

2007 Superior Court
Drug Case Sentencing Patterns
May 5, 2009

Prepared for the
Delaware Sentencing Research and Evaluation Committee
and
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In calendar year 2007, there were 3,020 cases in Delaware Superior Court that involved at least one drug charge at conviction. Seventy-three percent of the cases included only drug charges, while 27 percent included drug and non-drug charges. Of the 3,020 drug cases, 7.2 percent (218) involved at least one charge in a case resulting in a minimum drug term, be it drug trafficking or repeat Possession with the Intent to Deliver (PWITD). Of the 218 minimum term drug cases, 143 were drug trafficking convictions (16§ 4753A) where the minimum term is 2-years. It is interesting that 32 of the 143 drug trafficking sentences were diverted to non-minimum terms as part of drug court diversion or the 6-month DOC boot camp program. The remaining 71 minimum drug terms were PWITD repeat drug selling cases (16§ 4763a) where the minimum term is 3-years. Of the 3,020 total cases, 727 (24.1 percent) involved at least one PWITD charge that was not a minimum mandatory. The remaining 2,075 drug cases (68.7 percent) were for charges other than drug selling or drug trafficking. However, many non-drug selling cases include pleas from a drug selling charge (DelSAC August 2005).

Drug case sentencing is far more complex than just sending drug dealers to prison. This report provides a multi-dimensional view of sentencing of drug cases. Table 1 shows a detailed sentencing profile for drug trafficking cases. Chart 3 highlights the type and length of sentences for different types of drug cases. Chart 4 shows that 96 percent of the drug cases require that addiction issues be addressed, and Chart 6 shows how the application of prior drug selling convictions are applied at sentencing. The results for offenders convicted of drug crimes in Superior Court show that --

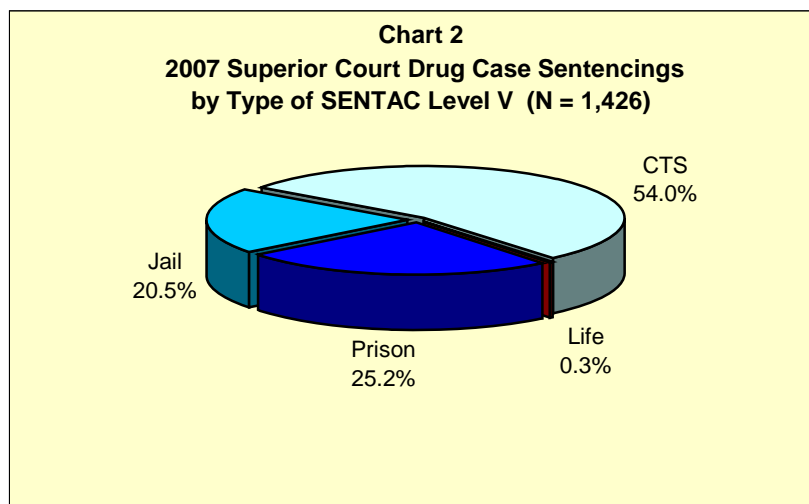
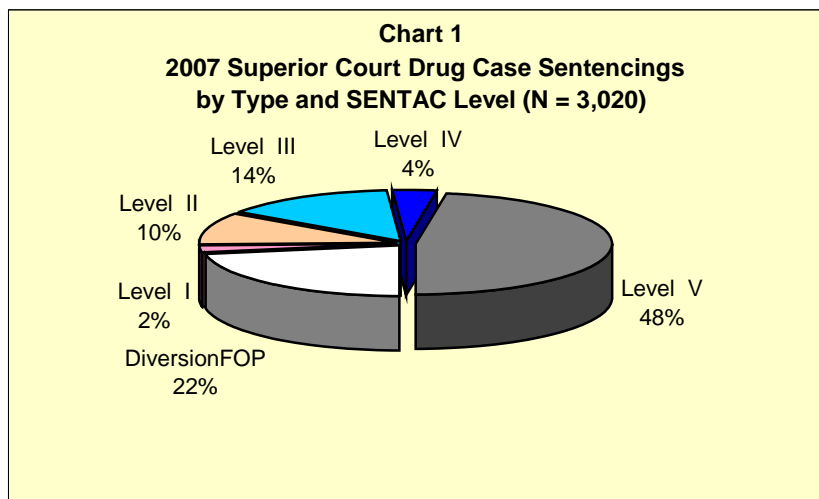
1. Most offenders are sentenced to some type of probation or credit for time served with probation to follow;
2. Twelve percent of all drug cases are sentenced to prison (terms greater than one year) and about half of these are minimum term sentences;
3. Most offenders, whether sentenced to prison or probation, are ordered to address their addiction problems with many being ordered to specific programs;
4. In many cases a repeat drug selling conviction does not result in the applicable 36-month minimum term.

This profile of Superior Court drug sentencing presents a much more complex picture than conventional wisdom and public discussions suggest. It shows a strong tendency towards treatment over incarceration. In fact, one of the most typical sentences is to the Drug Diversion program where after successful completion of drug treatment the drug charges are dismissed. Many other probationers find themselves sentenced to the DHSS TASC assessment and treatment programs. Even offenders sentenced to prison are often given an opportunity for intense drug treatment in boot camp, Key and Greentree in lieu of lengthy prison terms.

2007 Delaware Superior Court Sentencing

Chart 1, below, shows that just short of one-half (1,426) of the 3,020 Superior Court drug cases were sentenced to Level V incarceration and just over one-half were sentenced to some Level of SENTAC probation or Drug Court Diversion. One of the most likely drug sentences was drug court diversion (Diversion and First Time Offender Programs), which accounts for 22 percent (667) of the drug sentences. Few drug offenders are sentenced directly to Level IV, but many flow down to Level IV after completing their Level V term. Fourteen percent of the drug offenders are sentenced directly to Level III intensive probation supervision, 10 percent to Level II and only 2 percent to Level I.

Chart 2, below, provides a breakdown of Level V terms. The most likely Level V term is credit for time served (CTS), which means that over half (770 of 1,426) of the Level V drug cases are sentenced to time already served in pre-trial detention. After sentencing, these CTS cases report directly to DOC probation without entering sentenced jail or prison status. About one-fourth (360) of the Level V drug cases are sentenced to prison with terms greater than one year: drug cases going to prison account for about 12 percent of all drug convictions. One-fifth (292) of the Level V cases were sentenced to jail terms of one year or less.



2007 Drug Trafficking Sentencing Summary

Table 1, below, summarizes the types of sentences, length of sentences and the DOC bed estimates for 2007 Superior Court drug trafficking cases. Drug trafficking is Delaware's per se law where conviction of possessing of 10 grams of cocaine (different weights for other drugs; more for marijuana, 5 lbs. – less for heroin 2.5 grams) will result in a minimum term: 2-years for cocaine and marijuana and 3-years for heroin. The final six months of this minimum term can later be adjusted by DOC for treatment at Level IV (11§ 4753(d)).

In addition, Delaware's boot camp (11§ 6712), drug court and the drug diversion laws (16§ 4764) allow for judicial discretion to divert from the Level V 2-year minimum terms to shorter jail terms or non-prison treatment options. Thirty-two (22 percent) of the 143 drug trafficking convictions in 2007 resulted in diversion from the minimum term. Twenty-eight of the drug trafficking cases resulted in the 6-month DOC boot camp program. If a diverted drug trafficker fails in boot camp or the subsequent special post prison probation, the original drug trafficking term can be imposed and the original full term served in prison. Likewise, the four drug traffickers that were sentenced to drug court diversion need to successfully complete their drug treatment to avoid the imposition of the minimum term and to earn the removal of the guilty plea and dismissal of all charges.

Of the 143 drug trafficking convictions, 111 (78 percent) were sentenced to at least the 2-year minimum term. While many, 45, were sentenced to the 2-year minimum term, many others (66) were sentenced to longer terms ranging as high as 27 years (324 months). The drug trafficking law (16§ 4753A) is complex and in addition to the 2-year minimum provides for higher minimum terms of 4, 8, 10, and 25 years depending upon the type of drug and tiered weights. Moreover, the Level V terms shown in Table 1 are the aggregate sentence for all charges in a case, which helps account for some of the longer terms.

The DOC bed impact for drug trafficking charges ranges between 470 beds and 578, depending on how many of the offenders sent to prison serve the final 6-months of their term at Level IV and the mix of charges in a case some of which would receive Truth in Sentencing good time credits. If the actual DOC bed impact of drug trafficking sentencing was the average of the high and low estimates at 524, these offenders would account for 14 percent of the DOC prison population (524/ 3,723) (DelSAC January 2009).

The drug trafficking population could be higher without the DOC bed savings attributed to diversion. The drug trafficking diversion cases, which numbered 32, provide a 64 DOC bed savings. In other words, the low drug trafficking bed count estimate would have been 534 beds instead of 470. The median term for drug traffickers that went to prison was 8 years (96 months). This median term is very important because it can be affected by subtle changes in sentencing practice from year to year. Not much is needed for the distribution of drug trafficking sentences to shift slightly higher, and if the new sentencing pattern persisted into the future, the DOC bed impact could increase significantly.

Table 1
2007 Drug Trafficking Lead Charge: Sentence Aggregate for All Charges

Level V Type	Sentenced		Percent Total of Admits	Estimated DOC Population IF ...			Percent Total of Population
	Level 5 Months			Minus 6 mos. & TIS on Remainder	Full Term minus 6 mos.	Full Term	
Drug Court Diversion		4	2.8%	0.0	0.0	0.0	0.0%
Boot Camp Diversion	24 (6)	19	13.3%	9.5	9.5	9.5	1.6%
Boot Camp Diversion	36 (6)	6	4.2%	3.0	3.0	3.0	0.5%
Boot Camp Diversion	48 (6)	3	2.1%	1.5	1.5	1.5	0.3%
Total Drug Trafficking Diversion		32					
Prison	24	45	31.5%	67.5	67.5	90.0	15.6%
Prison	30	3	2.1%	6.0	6.0	7.5	1.3%
Prison	36	16	11.2%	40.0	40.0	48.0	8.3%
Prison	42	2	1.4%	6.0	6.0	7.0	1.2%
Prison	48	11	7.7%	38.5	38.5	44.0	7.6%
Prison	50	1	0.7%	3.7	3.7	4.2	0.7%
Prison	60	7	4.9%	26.8	31.5	35.0	6.1%
Prison	72	4	2.8%	18.7	22.0	24.0	4.2%
Prison	84	1	0.7%	5.5	6.5	7.0	1.2%
Prison	96	5	3.5%	31.9	37.5	40.0	6.9%
Prison	108	2	1.4%	14.5	17.0	18.0	3.1%
Prison	120	3	2.1%	24.2	28.5	30.0	5.2%
Prison	156	2	1.4%	21.3	25.0	26.0	4.5%
Prison	180	3	2.1%	37.0	43.5	45.0	7.8%
Prison	216	1	0.7%	14.9	17.5	18.0	3.1%
Prison	240	1	0.7%	16.6	19.5	20.0	3.5%
Prison	288	2	1.4%	40.0	47.0	48.0	8.3%
Prison	300	1	0.7%	20.8	24.5	25.0	4.3%
Prison	324	1	0.7%	22.5	26.5	27.0	4.7%
Total Drug Trafficking Prison		111					
Totals		143	100.0%	470.2	522.2	577.7	100.0%

DelSAC April 2009

2007 Drug Sentencing by Type of Sentence and Length (in months)

Chart 3, below, summarizes the type and length of the 3,020 drug case sentences in 2007. For Level V terms, the sentence length is shown in months. Level V terms include prison terms of greater than one year, jail terms of one day up to one year, and credit for time served terms (CTS). CTS means convicted drug offenders were given credit for time served in pre-trial detention. SENTAC counts “CTS” as a Level V sentence. Most of the CTS drug offenders were immediately admitted to one of the probation levels following sentencing. Probation terms are shown by their SENTAC Levels, which range from IV through I where Level IV is quasi-incarceration like work release and Level I is administrative probation. Restitution and fine only sentences are grouped with Level I and they are coded as “LI&ResFine.”

Sentencing in Delaware is complex covering the gamut from diversion where successful completion of a drug program can result in a dismissal of a guilty plea to a life term without the possibility of release. The different types of sentences are described in the summary below.

Types of Delaware Sentencing

PWITD Minimum requires a prior PWITD conviction that results in a minimum 3-year term.

Trafficking Minimum upon conviction requires at least a 2-year minimum term. Diversion sentencing and boot camp laws grant judges the discretion to convict on the drug trafficking but to divert offenders to the treatment or boot camp programs.

PWITD TIS includes the SENTAC TIS Felony C (narcotic) and Felony E (non-narcotic) sentencing that provides for up to 25 percent time off for good time. Felony C presumes that the term will include at least some Level V time. These offenders are often diverted to boot camp and drug court diversion.

Other Drugs TIS includes the felony “x” fees of a school or park, maintaining a dwelling or vehicle for the use or selling illicit drugs and any misdemeanor possession charges, primary cocaine and heroin that are filed in Superior Court. These cases are sentenced as “regular” Truth in Sentencing terms receiving up to 25 percent good time when sentenced to Level V.

Addiction Sentencing is a Level V sentence that embraces the SENTAC principles of rehabilitation within a sentencing guideline framework. An addiction sentence allows for suspension of Level V time upon successful completion of a DOC prison treatment program. Failure to successfully complete the program can result in a number of outcomes ranging from the offender serving all or a portion of the remaining Level V time to the original sentence being restructured.

Delaware’s DOC’s boot camp (11§ 6712) provides for diversion of PWITD and drug trafficking offenders to be diverted to a 6-month voluntary military style program that emphasizes in addition to the strict discipline and work, addiction rehabilitation.

Diversion sentencing includes *drug court* and *first time offender* sentencing (16 § 4764) that allow judges the discretion to divert any drug offender from any level of sanctioning include minimum drug trafficking terms to non-prison, non-probation treatment. Upon successful completion of drug court treatment an offender’s diversion charges are dismissed.

Chart 3 Drug Sentencing Highlights:

Out of the 3,020 Superior Court drug cases resulting in conviction in 2007, the most typical sentencing is probation (I through IV) at 902 or 29.9 percent. Credit-for-time-served (CTS) was the second most frequent type of drug sentence at 770 or 25.5 percent. A CTS sentence is where pre-trial detention time before conviction is credited as an offenders full Level V incarceration time. Over 400 (52 percent) of the CTS cases were in pre-trial detention for less than one month. The number of CTS cases with longer pre-trial terms diminishes with just over 140 being in pre-trial detention between one and two months and about 70 for pre-trial terms of two to three months. After conviction, most of the CTS cases were placed on some level of probation. Therefore, shortly after sentencing almost 1,672, or 55 percent of all drug cases were placed on probation (the 902 sentenced directly to probation plus the 770 sentenced to probation with credit for time served).

The third most voluminous category of sentencing was Drug Court Diversion at 667, which accounts for 22.1 percent of the 3,020 2007 Superior drug cases. Drug Court Diversion, under the authority of the state's criminal court, focuses primarily on drug treatment and secondarily on the crime. If the offender successfully completes their treatment program, the guilty plea for the case is dismissed. While most of the drug diversion sentences were for non-drug selling convictions (497), there were 166 PWITD and 4 drug traffickers sentenced to Drug Court Diversion.

Due to Delaware's unified correction system, jail and prison are divided by sentence length. Jails include terms of one day to one year and are equated to stays in local or county jail in other states. Prison terms include sentences greater than one year, and would be considered equivalent to a prison sentence in other states. In 2007 there were 292 jail drug sentences accounting for 9.7 percent of the total drug cases. Most jail terms are for one, two, three, six and twelve months, with six months having the highest volume. Nine of 55 (16 percent) of the 12-month jail terms include a diversion to the 6-month DOC boot camp program.

There were 364 prison drug sentences in 2007, which accounted for 12 percent of all Superior Court drug cases. Of these 364 prison sentences, 181 (6 percent) of all Superior Court drug cases were minimum terms. Although prison terms start with any term greater than 12 months, most prison terms fall into one of three categories. There is a spike in prison drug sentences at 24 months and another at 36. Both of these groups number between 90 and 100. These two categories of drug sentences are linked to the 2-year minimum term for drug trafficking and the 3-year term for trafficking heroin and repeat PWITD. The third category of prison sentences includes a low volume spread of cases between 39 to 300 months. These cases usually include additional charges of extreme violence, use of firearms, and very extensive criminal histories that result in habitual sentences.

If an offender gets a jail term in Delaware, their time is served and the offender is usually released to one of the levels of probation. However prison terms are far more complex. Many of the drug offender prison terms include explicit incentives to complete some form of drug treatment. Before Boot Camp sentences are suspended, they range from 1 to 17 years but upon sentencing the Level V term is suspended for six months at Boot Camp. Likewise addiction sentencing, which includes a 9 to 15 month stay in the prison based Key or Greentree program, range from 1 to 15 years. When the offenders successfully complete these programs the longer terms are suspended.

Chart 3: 2007 Superior Court Drug Case Sentencings
Aggregate Terms for all Charges in a Drug Case
by Type of Sentence:
 Minimum Terms, PWITD Not Minimum, "Other Drugs,"
 Addiction and Boot Camp Terms

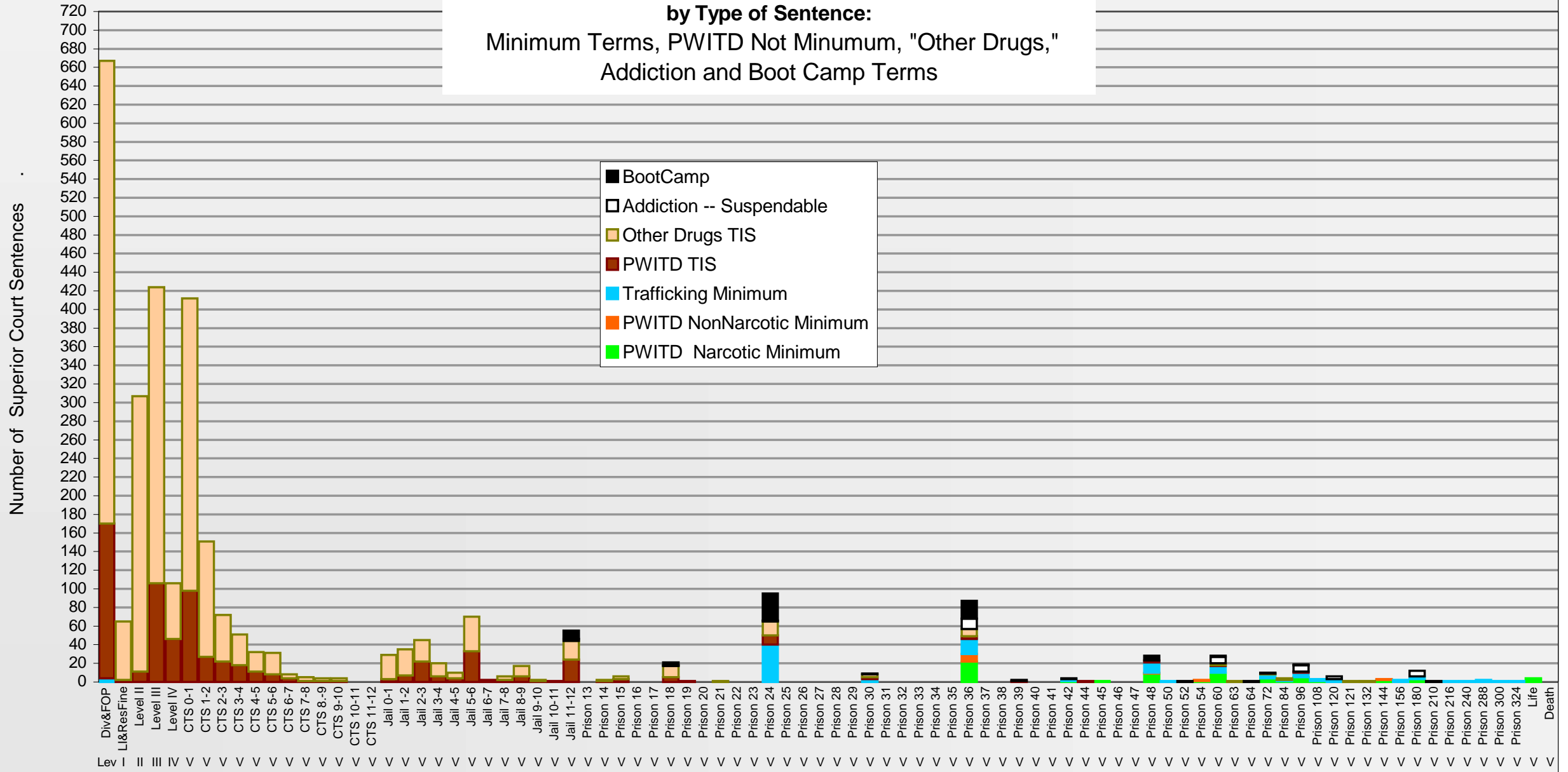


Chart 3: Are Non-Violent Drug Offenders Sentenced to Prison?

Some of the most frequently asked questions and discussed topics regarding Delaware drug sentencing practices are, “How many non-violent drug offenders are sentenced to prison?” or “Isn’t it true that most offenders are sentenced to prison for non-violent offenses?” Examining Chart 3, above, the question can be answered with some certainty when using the legal definition of violent crime found in 11§ 4201.

Prison, which includes sentences greater than one year, on Chart 3 starts with “Prison 13” which demarks the starting point for prison sentences of 13 months and these extend all the way to the right out to Prison 324 months (or 27 years), and “Life” and “Death.” So, when examining the drug prison sentences the *PWITD TIS* (dark brown) represents non-minimum term PWITD convictions, *Trafficking Minimum* (light blue) represents drug trafficking convictions, *PWITD NonNarcotic Minimum* (orange) and *PWITD Narcotic Minimum* (light green) are all violent offenses per 11§ 4201. *Boot Camp* sentences (black) are provided as a suspended 6-month term at DOC Boot Camp in exchange for a longer violent felony sentence. Likewise, *Addiction* sentences (white) represent suspended sentences for a violent felony.

This leaves *Other Drugs TIS* (tan) as the possible source of non-violent drug admissions to prison. Not all of charges in the category *Other Drugs TIS* are for non-violent drug crimes. For instance, this category includes possessing drugs within “x” feet of a school, park, church, etc., which are violent felonies. However, this category also includes maintaining a dwelling or vehicle for the use or distribution of illicit drugs and some types of possession of drug paraphernalia, which are non-violent felonies. Within the prison terms on Chart 3 there are 50 convictions for “Other Drugs TIS”, which accounts for 2.4 percent of the 2,052 convictions for *Other Drugs TIS* in 2007.

These 50 *Other Drugs TIS* cases with prison sentences can be broken into two groups: cases with only drug charges and cases with a combination of drug charges and non-drug charges. There were 28 cases that included both drug and non-drug charges. A detailed case review found that of these 28 cases only four cases had a violent drug charge, but 23 included other violent Title 11 charges like Robbery, Assault, Reckless Endangering and Possession of a Firearm During the Commission of a Felony or by Person Prohibited. Notably, half of this group of offenders illegally used or possessed a deadly weapon. Therefore, while the drug charge in the case may have been a non-violent crime, the overall case involved violence and is not seen as a candidate for a nonviolent drug case resulting in a prison term. The other 22 *Other Drug TIS* cases had only drug charges in the case. Nine of the 22 *Other Drug TIS* cases did not include a violent felony drug charge.

The answer to the question “How many non violent drug offenders are sentenced to prison?” is – fourteen nonviolent drug offenders were sentenced to prison in Delaware in 2007. Or in other words, of the 364 drug offenders sentenced to prison in 2007, 3.8 percent (14) were for a conviction on a non-violent charge.

2007 Drug Sentencing by Type of Drug Treatment

An important dimension of Delaware drug offender sentencing is the degree that sentencing orders include directives for offenders to seek or participate in addiction treatment. Chart 4 below shows that in 2007, almost all cases are considered for addiction treatment: 49 percent are actually sentenced to specific treatment programs and 47 percent were sentenced to be assessed and if found in need they are required to fully participate in treatment. Only 4 percent of the drug cases have no mention of treatment. Not to comply with treatment whether the offender is incarcerated or on probation is a violation of the sentencing order that may result in a violation of probation or a modification of the sentence, each resulting in the application of deferred punishments. As addiction treatment became intertwined with punishment in Delaware, the number of violations relating to the failure to comply with addiction treatment lead to increased violations. For instance, in 1995, the number of probation violators sentenced to incarceration increased from about 1,250 to 2,000 because of the number of offenders failing to comply with the court ordered community treatment (DeISAC 2002).

Although one of the principles of SENTAC, since its inception, has been rehabilitation, the movement toward a treatment orientation for drug cases was gradual. In the mid-1990's the Delaware Drug Court emphasized two styles of pre-incarceration addiction treatment. First, was Drug Court Diversion where diversion eligible defendants waived their right to a jury trial and agreed to a stipulated fact trial if they do not comply with diversion conditions. These defendants appear monthly before a drug court judge, who monitors their addiction treatment progress. Upon successful completion, the charges against the defendant are dismissed. Second, drug offenders sentenced to probation were sentenced to Treatment Access Center (TASC), which is operated by DHSS. These offenders, who were primarily probationers, were to report to TASC for assessment and addiction referral. TASC provides routine progress reports to the sentencing judge.

During April 1997, the Department of Correction Boot Camp opened at the Sussex Correctional Center. Some drug offenders received a Boot Camp diversion sentence and their original longer Level V terms were suspended upon successful completion of the 6-month long military style program that included addiction treatment (DeISAC April 2001 and November 2007). Also started in 1997 was the increase in the number of prison "addiction" sentences that suspended lengthy prison terms for the successful completion of the Key or Greentree prison treatment programs. These programs lasted between 9 to 15 months depending upon the progress of the offender (DeISAC 2002).

Chart 4 Highlights: Type of Drug Treatments part of 2007 Sentencing Orders

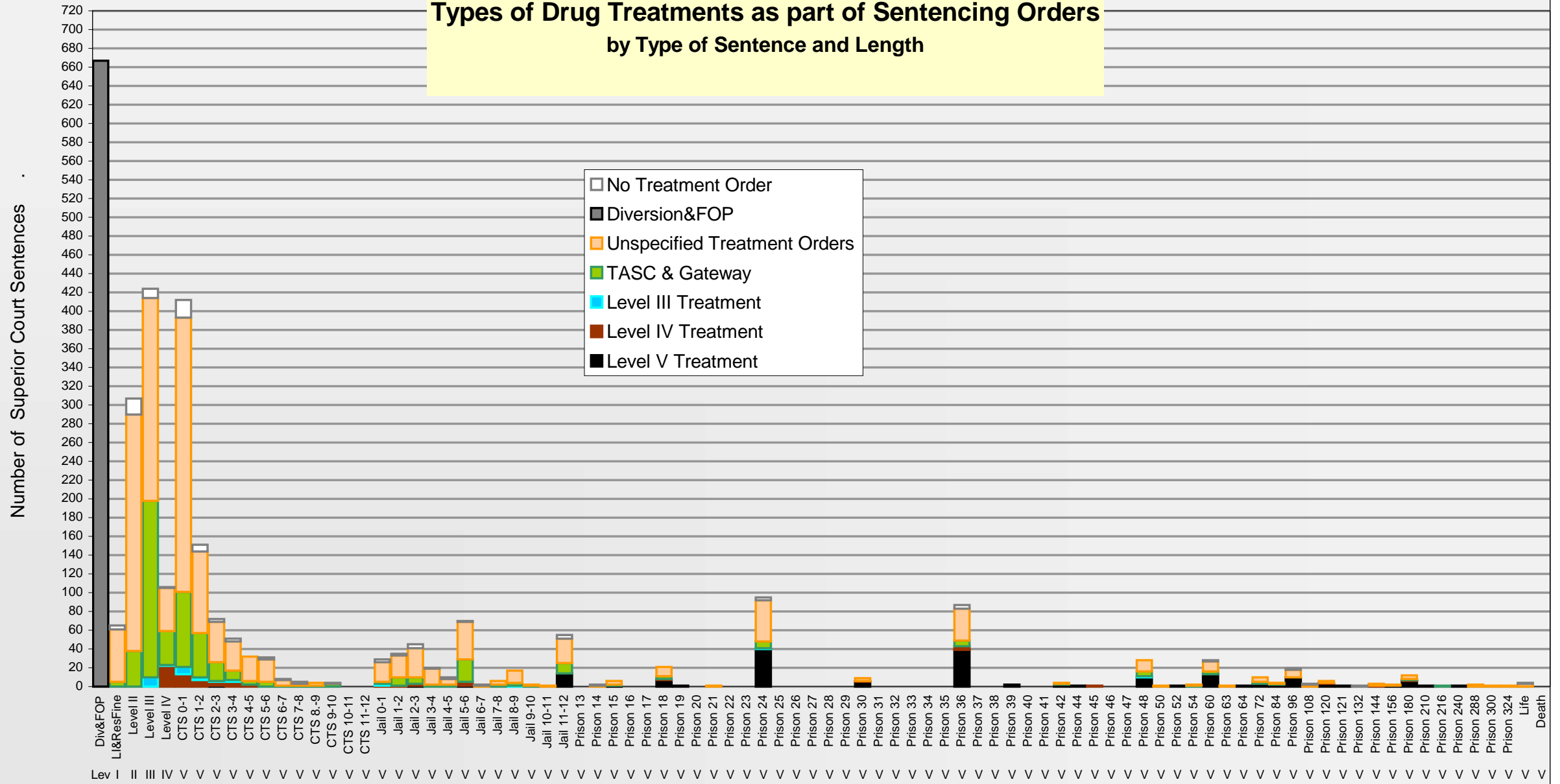
Drug Court Diversion sentences diverted 667, (21 percent) of the Superior Court drug cases from the criminal track to the voluntary community treatment.

TASC sentences numbered 534 (18 percent) of the Superior Court drug cases. Most of these were sentenced directly to probation, but 95 of the TASC sentences were for incarcerated offenders that enter TASC when released from jail or prison.

The number of offenders receiving a jail or prison sentence in 2007 for a drug charge was 656 (292 jail and 364 prison) and of these 168 (26 percent) were ordered to prison based Key or Greentree. Upon successful completion of their prison treatment program their Level V terms would be suspended and they would be released to probation.

In addition to the above mentioned treatment sentences, 47 percent of the 2007 drug cases were to be assessed by DOC for the need for treatment.

**Chart 4: 2007 Superior Court Drug Case Sentencings
Types of Drug Treatments as part of Sentencing Orders
by Type of Sentence and Length**



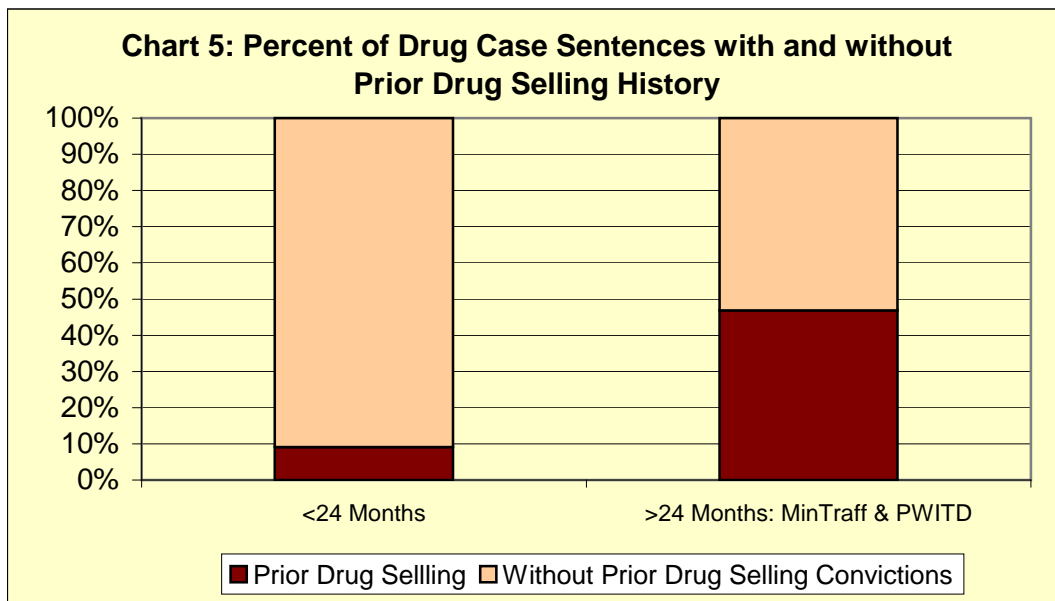
2007 Drug Sentencing by Prior Drug Selling Convictions

An important dimension of Delaware drug case sentencing is the degree that sentencing orders are affected by prior drug selling convictions. In Delaware, the repeat drug selling statute (16§ 4763) states that a conviction of another drug selling episode will result in a minimum 3-year sentence. Charts 5 and 6 summarize repeat drug-selling conviction results. Of the 3,020 drug cases, 443 (13 percent) of the offenders had a prior Delaware drug selling conviction.

The general assumption is that prior drug selling convictions result in a subsequent prison term. While there is a strong correlation with prior drug selling convictions and long prison terms, not all drug offenders with prior drug selling convictions go to prison.

Of the 229 drug offenders sentenced to 36 months or more, 124 (54 percent) had a prior drug selling conviction. Of the 333 offenders sentenced to 24 months or more, 158 (47 percent) had a prior drug selling conviction. There were 2,662 offenders sentenced to less than 24 months in prison including jail terms, CTS, probation and even Drug Court Diversion. These offenders are not normally thought of as having a prior drug selling conviction, yet, of these 2,662 offenders, 242 (9 percent) had a prior drug selling conviction (see Chart 5 below).

Some of the reasons, drug offenders who have a repeat drug selling conviction do not receive a minimum 36-month sentence are – the offender was not arrested for repeat drug selling, the offender’s charges were plead to a non-drug selling offense, or the prior record was not readily available to allow for a minimum term sentence. The data in this part of the analysis goes back to 1996 and different methods of data retrieval had to be used to generate the history of prior drug sales. These methods may not have been available to the court or prosecutors.



**Chart 6: 2007 Superior Court Drug Case Sentencings
with and without Prior Drug Selling Convictions
by Type of Sentence and Length**

