPL 70.00[3][b]), and the maximum sentences (which must be at least three years per CPL 70.00[2]), are as follows:

3(a)(i) and 2(a): 15-25 years (min) to Life (max) for a Class A-1 Felony

Per CPL 70.00(3)(a)(ii), the minimum period of imprisonment for a Class A-II Felony shall be at least three years nor more than 8 and 1/3 years (EXCEPT for PREDATORY SEXUAL ASSAULT [PSA] (PL 130.95) or PSA Against a Child (PL 130.96) for which the minimum is between 10 and 25 years). The maximum per PL 70.00(2)(a) is Life in Prison.

3(a)(i) and 2(b): Class B felony: 8 and 1/3 yr min to 25 yr max;

3(a)(i)) and 2(c) : Class C felony: 5 yr min to 15 yr max;

3(a)(i) and 2(d): Class D felony: 2 and 1/3 yr min to 7 yr max;

3(a)(i)) and 2(e): Class E felony: 1and 1/3 yr min to 4 yr max.

These ranges represent the HIGHEST RANGE of indeterminate sentences for each level offense. It does not mean, necessarily, that a defendant could not receive a lesser range (which often happens). So, per PL 70.00 (2) and (3) set forth above, a defendant convicted of a first time, Class D NVF, for example, could possibly receive an indeterminate sentence of one to

three years, one and a third to four years, two to six years up to two and a third to seven years.

4. When a defendant (who is neither a 2FO or PFO) is sentenced for a Class D or E felony, and the court, (having regard for the nature and circumstances of the crime and to the defendant's history and character), concludes that an indeterminate sentence would be unduly harsh, MAY IMPOSE A DEFINITE SENTENCE OF IMPRISONMENT of one year or less.

5. See text for Life Imprisonment without parole .

#### SECOND FELONY OFFENDERS (2FO) (PL 70.06):

1.a. A 2FO is a person (other than a 2VFO per CPL 70.04), who is convicted of a felony (other than an a Class A-1 felony), who stands CONVICTED OF A FELONY, AFTER HAVING OBTAINED ONE OR MORE PREDICATE FELONY CONVICTIONS (PFC).

b(i) To be a PFC, the conviction must have been in NYS of a felony, or in any other jurisdiction of an offense for which a sentence exceeding one year of imprisonment (or a death sentence) was authorized and is authorized in NYS , whether or not such sentence was actually imposed. (Obviously, if the death sentence had been carried out for the prior, this discussion would be moot).

(ii) Sentence upon such prior conviction must have been imposed BEFORE commission of the present felony;

(iii) Sentences include: suspended sentences, suspended execution of sentences, probation, conditional discharge, unconditional discharge and certification to the division of substance abuse services;

(iv) Except as per (v), the sentence on the PF MUST HAVE BEEN IMPOSED NOT MORE 10 YEARS BEFORE COMMISSION of the current felony of which the defendant stands convicted.

(v) In calculating the 10-year period, any period of time during which the defendant was INCARCERATED FOR ANY REASON between the commission of the previous felony and the commission of the present one SHALL BE EXCLUDED, and such 10-year period SHALL BE EXTENDED by a period equal to the time served under such incarceration;

(vi) An offense for which the defendant was PARDONED on the ground of INNOCENCE is NOT a PFO.

Per CPL 70.06 (4) and (3), the MINIMUM period of INDETERMINATE imprisonment for a 2FO is ONE-HALF of the MAXIMUM term imposed as follows:

4[a]) and 3(a): 6yrs up to 12 and 1/2 yr min to Life max for a Class A-II felony (10-25 yr min to Life max for PSA or PSA Against a Child);

4(b)/3(b): Class BF: 4 and 1/2 to 9 yr min up to 12 and 1/2 to 25 yr max;

4(b)/3(c) : Class CF: 3 to 6yr min up to 7 and 1/2 to 15 yr max;

4(b)/3(d): Class DF: 2 to 4yr min up to 3 and 1/2 to 7 yr max.

4(b)/3(e): Class EF: 1 and 1/2 to 3 yr min up to 2 yr min to 4 yr max

(SEE CPL 400.21 for Procedures to Determine 2FO status).

#### PERSISTENT FELONY OFFENDER (PL 70.10):

1.(a). A PFO is a person who stands convicted of a felony after having previously been convicted of TWO OR MORE felonies as follows:

(b) a conviction of a felony in NYS or of a crime in another jurisdiction, provided that:

- (i) a sentence exceeding one year (or to death) was imposed therefor; and
- (ii) the defendant was imprisoned under sentence for such conviction before committing the current felony; and
- (iii) the defendant was not pardoned on the ground of innocence; and
- (iv) such conviction was for a felony (other than persistent sexual abuse [PL 130.53]).

(c) For purposes of determining whether a person has two or more prior felony convictions, two or more convictions of crimes that were committed before the defendant was imprisoned under sentence for any such convictions shall be deemed to be ONLY ONE conviction.

2. AUTHORIZED SENTENCE: When the court determines pursuant to CPL 400.20 that a defendant is a Persistent FO, and concludes (in the exercise of discretion), that the defendant's character and history and the nature and circumstances of his criminal conduct warrant EXTENDED INCARCERATION and LIFE-TIME SUPERVISION in the public interest, it may, (in lieu of imposing a sentence authorized by PL 70.00, 70.02 (VF), 70.04 (2VFO), 70.06 (2FO), 70.80[5] (PFSO), impose (upon the crime for which the defendant now stands convicted), the sentence of imprisonment authorized by that section for a CLASS A-1 FELONY.

So, for example if the defendant is to be sentenced for a Class D NVF (for which PL 70.00 would otherwise apply), and qualifies as a Persistent FO, he could be sentenced to an indeterminate term of anywhere from 15 to 25 years (minimum) (PL 70.00[3][a][i]) to LIFE (PL 70.00[2][a]). (See generally People v Prindle 2017 NY Slip Op. 05267 [Court of Appeals 6/29/17]).

If the court declines to sentence the defendant as a PFO, it may sentence him/her as a 2FO.

## VIOLENT FELONY OFFENDERS (VFO) DETERMINATE SENTENCES:

The authorized sentences per PL 70.02 (3) for a first time VFO are as follows:

- (a) Class BVF: 5 yrs min to 25 yrs max (+ 2 and 1/2 to 5 yrs PRS per PL 70.45[2][f]);
- (b) Class CVF: 3 and 1/2 yr min to 15 yrs max (+ 2 and 1/2 to 5 yrs PRS per PL 70.45[2][f]);
- (c) Class DVF: 2 yrs min to 7 yrs max (+ 1 and 1/2 to 3 yrs PRS per PL 70.45 [2][e]);
- (d) Class EVF: 1 and 1/2 yrs min to 4 yrs max (+ 1 and 1/2 to 3 yrs PRS per PL 70.45[2][e]).

See PL 70.02 (4) (b) (i-iii) for alternative definite sentence possibility for a Class DVF (armed felony) with mitigating circumstances, and the defendant's participation in comparison to others was relatively minor, or there are proof deficiencies.

## SECOND VIOLENT FELONY OFFENDERS (2VFO) PL 70.04:

1. (a). A 2VFO is a person who stands convicted of a VFO (PL 70.02), after having previously obtained a PREDICATE VIOLENT FELONY CONVICTION.
  - (b)(i). For a conviction to qualify as a PVF, it must have been in NYS of a Class AF (other than a drug offense per PL 220) or a VF, or in any other jurisdiction of an offense which includes all of the essential elements of any such felony for which a sentence in excess of one year in prison (or of death) was authorized, and is authorized in this state whether or not such sentence was imposed;
  - (ii). The sentence upon such prior conviction must have been imposed BEFORE the commission of the present felony;
  - (iii) Sentences include suspended sentences, suspended execution of sentences, conditional and unconditional discharges and certification to the care and custody of the division of substance abuse services;
  - (iv) Except as per subdivision (v), the sentence must have been imposed NOT MORE THAN 10 YEARS before the commission of the current felony;
  - (v) Any period of time during which the defendant was incarcerated for any reason between the commission of the previous felony and the commission of this one SHALL BE EXCLUDED and such period SHALL BE EXTENDED by a period(s) equal to the time served under such incarceration.
  - (vi) An offense for which the defendant has been pardoned on the ground of innocence is NOT a PVF conviction.

(See CPL 400.15 for Procedures to Determine 2VFO status)

The DETERMINATE sentences per PL 70.04(3) for a 2VFO ( which are followed by PRS per PL 70.45 [2][e] and [f]), are as follows:

- (a) Class BVF: 12 yrs min up to 25 yrs max + 2 and 1/2 to 5 yrs PRS;
- (b) Class CVF: 8 yrs min to 15 yrs max + 2 and 1/2 to 5 yrs PRS;
- (c ) Class DVF: 5 yrs min to 7 yrs max + 1 and 1/2 to 3 yrs PRS;
- (d) Class EVF: 4 years + 1 and 1/2 to 3 yrs PRS

PERSISTENT VIOLENT FELONY OFFENDERS (PVFO) PL 70.08):

1(a). A PVFO is a person who stands convicted of a VF (PL70.02) (or of Predatory Sexual Assault [PSA] [PL 130.95] or PSA of a Child [PL 130.96]), after having obtained TWO OR MORE PREDICATE VF CONVICTIONS (70.04[1][b]).

(b) The criteria of PL 70.04 (1)(b) apply to determine whether a person has two or more PVF convictions.

2. When the court has found, pursuant to CPL 400.16 that the defendant is a PVFO, the court MUST impose an INDETERMINATE sentence of imprisonment the MAXIMUM of which SHALL BE. LIFE IMPRISONMENT.

The MINIMUM periods of INDETERMINATE imprisonment for a PVFO are as follows;

3 (a) PSA (PL130.95) or PSA of a Child (PL 130.96), (Class A-II felonies), the minimum must be 25 years;

- (a-1) Class BVF: 20-25 yrs;
- (b) Class CVF: 16-25 yrs;
- (c ) Class DVF: 12-25 yrs

DEFENDANTS WITH HYBRID HISTORIES (VF with NVF prior)

PL 70.06 (6)

6. Where the defendant stands convicted of a VF (PL70.02) and has a prior NVFC (i.e. this one is a VF, and the prior is a NVF), the DETERMINATE sentence ranges (which also includes PRS per PL 70.45[e][f]), are as follows:

- (a) Class BVF: 8 yr min to 25 yr max + 2 and 1/2 to 5 yrs PRS;
- (b) Class CVF: 5 yr min to 15 yr max + 2 and 1/2 to 5 yrs PRS;

(c ) Class DVF: 3 yr min to 7 yr max + one and 1/2 to 3 yrs PRS;

(d) Class EVF: 2 yr min to 4 yr max + one and 1/2 to 3 yrs PRS.

Where a defendant stands convicted of a NVF and has a prior VFC (i.e. this one is NVF and the prior is a VF), the defendant will still be sentenced as a 2FO to an INDETERMINATE sentence as set forth in PL 70.06 (4)(a)-b) [minimum = 1/2 the maximum] and 3 [a]-[e] as follows:

PL 70.06

4(a)/3(a) Class A-II F: 6 to 12 and 1/2 yr min to Life (10 to 25 yr min for PSA or PSA/Child;

4(b)/3(b) Class BF: 4 and 1/2 to 9 yr min to 12 and 1/2 yr to 25 yr max;

4(b)/3(c ) Class CF: 3 to 6 yr min to 7 and 1/2 yr -15 yr max;

4(b)/3(d) Class DF: 2 to 4 yr min to 3 and 1/2 yr to 7 yr max;

4(b)/3(e) Class EF: 1 and 1/2 to 3 yr min to 2 to 4 yr max.

While the defendant may suffer no greater sentence with a PVF conviction than with a PNVF, he/she would, by reason of the PVF conviction, be excluded from certain alternative sentencing options like Parole Supervision (CPL 410.91) and Shock Incarceration (CL 865).

FELONY DRUG OFFENDERS (FDO) PL 70.70- (OTHER THAN CLASS A):

1.(a) A FDO is a defendant who stands convicted of any felony defined in PL 220 or 221.

(b) A SECOND FELONY DRUG OFFENDER (2FDO), is a 2FO as defined in PL 70.06 who stands convicted of any felony defined in PL 220 or 221.

(c ) a VF has the same meaning as defined in PL 70.02(1).

2. Except as provided in PL 70.70 (3) (2FDO) or (4) (2FDO with a prior VF), a sentence of imprisonment for a FDO SHALL BE A DETERMINATE SENTENCE

(a) Except as provided in subdivisions (b) (Probation) or C (Alternative Definite), the court shall impose a DETERMINATE sentence which shall be imposed in whole or half years followed by PRS (PL 70.45) as follows:

- (i) Class B FDO: One - Nine Years (except that the term for Criminal Sale of a Controlled Substance [CSCS] at /near School Grounds [PL 220.44(2)], or on a School Bus [PL 220.00(17)], or CSCS to a Child (PL 220.48) SHALL BE AT LEAST TWO YEARS AND SHALL NOT EXCEED NINE YEARS.

The range of PRS, per PL 70.45 (2)(b) is 1 to 2 years.

Per PL 70.70 (2)(a)(ii), the DETERMINATE SENTENCE for a Class CDFO is from ONE to FIVE AND 1/2 YEARS. The PRS is from 1 to 2 years. (PL 70.45[2][b]);

(iii) Class D FDO: One to Two and 1/2 years +1 year PRS (PL 70.45 [2][a]);

(iv) Class E FDO: One to One and 1/2 years + 1year PRS (PL 70.45 [2][a].

PL 70.70 (2)(b): The court, may, in any event, sentence a defendant convicted of a Class B, C, D or E FDO (under PL 220 or 221), to PROBATION per PL 60.04 and 60.05.

PL 70.70 (2)(c): If the court, (considering the nature/circumstances of the offense and history/character of the defendant, believes that it would be UNDULY HARSH to impose a DETERMINATE sentence upon a defendant convicted of a Class C, D, E, felony under PL 220 or 221, or Class B felony under PL 220 (excluding CSCS to a Child [PL 220.48]), MAY IMPOSE A DEFINITE SENTENCE OF IMPRISONMENT of one year or less.

(d) The court may direct that a DETERMINATE sentence imposed on a defendant convicted of a Class B DFO (other than PL 220.48), be executed as a sentence of PAROLE SUPERVISION per CPL 410.91.

#### CPL 410.91 SENTENCE OF PAROLE SUPERVISION (PS)

1. A sentence of PS is an INDETERMINATE or DETERMINATE sentence of imprisonment imposed per PL 70.70 (b) and (d) which may be imposed upon a ELIGIBLE DEFENDANT (defined in subdivision 2).

If an indeterminate sentence, it shall have a minimum and maximum within the ranges specified in PL 70.06 (3) and (4). If it is determinate, the sentence shall have a term with the ranges set forth in PL 70.70 (3)(b)(iii) and (iv).

If the court directs that the sentence be executed as PS, it shall REMAND the defendant for immediate delivery to a reception center operated by NYSDOCCS per CPL 430.20 and CL 601 for a period NOT TO EXCEED 10 DAYS. The defendant will then be placed UNDER THE IMMEDIATE SUPERVISION of DOCCS and MUST COMPLY WITH THE CONDITIONS OF PAROLE, which SHALL INCLUDE an INITIAL PLACEMENT in a DRUG TREATMENT CAMPUS FOR 90 DAYS at which time he/she shall be released therefrom.

2. An ELIGIBLE DEFENDANT is a FELONY OFFENDER convicted of a SPECIFIED OFFENSE defined in subdivision 5, who stands CONVICTED OF NO OTHER FELONY OFFENSE, who has NOT PREVIOUSLY BEEN CONVICTED of a VFO (PL 70.02), a Class A FO or a Class B FO (other than under PL 220), and is NOT SUBJECT to an UNDISCHARGED TERM OF IMPRISONMENT.

5. SPECIFIED (i.e. PS-eligible) OFFENSES include: BURGLARY 3d degree (PL 140.20), CRIMINAL MISCHIEF (CM) 2d (PL 145.10), CM 3d degree (PL 145.05), GRAND LARCENY (GL) 3rd degree (PL 155.35)( excluding firearms, rifles and shotguns), GL 4th degree (PL 155.30[1-6], [8-10]), UUV 2d degree (PL 165.06), CPSP 3d degree (PL165.50) (excluding firearms, rifles and shotguns), CPSP 4th degree (PL 165.45 [1-3],[5-6]), FORGERY 2d degree (PL 170.10), CPFI 2d degree (PL 170.25), UNLAWFUL USE OF SLUGS 1st degree (PL 170.60), CRIMINAL DIVERSION OF MEDICAL MARIJUANA 1st degree (PL 179.10), or an ATTEMPT to commit any of the above offenses (as long as it is a felony).

Also included: a CLASS B FELONY OFFENSE under PL 220 where a sentence is imposed pursuant to PL 70.70 (2)(a); any CLASS C, D or E CONTROLLED SUBSTANCE (CS) or MARIJUANA FELONY defined in PL 220 and 221.

3. When an indeterminate or determinate sentence of imprisonment is imposed upon an eligible defendant for a specified offense, the court MAY DIRECT that such sentence be executed as a sentence of PS IF THE COURT FINDS: (i) that the defendant has a HISTORY of CS DEPENDENCE that is a SIGNIFICANT CONTRIBUTING FACTOR to his/her criminal conduct; (ii) the defendant's CS dependence COULD BE APPROPRIATELY BE ADDRESSED by a sentence of PS, and (iii) that imposition of such sentence would NOT have an ADVERSE EFFECT ON PUBLIC SAFETY OR PUBLIC CONFIDENCE IN THE INTEGRITY OF THE CJS.

See subdivision 6 regarding assessment of the defendant's needs while enrolled at the DRUG TREATMENT CAMPUS.

See subdivision 7 regarding the provision of money, clothes and transportation to the county of supervision.

See subdivision 8 regarding reasonable suspicion of violation of conditions.

PL 70.70 (3): SENTENCES OF IMPRISONMENT FOR 2FDO'S:

(a) This subdivision applies to 2FDO whose PF is a NVF.

(b) Except as provided in subdivisions (c ), (d) and (e), when the court has found per CPL 400.21 that the defendant is a 2FDO convicted of a Class B, C, D or E felony per PL 220 or 221, the court SHALL IMPOSE A DETERMINATE SENTENCE followed by PRS as follows:

(i) Class B FDO: 2 yr min to 12 yr max + 1 and 1/2 to 3 yrs PRS (PL 70.45 [2][d]);

(ii) Class C FDO: 1 and 1/2 yr min to 8 yr max + 1 and 1/2 to 3 yrs PRS (PL 70.45 [2][d]);

(iii) Class D FDO: 1 and 1/2 yr min to 4 yr max + 1 to 2 yrs PRS (PL 70.45 [2][c]);

(iv) Class E FDO: 1 and 1/r min to 2 yr max + 1 to 2 yrs PRS (PL 70.45 [2][c]).

(c ) The court MAY, nevertheless, sentence a Class B 2FDO to LIFETIME PROBATION per PL 65.00 and MAY sentence a Class C, D, and E 2DFO to probation per PL 65.00.

(d) PAROLE SUPERVISION: If the defendant is convicted of a SPECIFIED OFFENSE under CPL 410.91, stands convicted of NO OTHER FELONY OFFENSE, HAS NOT PREVIOUSLY BEEN CONVICTED OF A VF, a CLASS AFO or BFO, and is NOT UNDER THE JURISDICTION OF (or awaiting delivery to) DOCCS, the court MAY DIRECT that a determinate sentence imposed here under be EXECUTED AS A PAROLE SUPERVISION (PS) SENTENCE.

(e) ALTERNATIVE DEFINITE (AD) SENTENCE: If the court concludes that a determinate sentence would be unduly harsh (considering the circumstances of the offense and the defendant's history and character), it MAY impose a DEFINITE SENTENCE (up to one year) for a Class C, D or E Felony Offense defined in PL 220 and 221.

(4)(a) SECOND FELONY DRUG OFFENDER (2FDO) with a PRIOR VIOLENT FELONY (PVF) conviction.

(b) When the court finds per CPL 400.21 that the defendant is a 2FDO with a PVF conviction, who now stands convicted of s Class B, C, D, E felony offense defined in PL 220 or 221, the court SHALL IMPOSE a DETERMINATE SENTENCE (followed by PRS) as follows:

(i) Class B FDO: 6 yr min to 15 yr max + 1 and 1/2 to 3 yrs PRS (PL 70.45 [2][d]);

(ii) Class C FDO: 3 and 1/2 yr min to 9 yr max + 1 and 1/2 to 3 yrs PRS (PL 70.45 [2][d]);

(iii) Class D FDO: 2 and 1/2 yr min to 4 and 1/2 yr max + 1 to 2 yrs PRS (PL 70.45[2][c]);

(iv) Class E FDO: 2 yr min to 2 and 1/2 yr max + 1 to 2 yrs PRS (PL 70.45 [2][c]).

PL 70.71(1): SENTENCE OF IMPRISONMENT FOR A CLASS A FELONY DRUG OFFENDER (FDO):

(a) A FDO is a defendant who stands convicted of a Class A FDO as defined in PL 220.

(b) A 2FDO is as defined in PL 70.06 and who stands convicted of (and is to be sentenced for) a Class AFDO per PL 220.

(c ) A VFO has the same meaning as per PL 70.02.

2 (a) (FIRST TIME CLASS A DFO): Except as set forth in subdivisions 3, 4 or 5, this section applies to a defendant convicted of a Class A DFO.

(b) The court SHALL impose a DETERMINATE term of imprisonment (in whole or half years) followed by PRS as follows:

(i) Class A-1 DFO: 8 yr min to 25 yr max + 5 yrs PRS (PL 70.45[2]);

(ii) Class A-II FDO: 3 yr min to 10 yr max + 5 yrs PRS (PL 70.45[2]).

(c ) LIFETIME PROBATION: The court may, nevertheless, sentence a defendant convicted of a Class A-II FDO (PL 220), to lifetime probation per PL 65.00)

3(a). SECOND FELONY DRUG OFFENDER (2FDO) with a PRIOR NON-VIOLENT FELONY (PNVF) CONVICTION:

(b) When the court finds per CPL 400.21 that a defendant is a 2FDO, who stands convicted of a Class A FDO (PL 220), the court SHALL IMPOSE a DETERMINATE sentence of imprisonment followed by PRS (PL 70.45) as follows:

(i) Class A-1 FDO: 12 yr min to 25 yr max + 5 yrs PRS (PL 70.45[2]);

(ii) Class A-2 FDO: 6 yr min to 12 yr max + 5 yrs PRS (PL 70.45[2]);

(c ) The court may nevertheless sentence a defendant convicted of a Class A-II FDO to LIFETIME PROBATION per PL 65.00.

4 (a): SECOND FDO (CLASS A)WITH A PRIOR VIOLENT FELONY (PVF) CONVICTION:

(b) If the court finds per CPL 400.21 that the defendant is a 2FDO with a PVF conviction, it must impose a DETERMINATE SENTENCE followed by PRS as follows:

(i) Class A-1FDO: 15 yr min to 30 yr max + 5 yrs PRS (PL 70.45[2]);

(ii) Class A-II FDO: 8 yr min to 17 yr max + 5 yrs PRS (PL 70.45[2]).

See subdivision 5(a)-(b)-(c ) for MAJOR DRUG TRAFFICKING SENTENCING.

PL 70.80 : SENTENCES FOR FELONY SEX OFFENSES (FSO):

1 (a): A FSO means a conviction for any offense defined in PL Art. 130 including a SEXUALLY MOTIVATED FELONY (SMF) (PL 130.91: See specified offenses in subd. [2] committed for purposes of sexual gratification [subd.1]), or patronizing a person for prostitution 1st degree (PL 230.06) and 2d degree (PL 230.05), Aggravated Patronizing of a Minor for Prostitution 3d degree (PL 230.11), 2d degree (PL 230.12) and 1st degree (PL 230.13), Incest 2d degree (PL 255.26) and 1st degree (PL 255.27), or a FELONY ATTEMPT OR CONSPIRACY to commit the above offenses.

(b) A FSO shall be deemed a VIOLENT FELONY SEX OFFENSE (VFSO) if it is for an offense defined as such in PL 70.02 or for a SMF (PL130.91) where the specified offense is a VFO as per PL 70.02.

(c ) A PREDICATE FELONY SEX OFFENDER (PFSO) is a person who stands convicted of any FSO (other than a Class A-1 Felony), after having previously obtained one or more PREDICATE FELONY CONVICTIONS (PFC) per PL 70.06(1) or 70.04(2).

(d) A VFO is as defined in PL 70.02. A NVF is “any felony” (not defined in PL 70.02).

2. In sentencing a FSO, the court may consider all relevant factors set forth in PL 1.05 as well as the defendant’s criminal history (including any sex offenses), any mental illness or abnormality, the defendant’s ability to control his sexual behavior and, if not, the extent to which such difficulty may pose a threat to society.

3. Except as provided in subdivisions 4-8, or when a defendant is being sentenced for a Class A-II felony of Predatory Sexual Assault (PSA) (PL 130.95) or PSA of a Child (PL 130.96), or for any Class A-1 SMF for which a life sentence without parole must be imposed, a sentence for a defendant convicted of a FSO shall be a DETERMINATE sentence (followed by PRS).

4 (a) Except as provided in subdivisions 5-8, the DETERMINATE terms must be as follows:

(i) Class B FSO: 5 yr min to 25 yr max + 5 to 20 yrs PRS (PL 70.45 [2-a][c]);

(ii) Class C FSO: 3 and 1/2 yr min to 15 yr max + 5 to 15 yrs PRS (PL 70.45[2-a][b]);

(iii) Class D FSO: 2 yr min to 7 yr max + 3 to 10 yrs PRS (PL 70.45 [2-a][a]);

(iv) Class E FSO: 1 and 1/2 yr min to 4 yr max + 3 to 10 yrs PRS (PL 70.45 [2-a][a]).

(b) PROBATION: The court may sentence a defendant convicted of a Class D or Class E Felony to probation per PL 65.00.

(c ) ALTERNATIVE DEFINITE SENTENCE: May be imposed for a Class D or E FSO if the court finds that a determinate sentence would be unduly harsh (considering the circumstances of the offense and the defendant’s character and history).

5. SENTENCES OF IMPRISONMENT FOR A PREDICATE FELONY SEX OFFENDER (PFSO):

(a) This subdivision applies to a PFSO who stands convicted of a NVFSO and who has PREVIOUSLY BEEN CONVICTED OF ONE OR MORE FELONIES.

(b) NVPFO. Where the court has found that the defendant is a PFSO, and his PREDICATE conviction was a NVFO, the court MUST impose a DETERMINATE sentence as follows:

(i) Class B FSO: 8 yr min to 25 yr max + 10 to 25 yrs PRS (PL 70.45 [2-a][i]);

(ii) Class C FSO: 5 yr min to 15 yr max + 7 to 20 yrs PRS (PL 70.45 [2-a][h]);

(iii) Class D FSO: 3 yr min to 7 yr max + 5 to 15 yrs PRS (PL 70.45 [2-a][g]);

(iv) Class E FSO: 2 yr min to 4 yr max + 5 to 15 yrs PRS (PL 70.45 [2-a][g]).

(c ) VIOLENT PREDICATE FELONY OFFENSE (VPFO):

When the court finds that the defendant is a PFSO and the predicate is for a VFO, the court must impose a DETERMINATE sentence (followed by PRS) as follows:

- (i) Class B FSO: 9 yr min to 25 yr max + 10 to 25 yrs PRS (PL 70.45 [2-a][i]);
- (ii) Class C FSO : 6 yr min to 15 yr max + 7 to 20 yrs PRS (PL 70.45 [2-a][h]);
- (iii) Class D FSO: 4 yr min to 7 yr max + 5 to 15 yrs PRS (PL 70.45 [2-a][g]);
- (iv) Class E FSO: 2 and 1/2 y min to 4 yr max + 5 to 15 yrs PRS (PL 70.45 [2-a][g]).

(d) A defendant who stands convicted of a NVFSO (other than a Class A-1 or A-II Felony), who is adjudicated a PERSISTENT FELONY OFFENDER per PL 70.10, SHALL BE SENTENCED pursuant to PL 70.10 or pursuant to this subdivision.

6. SENTENCE FOR A VIOLENT FELONY SEX OFFENSE (VFSO):

Except as provided in subdivisions 7 and 8, a defendant who stands convicted of a VFSO MUST BE SENTENCED pursuant to PL 70.02 (VFO), 70.04 (2VFO), 70.06[6] (VFSO with a prior NVF), 70.08 (Persistent VFO) and 70.10 (Persistent FO), as applicable.

7. When a defendant stands convicted of a SMF (PL 130.91) and the specified offense is a Class A felony, the court must sentence the defendant in accordance with:

- (a) section 60.06 and 70.00 as applicable if such offense is a Class A-1 Felony; and
- (b) section 70.00, 70.06, or 70.08, as applicable, if such offense is a Class A-II Felony.

8. Whenever a JO stands convicted of a FSO, he must be sentenced pursuant to PL 60.10 and 70.05.

9. Every determinate sentence for a FSO SHALL INCLUDE a period of PRS.

## ADOLESCENT OFFENDERS (AO):

CPL 1.20(44) defines an AO as a person charged with a FELONY committed when he/she was 16 (after 10/1/18) or 17 (after 10/1/19).

This "Raise the Age" law elevated the age of criminal responsibility (as an adult offender) to age 18 from age 16. Consequently, AO'S prosecuted in Superior Court are adjudicated in the Youth Part (CPL 720.10), and may, if warranted, (see CPL 722.21, 722.23), be able to have their cases transferred to Family Court (CPL 725) where they would then be treated as Juvenile Delinquents under the Family Court Act (FCA). (See 9/17/20 article on Defending Young Offenders).

Pursuant to CPL 60.10-a, when an AO is convicted of an offense, the court shall sentence the defendant to ANY SENTENCE authorized to be imposed on a person who committed such offense at age 18 or older, but the court SHALL CONSIDER THE AGE OF THE DEFENDANT in exercising its discretion at sentencing.

So, if an AO convicted of a felony is denied YO status, he/she would be subject, depending on the level and nature of the offense committed, to the range of sentencing availing to an adult from probation (if applicable) to either an indeterminate sentence (for a NVF conviction) or a determinate sentence followed by PRS for a VF conviction.

## JUVENILE OFFENDERS (JO):

JO status, as defined in CPL 1.20(42) and PL 10.00(18), pertains to offenders, age 13 and 14-15 who commit certain designated felonies that warrant prosecution in Youth Part (CPL 722.10) or, in certain circumstances (see CPL 722.20, 722.22, 725) transfer to Family Court.

JUVENILE OFFENDER, per PL 10.00(18), includes: (1) a 13-year-old who is CRIMINALLY RESPONSIBLE (see PL 30.00[2]) for acts constituting Murder 2d degree (PL 125.25[1][2]) or as a SMF (PL 130.91); as well as (2) a 14-15-year-old who is criminally responsible for acts constituting Murder 2d degree (PL 125.25[1][2]) and FELONY MURDER (PL 125.25[3]) where the underlying felony is one for which defendant is criminal responsible; Kidnapping 1st degree (PL 135.25), Arson 1st degree (PL 150.20), Assault 1st degree (PL 120.10[1][2]), Rape 1st degree (PL 130.35[1][2]), CSA 1st degree (PL 130.50[1][2]), ASA (PL 130.70), Burglary 1st degree (PL 140.30), Burglary 2d degree (PL 140.24[1]), Arson 2d degree (PL 150.15), Robbery 1st degree (PL 160.15), Robbery 2d degree (PL 160.10[2]), CPW 2d degree (PL 265.03) where such machine gun or firearm is possessed on school grounds (PL 220.00), or Attempted: Murder 2d degree, Kidnapping 1st degree or such conduct as SMF (PL 130.91).

The FELONY SENTENCE RANGES for JO'S adjudicated in Youth Part (and who do not receive YO status) are set forth in PL 70.05

1. A sentence of imprisonment for a felony committed by a JO SHALL BE AN INDETERMINATE SENTENCE. (See PL 70.20[4][a] regarding placement of JO'S, and AO'S [with or without YO]), in the custody of the Office of Children and Family Services.
2. The MINIMUM (per subdivision 3[a]-[c] and MAXIMUM INDETERMINATE terms of sentences (per subdivisions 2 [a]-[d]) are as follows:

(a) Murder 2d degree (Class A): 5 yrs to 9yrs min to Life Imprisonment. (i.e. best case: 5 yrs to life, worst case: 9 yrs to life). BUT, where the offense is PL 125.25 (1) or (2) and the defendant was 14 or 15 years old at the time of such offense, the minimum range must be between 7 and 1/2 and 9 years.

(b) For Arson 1st degree (Class A) and Kidnapping 1st degree (Class A), the range is: 4 to 6 yrs min to 12 to 15 yrs max. (Best case: 4 to 12 years; Worst case 6 to 15 years);

(c ) Class BF: 3 and 1/3 min to 10 yrs max;

(d) Class CF: 2 and 1/3 min to 7 yrs max;

(e) Class DF: 1 and 1/3 min to 4 years max.

#### YOUTHFUL OFFENDER (CPL 720.10)

Whenever a client qualifies as an ELIGIBLE YOUTH (CPL 720.10[2]) (i.e. crime committed between the ages of 16 and 19, or a JO), and is not foreclosed by subdivisions 2(a): (Class A-1, A-2 or an ARMED FELONY [CPL 1.20(41)] without mitigating circumstances defined in subdivision 3), 2(b): (prior felony conviction and sentence), or 2 (c ): (prior YO adjudication on a felony or a JO adjudication [after 9/1/18] on a DESIGNATED FELONY ACT under the FCA), counsel should ALWAYS be advocating for a YO adjudication to spare the client a criminal record and to subject him/her to sentencing at the CLASS E FELONY LEVEL pursuant to PL 60.02 (2). (See 9/17/20 article on Defending Young Offenders).

#### DEFENDANTS WHO ARE VICTIMS OF DOMESTIC VIOLENCE:

Recognizing that many offenders (typically women) are victims of DV, and that most women in prison have no prior history of violence (and are deemed to be at low risk of recidivism), in 2019, the State Legislature enacted the DV Survivor Justice Act which enables eligible defendants to seek more lenient sentencing alternatives (PL 60.12) and for those already sentenced in excess of eight years of prison, to apply under CPL 440.47 for re-sentencing.

PL 60.12 (1) states that where a court is imposing sentence pursuant to PL 70.00 (NVF), 70.02 (VF), 70.06 (2FO) or 70.71 (2) or (3) (Class A DFO), OTHER THAN FOR: Aggravate Murder (PL 125.26), Murder 1st degree (PL 125.27) Terrorism (PL Art. 490), a REGISTERABLE SEX OFFENSE (CL Art. 6-C), an ATTEMPT/CONSPIRACY to commit any such offense, and the court is authorized or required per PL 70.00, 70.02, 70.06 or 70.71 (2) or (3), the court MAY, AFTER A HEARING, impose sentence in accordance with PL 60.12.

At such HEARING, the court must find that: a) at the time if the instant offense, the defendant was a VICTIM OF DV subjected to physical, sexual or psychological abuse inflicted by a member of the same family or household (CPL 530.11); b) such abuse was a SIGNIFICANT CONTRIBUTING FACTOR to the defendant's criminal behavior; (c ) a sentence of imprisonment per PL 70.00, 70.02, 70.06 , 70.71 (2) or (3) or 70.71 (3) would be UNDULY HARSH considering the nature/circumstances of the crime and the defendant's history/character.

The court shall consider oral and written arguments, take testimony from witnesses offered by either side and consider relevant evidence (including reliable hearsay).

The defendant need NOT have raised the defense of such abuse (whether as self defense duress or extreme emotional disturbance) for the court to consider it in deciding whether the defendant should be sentenced as a DV survivor.

2. Where a court would otherwise be required to impose a DETERMINATE sentence per PL 70.02, it may instead impose a DEFINITE sentence of one year or less, or PROBATION per PL 65.00 or MAY FIX a DETERMINATE sentence (followed by PRS per PL 70.45) as follows:

(a) Class BVF: one yr min to five yr max

(b) Class CVF: one year min to 3 and 1/2 yrs max;

(c) Class DVF: one year min to 2 yrs max;

(d) Class EVF: one year min to one and 1/2 yrs max.

3. Where the court would otherwise be required to impose a sentence for a Class AF per PL 70.00, the court may fix a DETERMINATE term of AT LEAST 5 YEARS UP TO A MAXIMUM OF 15 YEARS;

4. Where the court would otherwise be required to impose a sentence for a Class A-1F per PL 70.71 (2)(b)(i) (Class A DFO), the court may fix a DETERMINATE term of AT LEAST 5 YEARS UP TO A MAXIMUM OF 8 YEARS;

5. Where the court would otherwise be required to impose a sentence for a Class A-1F per PL 70.71 (3)(b)(i) (Class A 2FDO), the court may fix a DETERMINATE term of AT LEAST 5 YEARS UP TO A MAXIMUM OF 12 YEARS;

6. Where the court would otherwise be required to impose a sentence for a Class A-2F per PL 70.71 (2)(b)(ii), the court may fix a DETERMINATE term of AT LEAST ONE YEAR UP TO A MAXIMUM OF 3 YEARS;

7. Where the court would otherwise be required to impose a sentence for a Class A-2F per PL 70.71 (3)(b)(ii), the court may fix a DETERMINATE TERM of AT LEAST 3 YEARS UP TO A MAXIMUM OF 6 YEARS;

8. Where the court would otherwise be required to impose a sentence per PL 70.06 (6), (where the defendant is a 2FO and this one is a VF), the court may fix a TERM OF IMPRISONMENT (followed by PRS per PL 40.45) is as follows:

(a) Class BF: 3 yr min to 8 yr max;

(b) Class CF: 2 and 1/2 yr min to 5 yr max;

(c) Class DF: 2 yr min to 3 yr max;

(d) Class EF: one and 1/2 yr min to 2 yr max.

9. Where a court would otherwise be required to impose a sentence for a Class B, C, D or E felony per PL 70.00 (NVF), the court MAY impose a DETERMINATE sentence in accordance with PL 70.70 (2) (which otherwise applies to FDO'S) as follows:

(a)(i) BF: one yr min to 9 yr max (See exception for sale on school grounds/ school bus/to a child); PRS is one to two years (PL 70.45[2][b])

(ii) Class CF: one yr min to 5 and 1/2 yrs max + 1 to 2 yrs PRS (PL 70.45[2][b]);

(iii) Class DF: one yr min to 2 and 1/2 yrs max + 1 yr PRS (PL 70.45[2][a]);

(iv) Class EF: one yr min to 1 and 1/2 yrs max + 1 yr PRS (PL 70.45[2][a]).

10. Except as provided in subdivision 7 above, where a court would otherwise be required to impose a sentence per PL 70.06 (3) (2FO), the court may impose a DETERMINATE sentence in accordance with PL 70.70 (3) (which otherwise applies to 2FDO'S):

(b)(i) Class BF: two yr min to 12 yrs max + 1 and 1/2 to 3 yr PRS (PL 70.45 [2][d]);

(ii) Class CF: one and one-half yr min to eight yr max + 1 and 1/2 to 3 yrs PRS (PL 70.45[2][d]);

(iii) Class DF: one and 1/2 yr min to 4 yr max + 1 to 2 yrs PRS (PL 70.45[2][c]);

(iv) Class EF: one and 1/2 yr min to to 2 yrs max + 1 to 2 yrs PRS (PL 70.45 [2][c]).

11. Where the court would otherwise be required to impose a sentence per PL 70.06 (3), where the prior is a VF (PL 70.02), the court may impose a DETERMINATE sentence in accordance with PL 70.70 (4) (which otherwise applies to 2DFO'S) as follows:

(b)(i) Class BF: six yr min to 15 yr max + 1 and 1/2 to 3 yrs PRS (PL 70.45[2][d]);

(ii) Class CF: three and 1/2 yr min to 9 yr max + 1 and 1/2 to 3 yrs PRS (PL 70.45[2][d]);

(iii) Class DF: two and 1/2 yr min to four and 1/2 yr max + 1 to 2 yrs PRS (PL 70.45[2][c]);

(iv) Class EF: two to two and 1/2 yr max + 1 to 2 yrs PRS (PL 70.45[2][c]).

#### A FEW WORDS ABOUT SHOCK INCARCERATION:

Pursuant to Correction Law (CL) 865 (2), shock incarceration (SI) is a program for which eligible inmates are selected to participate and serve six months in a SI facility which provides: rigorous physical activity, intensive regimentation and discipline along with rehabilitation therapy and programming. Such inmates may be selected either: (i) at a reception center; or (ii) at a general confinement facility when the eligible inmate becomes eligible for parole release WITHIN THREE YEARS in the case of an INDETERMINATE SENTENCE or then becomes eligible for CONDITIONAL RELEASE WITHIN THREE YEARS in the case of a DETERMINATE SENTENCE.

Subdivision 1 defines an ELIGIBLE INMATE as one who has been sentenced to an INDETERMINATE TERM who will become ELIGIBLE for PAROLE RELEASE WITHIN THREE YEARS, or sentenced to a DETERMINATE term who will be ELIGIBLE for CONDITIONAL RELEASE WITHIN THREE YEARS.

The defendant MUST also be: UNDER age 50; NOT previously convicted of a VF (in NYS or an equivalent offense elsewhere), upon which an indeterminate or determinate term was imposed; and was between the ages of 16 and 50 when the present crime was committed.

The following are also excluded: any person CONVICTED of a VF (except if convicted of Burglary 2d degree under PL 140.25[2] and Robbery 2d degree under PL 160.10[1], or an ATTEMPT thereof); any person convicted of a CLASS A-1FO, ANY HOMICIDE (PL Art. 125), ANY FELONY SEX OFFENSE (PL Art. 130), ANY ESCAPE/ABSCONDING OFFENSE (PL Art 225).

See text of CL 867 for Selection Procedures for Participation in the Shock Program:

1. Inmate may apply to the Screening Committee;
2. If the committee deems the inmate's participation in Shock to be consistent with community safety and the applicant's welfare, it may forward the application to the DOCCS commissioner for approval or disapproval.
3. 2(a)above procedures apply to JUDICIALLY SENTENCED SHOCK INCARCERATION only to the extent that the screening committee may determine the inmate's physical and mental suitability for participation and successful completion of the program.

An inmate SENTENCED to SI SHALL PROMPTLY COMMENCE participation in the program when he/she is an ELIGIBLE INMATE per CL 865(1).

3. Inmates must agree to be bound by all the terms and conditions of the SI program (in order to obtain a certificate of EARNED ELIGIBILITY for release to parole at the expiration of his/her minimum term per CL 805), and if they fail to complete the program, they will be transferred to a NON-SHOCK INCARCERATION CORRECTIONAL FACILITY to continue service of their sentence.

Before advocating for SI on behalf of an eligible client, counsel should make sure that the client is prepared for and hopefully well-suited, physically and mentally, to the rigors of Shock Incarceration which has sometimes been described as a non-military version of Boot Camp.

Just as not knowing all the potential if-comes and outcomes of a guilty verdict or plea beforehand can be problematic, encouraging a client to pursue a seemingly favorable course like Shock Incarceration, Parole Release (CPL 410.91) or perhaps, Judicial Diversion (CPL 216), (which, if successfully completed, can mean much less time spent behind bars), can be a road-map to disappointment (i.e. return to prison), when good intentions (or just a strong desire to get out of custody ASAP), are not supported by sincere commitment. In such cases, knowing the client may be just as important as knowing the law.

