



An Analysis of the
The Minimum Mandatory Drug Sentencing Reform Act
House Bill 181

Illicit Drug Selling Cases
With and Without pre-HB210 and HB 210
Minimum Mandatory Drug Sentencing

May 31, 2005

Prepared by:
Kara Wrede
Chuck Huenke
John O'Connell

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BACKGROUND:

House Bill 181, 143rd General Assembly, if enacted, would replace drug mandatory sentences with the SENTAC/Truth in Sentencing Felony C designation. The maximum Level V prison term for a Felony C is 15 years [Title 11 §4205(b)(3)]. The minimum presumptive sentence under SENTAC (Benchbook January 2005) is up to 30 months at Level V. HB 181 also would eliminate the existing multi-tiered drug trafficking weight thresholds, establishing instead a single trafficking weight for each illicit drug.

Currently in the Department of Correction (DOC), there are two types of drug mandatory sentences being served by offenders: pre-HB 210 and HB 210 drug minimum mandatory terms. HB 210, which was enacted June 30, 2003, reduced the drug minimum mandatory sentences for drug trafficking (Title 16 §4753A) and the subsequent offenses of possession with the intent to deliver (Title 16 §4763).

HB 210 also raised the initial level of per se cocaine possession from 5 to 10 grams for presumption of drug trafficking. All types of illicit drugs, except heroin, were affected by the following minimum term changes:

First tier drug trafficking 10 to 50 grams	...	minimum term reduced from 3 to 2 years,
Second tier drug trafficking 50 to 100 grams	...	minimum term reduced from 5 to 4 years,
Third tier drug trafficking 100 grams plus	...	minimum term reduced from 15 to 8 years.

HB 210 also removed in part the “mandatory” from the drug trafficking sentences so that during the last six months of the term the offender may be “flowed down” from Level V to Level IV, thereby reducing the actual Level V term to 18 months instead of the three years that existed prior to HB 210. HB 210 also limited the types of prior convictions that can be used as history to justify using §4763 to only Possession with the Intent to Deliver – PWITD - (16 §4751 and §4752), Drug Trafficking (16 §4753A), and Selling Drug to a Minor (16 §4761) instead of any prior drug crime conviction. And once invoked, the repeat drug conviction penalty for PWITD was reduced (except for heroin) from five to three years minimum sentence with the ability to serve the last six months at Level IV. Finally, HB 210 eliminated the 15-year minimum term provided in 16 §4763(a).

To date, HB 210 is expected to result in a gradual reduction over the next two to three years of 298 DOC Level V beds.

Two members of the Legislature, Senator James Vaughn and Representative Pamela S. Maier, have written letters requesting specific information regarding the size of the pre-HB 210 and HB 210 DOC minimum mandatory drug populations, the potential DOC bed impact of HB 181 (formerly HB 517) and a summary of the arrests and criminal histories of drug traffickers and drug sellers, as well as, the prosecutorial and sentencing patterns for these crimes.

This study addresses the inquiries of these legislators as well as many other interested parties including SENTAC, the Sentencing Research and Evaluation Committee, and SURJ by addressing the following topics:

Illicit Drug Sales Arrest Outcomes:

This section of the study provides an overview of how many persons are arrested for illicit drug sales and the ultimate consequence of these crimes in terms of plea downs and the types of sentences. To obtain these results a sample of drug sales arrests (Drug Trafficking 16 §4753A, and Possession with the Intent to Deliver (PWITD) 16 §4751 (narcotic) and 16 §4752 (non-narcotic) for the fourth quarter 2003 were tracked to determine the type of convictions and sentences. This section also provides a criminal history profile for all drug sales arrestees in the sample.

Snapshot of the DOC Level V

Pre-HB 210 and HB 210 Minimum Mandatory Populations:

This section provides a June 30, 2004 snapshot of Level V the pre-HB 210 and the HB 210 minimum mandatory drug populations by type of statute and special sentencing conditions such as stipulated deferred sentences to boot camp. This section also provides a criminal history profile of the offenders sentenced to HB 210 or pre-HB 210 minimum mandatory drug sentences that were part of the June 30, 2004 DOC snapshot population.

HB 181 DOC Bed Impact Scenario One:

What if HB 181 is enacted and the June 30, 2004 DOC drug minimum mandatory population had the same type of sentences and distribution as the 2004 Superior Court (sans drug crimes and HB 210 minimum Burglary 2nd Degree) Felony C sentencing orders? The DOC Level V population reduction for this scenario is quite dramatic because 64 percent of the drug traffickers and PWITD offenders would be sentenced to probation (the current Felony C practice) instead of prison.

HB 181 DOC Bed Impact Scenario Two:

What if the drug trafficking and repeat drug sales crime are sentenced a somewhat tougher than “regular” Felony C, more in line with SENTAC’s presumptive drug

sentencing guidelines? Furthermore, what if some of the drug sales cases that included the use or possession of a weapon resulted in the use of minimum mandatory firearm and deadly weapons statutes? The assumptions in this scenario suggest that the criminal justice adversarial system may sentence only 32 percent of the current drug traffickers and repeat drug sellers to prison. Scenario Two also assumes that with the decrease in penalties under HB 181 prosecutors and judges may begin to opt to use the current firearm minimum mandatory sentences. Fifty-four percent of persons currently serving time for a drug trafficking or a repeat drug selling conviction have a firearm or deadly weapon charge in their criminal history. In Scenario Two it is assumed that 35 percent of this type offender would be convicted for a weapons minimum mandatory sentence.

SUMMARY OF FINDINGS

Without HB 210 reduced sentencing terms, the DOC minimum mandatory drug offender population would probably exceed 600.

The forthcoming HB 210 report assessing the implementation of the new drug crime sentencing laws shows a process leading to a 298 DOC Level V beds reduction – resulting in a DOC drug trafficking and repeat PWITD population of about 302.

HB 181, per Scenario One, which would require a full implementation of the current Felony C sentencing pattern including sentencing 64 percent of the drug trafficking and repeat PWITD cases to probation could result in a DOC drug trafficking and repeat PWITD population of about 174.

HB 181, per Scenario Two, which estimates that only 32 percent of the drug trafficking and repeat PWITD cases would be sentenced to probation and about 19 percent of the offenders sentenced to prison would be sentenced for a minimum mandatory weapon charge in lieu of a HB 210 minimum drug selling sentence, could result in a DOC drug trafficking and repeat population (including the tradeoff for weapon minimum mandatory sentence) of about 399.

ILLICIT DRUG SALES ARREST OUTCOMES

For this section of the study all drug sales arrests (Drug Trafficking 16 §4753A, and Possession with the Intent to Deliver (PWITD) 16 §4751 (narcotic) and 16 §4752 (non-narcotic) were extracted from Criminal Justice Information System (CJIS) for the fourth quarter of 2003. Each drug arrest charge within those events was tracked to determine the types of convictions and sentences associated with illicit drug sales activity. The tracking period for these arrests ended in April of 2005, therefore the results are 96 percent complete with only four percent (30) of these cases still being listed as pending. Because these arrests occurred after the June 30, 2003 implementation of HB 210, the arrestees in this part of the study were not longer affected by the minimum mandatory sentencing practice that predated HB 210. Under HB 210, drug sales minimum mandatory sentences are shorter than before HB 210 and subject to movement to Level IV within the last six months of the term.

In the fourth quarter of 2003, there were 740 drug sales charges involving 492 persons. Forty-five (9 percent) of these persons were not residents of Delaware. Of the 740 charges, 107 were for drug trafficking, 360 were for PWITD-narcotic and 273 were for PWITD non-narcotic.

Table 1 below shows that 23.4 percent of these drug sales charges are convicted for the original charge. In some cases, the drug sales charges are pled to a lesser drug charge such as a lower tier drug trafficking charge and result in a conviction. This happens for about 6 percent of the drug sale charges. The majority of the drug trafficking and PWITD charges, however, are nol-prossed. In these cases, the drug trafficking or PWITD charges are removed from the case. This occurs in about 66 percent of the charges. For many of these nol-prossed drug trafficking and PWITD charges there is a conviction for another charge within the case.

In total, about 30 percent (219 out of 740) of the original drug sales arrest charge result in a guilty finding for the original charge or lesser-included drug charge. Of these 219 convictions for drug sales charges, 11.4 percent (25) receive a drug sales HB 210 minimum sentence. It is interesting to note that of all the drug trafficking and PWITD charges that only 3.4 percent result in a HB 210 minimum mandatory drug term.

Twenty-five HB 210 drug trafficking and repeat PWITD minimum sentences per quarter may not appear to be a high volume of cases considering the starting point of 740 charges. However, if this single quarter of data were annualized, which would yield 100 cases per year, and these cases were sentenced under the pre-HB 210 drug mandatory sentences the prison bed impact would be noteworthy. In the June 30, 2004 DOC HB 210 and pre-HB 210 minimum mandatory snapshot population the average drug trafficking term was just over 5 years, and the repeat PWITD average term was almost 9 years. Of course many of these longer terms were pre-HB 210 terms – but if the pre-HB 210 sentencing structure were still in place the 100 convictions per year could easily yield a DOC population of over 600.

Table 1
 2003 4th Quarter Drug Sales Arrest Outcomes
 Drug Trafficking and Possession With Intent to Deliver Charges

	Arrest Charges	Guilty Original Charge (a)	Guilty Lesser Incl Charge (b)	Total Drug Sales Convictions (a + b)	Number of Drug Min-Mand Sentences	Percent of Drug Sales Convictions Minimums	Nolle Prosequi or Not Guilty	Pending
Drug Trafficking	107	12	10	22	15	68.2%	80	5
<i>Tier 1: 10 to 50 grams cocaine</i>	82	10	4	14	9	64.3%	65	3
<i>Tier 2: 50 to 100 grams cocaine</i>	10	2	3	5	4	80.0%	4	1
<i>Tier 3: 100+ grams cocaine</i>	15	0	3	3	2	66.7%	11	1
Possession w/Intent Deliver: Narcotic	360	107	15	122	10	8.2%	218	20
Possession w/Intent Deliver: Non-Narcotic	273	54	21	75	0	0.0%	193	5
Totals	740	173	46	219	25	11.4%	491	30
Percent of Original Charges		23.4%	6.2%	29.6%	3.4%		66.4%	4.1%

DelSAC May 2005

Note: With the enactment of HB 210 on June 30,2003 minimum mandatory drug sentences allows for the last six months to be served at Level IV.

ILLCIT DRUG SALES ARREST OUTCOMES – GUILTY AS CHARGED SENTENCING PATTERN

What is the sentencing pattern for offenders guilty as charged for drug sales crimes?

Table 2 below provides sentencing detail for offenders found guilty of the original drug sales charge. As was reported above, 173 of the original 740 (23.4 percent) drug sale charges resulted in a conviction on the original charge. PWITD-narcotic charges have the highest chance of a conviction on the original charge at 29.7 percent. Drug trafficking has the lowest rate of conviction on the original charge at only 11.2 percent. PWITD-non-narcotic charges have a 19.8 percent conviction rate on the original charge.

Of the 173 guilty as charged drug selling convictions, only 27 (15.6 percent) received a Level V prison sentence of greater than one year. Fifteen (8.7 percent) received a Level V jail term of less than one year and twelve (6.9 percent) received a deferred sentence to DOC Level V boot camp. The Level V portion of the boot camp program lasts about 6 months. An important change occurred regarding DOC boot camp following the implementation of HB 210. As the minimum mandatory drug trafficking term decreased from three years to 18 months (two year minimum minus the six months Level IV flowdown), the number of offenders convicted of drug trafficking who received a deferred boot camp sentence has been reduced by one-half (HB 210, DelSAC forthcoming).

Ten of the 12 offenders convicted of drug trafficking received a HB 210 minimum mandatory drug term, nine received the lowest per se drug weight tier term of two years, and one received four years for the second per se drug weight term. Interestingly, four of the minimum mandatory terms were deferred for DOC boot camp program.

One offender convicted of drug sales was sentenced to Level V addiction sentence for DOC Level V treatment. Offenders with an “addiction sentences” often receive a long prison term of around the 5-year range, however, the actual time served at Level V is associated with the successful completion of the treatment which results in about an actual 14 months term – instead of a 60 months term. Ten of the drug sales sentences involved juveniles that received Family Court indefinite sentences to Youth Rehabilitative Services (YRS).

In summary, drug sales offenders convicted of the charged crime are sentenced as follows:

- 24 percent of the drug sales convictions result in Level V prison or jail time and 14 percent receive other Level V time in boot camp, DOC treatment or as juveniles at YRS.
- 23 percent received Level IV sentences (all these are for PWITD).
- 39 percent are sentenced to Level III, II, and I probation terms as well as lesser penalties such as fines.

Table 2
2003 4th Quarter Drug Arrest Outcomes
Guilty as Charged Drug Cases

	Arrest Charges	Guilty of the Original Charge	Pct. Guilty Org. Chg.	LV Drug Mand Sent	Types of Sentences							
					LV Prison Yr.+	LV Jail 1 Up to 1 Yr.	LV Boot Camp 6 mos.	Juvenile Level V Indefin.	Level V Treat.	Level IV	Level I, II, III Prob.	Lesser Other Penalty
Drug Trafficking	107	12	11.2%	10	8	0	4	0	0	0	0	0
<i>Tier 1: 10 to 50 grams cocaine</i>	82	10	12.2%	9	6	0	4	0	0	0	0	0
<i>Tier 2: 50 to 100 grams cocaine</i>	10	2	20.0%	1	2	0	0	0	0	0	0	0
<i>Tier 3: 100+ grams cocaine</i>	15	0	0.0%	0	0	0	0	0	0	0	0	0
Possession w/Intent Deliver: Narcotic	360	107	29.7%	10	18	10	5	9	1	21	33	10
Possession w/Intent Deliver: Non-Narcotic	273	54	19.8%	0	1	5	3	1	0	19	21	4
Totals	740	173	23.4%	20	27	15	12	10	1	40	54	14
Guilty of Original Charge: Percent Sentenced to ...					15.6%	8.7%	6.9%	5.8%	0.6%	23.1%	31.2%	8.1%

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Note: With the enactment of HB 210 on June 30,2003 minimum mandatory drug sentences allows for the last six months to be served at Level IV.

The “types of sentences” sum to the “guilty of the original charge” column. The LV Drug Mandatory Sentence column shows how many of the guilty of the original charge cases were sentenced to a mandatory sentence. E.g., 12 persons were found guilty of drug trafficking and 10 of the 12 terms received a mandatory term.

The two drug traffickers guilty of the original charge who did not receive a minimum mandatory drug sentence were sentenced as habitual offenders under 11§ 4214a and b.

ILLICIT DRUG SALES ARREST OUTCOMES – GUILTY LESSER-INCLUDED CRIME SENTENCING PATTERN

When offenders' cases are pled to a lesser-included offense, it is generally assumed that the severity of sentences decreases also. This section explores that assumption.

Table 3 below provides the sentencing detail for offenders found guilty of a lesser-included offense after being arrested for a drug sales charge. As was reported above, 46 of the original 740 (6.2 percent) drug sale charges result in a conviction for of a lesser-included charge. Almost 80 percent of these lesser-included sentences are for PWITD crimes. Only 10 drug trafficking charges are pled to lesser-included offenses and these pleas appear to be for cases with large amount of illicit drugs being pled to a lower drug trafficking tier.

Of the 46 lesser-included convictions, only 5 (10.9 percent) received a Level V prison sentence of greater than one year. All of these are for drug trafficking charges. Two PWITD offenders received Level V jail time (a term of less than one year) and only three others received a Level V term for a deferred boot camp or an indefinite juvenile sentence at YRS. Drug sales arrestees with cases that result in a guilty finding for a lesser-included crime are only about half as likely to receive some type of Level V term. Thirty-eight percent of the drug sales arrestees who are guilty as charged receive some type of Level V term. For drug sales arrestees guilty of lesser-included crimes, 22 percent receive some sort of Level V term, with only 11 percent receiving a prison term.

Level IV, while a frequent sentence for drug sale offenders guilty as charged (23 percent), was used infrequently for drug sales pled to lesser-included crimes. Only 6.5 percent of the lesser-included cases are sentenced to Level IV.

About 72 percent of the drug sales arrestees that are pled to lesser-included crimes are sentenced to probation Levels I, II or III or to a lesser punishment such as a fine.

Minimum mandatory drug terms are more likely to be used for cases where the offenders were not Delaware residents. Ten percent of Delaware residents that were convicted of a drug sales charge or lesser-included charge received a HB 210 minimum mandatory drug term, while 20 percent of the non-Delawarean offenders convicted of these charges received a HB 210 minimum mandatory term.

Table 3
2003 4th Quarter Drug Arrest Outcomes
Guilty of Lesser Included Crimes

	Arrest Charges	Guilty of the Lesser Included	Pct. Guilty Less. Incd. Chg.	LV Drug Mand Sent	Types of Sentences							
					LV Prison Yr.+	LV Jail 1 Up to 1 Yr.	LV Boot Camp 6 mos.	Juvenile Level V Indefin.	Level V Treat.	Level IV	Level I, II, III Prob.	Lesser Other Penalty
Drug Trafficking	107	10	9.3%	5	5	0	1	0	0	0	4	0
Tier 1: 10 to 50 grams cocaine	82	4	4.9%	0	0	0	0	0	0	0	4	0
Tier 2: 50 to 100 grams cocaine	10	3	30.0%	3	2	0	1	0	0	0	0	0
Tier 3: 100+ grams cocaine	15	3	20.0%	2	3	0	0	0	0	0	0	0
Possession w/Intent Deliver: Narcotic	360	15	4.2%	0	0	2	0	2	0	2	8	1
Possession w/Intent Deliver: Non-Narcotic	273	21	7.7%	0	0	0	0	0	0	1	18	2
	740	46	6.2%	5	5	2	1	2	0	3	30	3
Guilty of Lesser Included Charge: Percent Sentenced to ...					10.9%	4.3%	2.2%	4.3%	0.0%	6.5%	65.2%	6.5%

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Note: With the enactment of HB 210 on June 30,2003 minimum mandatory drug sentences allows for the last six months to be served at Level IV.

The “types of sentences” sum to the “guilty of the lesser included charge” column. The LV Drug Mandatory Sentence column shows how many of the guilty of the lesser included charge were sentenced to a mandatory sentence. E.g., 10 persons were found guilty of lesser-included drug trafficking and 5 of terms were mandatory terms.

ILLICIT DRUG SALES ARREST OUTCOMES – CRIMINAL HISTORY FINDINGS

In the fourth quarter of 2003, there were 492 persons arrested for 740 drug sales charges. Table 4 below shows the summary of the average (mean) and the low and high range for the types of crimes for which persons have been arrested. The average drug sales arrestee has been arrested in Delaware 11.2 times (including the current drug sales arrest).

Table 4
Arrest History Profile
For
2003 4th Quarter Drug Sale Offenders

	Minimum	Average	Maximum
Total Prior Arrests	1	11.2	55
Title 11 Violent Felony	0	1.1	12
Firearms and Dangerous Weapons	0	0.5	6
Title 16 Violent Felony Drug Sales	1	2.0	9
Title 16 Non-Violent Felony Drug	0	1.0	5
Title 16 Drug Misdemeanors	0	2.2	10
Title 11 Non Violent Felony	0	2.3	16
Other Misdemeanors	0	6.1	37
Violations of Probation	0	1.7	13

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Technical Note:

An arrest in this analysis accounts for one person being arrested anywhere in Delaware within a single day. If the Wilmington P.D and New Castle County Police arrested the person on the same day these events were counted as a single arrest event. The profile of the arrest history shows how many arrest events contained at least one charge classified into at least one of the subcategories of crime used in the criminal history profile. Therefore, this detail regarding the types of crimes sums somewhat higher than the count of prior arrests. For instance, within a single arrest event an arrestee may be charged with both a violent felony non-drug crime and a violent felony drug crime. “Maintaining a dwelling for the use of illicit drugs” is the most commonly cited non-violent drug felony.

For the average person arrested for drug trafficking or PWITD, their prior illicit drug activity is an important part of their criminal history – involving at least 5 out of the recorded 11 arrest events. The typical illicit drug seller has two charges for prior violent felony drug sales. These include prior drug trafficking and PWITD charges. The typical illicit drug seller has also been arrested in the past once for a non-violent felony drug offense like possession of drugs within “x” feet of a school or a park. Finally the typical drug seller has just over two prior arrest charges for simple misdemeanor possession of illicit drugs.

The typical drug seller also has some past serious violent behavior. On average, these drug trafficking and PWITD arrestees have at least one non-drug violent felony charge in their past. The most frequent non-drug violent felony charges were aggravated assault and robbery.

About one-half of the persons arrested for drug sales had an illegal firearm or deadly weapon charge in their criminal history.

Also, the typical drug seller was not immune from non-violent felony crimes. Non-violent felonies are most often associated with more serious thefts, Burglary 3rd and conspiracy. On average the typical drug seller has 2.3 prior non-violent felony charges in this history. The typical drug seller also has a robust misdemeanor criminal history. On average the typical drug seller has 6.1 misdemeanor charges in their history.

Finally, the 1.7 prior violation of probations indicates that the typical illicit drug seller has been convicted, placed on probation and then violated their terms of probation about twice.

SNAPSHOT OF THE DOC LEVEL V PRE-HB 210 AND HB 210 MINIMUM MANDATORY DRUG POPULATIONS

This section provides a June 30, 2004 DOC Level V snapshot population of minimum mandatory drug offenders. Because HB 210 became law on June 30, 2004 the DOC “minimum mandatory drug offender population” now include offenders sentenced under the Pre-HB 210 minimum mandatory drug laws and the new HB 210 minimum mandatory drug terms.

As discussed earlier, the enactment of HB 210 changed the minimum mandatory drug sentences for drug trafficking and repeat PWITD to shorter minimum mandatory terms with the last six months of the term eligible for flowdown to Level IV. The end result is that the three year drug trafficking terms were reduced to as little as 18 months at Level V (the two year HB 210 minimum minus the six month Level IV flowdown). In addition, the five year minimum mandatory term for repeat PWITD term was reduced to as little as 30 months (the three year HB 210 minimum mandatory minus the six month Level IV flowdown).

Table 5 below shows the DOC pre-HB 210 and the HB 210 minimum mandatory populations by the type of statute and special sentencing conditions such as deferred sentences to boot camp.

This section also provides a criminal history profile for these offenders.

Table 5
DOC Snapshot Population: June 30, 2004

HB 210 Minimum Term Drug and
Pre-HB 210 Minimum Mandatory Offenders

	Major Institutions	Boot Camp	Level IV Institutions	Statute Totals
Drug Trafficking (16 4753A)	259	17	31	307
PWITD Narcotic (16 4751)	130	9	3	142
PWITD Non-Narcotic (16 4752)	19	4	8	31
	408	30	42	480 Total

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On June 30, 2004, it is estimated that there were 480 persons with Level V sentences that were either pre-HB 210 or the new HB 210 minimum mandatory drug terms. Sixty-four percent of this population was incarcerated for drug trafficking, 30 percent for PWITD narcotics, and just over 6 percent for PWITD non-narcotics.

Most of these offenders, 85 percent (408) were serving their time in a major institution (Delaware Correctional Center, Howard Young Correction Institution, Sussex Correctional Institution, Webb Correctional Facility, Compact Cases and Baylor Correctional Institution). Thirty offenders (6 percent) were in the DOC boot camp program per (11§6712b) diversion legislation relating to drug trafficking and Burglary 2nd Degree cases. Forty-two of the offenders were housed in Level IV. While HB 210 provides for a Level IV flowdown after 18 months at Level V for the lowest tier drug trafficking cases (10 to 50 grams), it is too early for many, if any, of the 31 drug cases housed at Level IV to be associated with the HB 210 provisions. The exact reason for so many drug trafficking cases being in Level IV housing is unclear

Technical Note:

Crosschecking the Department of Correction CJIS files, CJIS arrest files, Superior Court Sentencing Orders and the Superior Court docket files, 531 possible pre-HB 210 and HB 210 minimum mandatory drug offenders were identified for the DOC population snapshot. Four hundred of these cases were included in the snapshot because the court and the DOC records were in agreement regarding statutes, sentence lengths and mandatory or minimum terms references. In addition, for 80 of the cases there were appropriate statutes and associated periods of incarceration, but they lacked legal reference for a pre-HB 210 or HB 210 minimum mandatory term. Because these cases did not have information pointing toward a non-minimum mandatory sentence, and they “appeared” to be a drug minimum mandatory sentence they were included in the study. Fifty-one of the cases, while initially appearing to be HB 210 minimum or pre-HB 210 mandatory drug cases, were found not to be. Some of these cases were early release cases associated with the ongoing 11§4217 process, addiction sentences, habitual offender sentences, boot camp violators with less than a mandatory term, cases with erroneous statute references, or missing records.

Table 6 below, provides a Delaware arrest summary for the 480 offenders serving pre-HB 210 and HB 210 minimum mandatory Level V drug sentences on June 30, 2004. Three separate groups of offenders are shown to capture factors that significantly impact criminal history patterns. For instance, Boot Camp offenders that are diverted from a drug minimum mandatory sentenced are expected to have less serious criminal histories than the “regular” minimum mandatory drug offenders. Likewise, non-Delawareans who are involved in illicit drug trade are often transients or have only lived in Delaware for a short time, and while involved in serious crime have not had the time to “build up” their Delaware criminal histories. (Note: In addition to non-Delawareans having possible out-of-state activity, almost 10 percent of the Delaware residents were found to have fugitive records from out of state – this indicates that even the in-state criminal history for even Delaware residence undercounts criminal history).

The results support these categories. Delaware residents incarcerated for a minimum mandatory drug charge average about 20 prior arrests each, Boot Camp offenders who have been diverted from a minimum mandatory drug offense average 13.4 prior arrests, and the non-Delawareans average only 2.8 prior offenses. In fact, for 34 out of the 51 non-Delawareans, the only arrest on their Delaware criminal history record is the arrest that lead to their minimum mandatory drug term.

When viewing the results from Table 4, which provides the arrest history for all persons arrested for drug trafficking or PWITD, and Table 6, which provides the arrest history for persons actually sentenced to minimum mandatory drug terms, the significance of prior criminal history becomes readily apparent. For the “arrestee” population the average number of prior arrests is about 11, while for the “incarcerated” population the average number of prior arrests is about 20.

There were 406 non-Boot Camp Delaware residents serving time for a minimum mandatory drug term on June 30, 2004. This group on average has about 20 prior arrests for which 6.5 are felony arrests. About 94 percent of this group has prior drug arrests in their criminal histories, which would qualify them for a repeat PWITD sentence, if convicted. In addition, 54 percent of this group has firearm or deadly weapon charges in their history. For first time drug offenders, 14 out of 25 have firearm or deadly weapon charge in their history. And while the “first time drug offender” may not qualify for a repeat PWITD minimum mandatory sentence, they may qualify for a firearm/weapon minimum mandatory term.

There were 11 persons serving minimum mandatory drug terms on June 30, 2004 for what appears to be a first time drug offense. While not being new to the criminal justice scene, with almost 9 prior arrests, they do have a very limited felony arrest history. Only about one-half of them have a prior felony arrest in addition to the one leading to the current conviction. Many of these minimum mandatory drug convictions, however, appear to have aggravating circumstances as part of their case. Six of 11 first time offenders were arrests with over 100 grams of cocaine or other listed minimum mandatory illicit drugs. Other factors include cases found guilty at trial, participation in an illicit drug ring and violation of probation while awaiting admission to Boot Camp.

The details associated with these first time offender cases are provided at the bottom of Table 6.

Table 6
Criminal History Profile
DOC Snapshot Population: June 30, 2004
HB 210 and Pre HB-210 Minimum Mandatory Terms

	Offenders	Percent	Average Number of Prior Arrests	Average Number of Felony Arrests
Delaware Residents:				
Repeat Drug Offenses and Weapon History	206	50.7%	22	7.7
Repeat Drug Offenses -- No Weapon History	175	43.1%	19	5.9
First Time Drug Offense and Weapon History	14	3.4%	7.6	2.2
First Time Drug Offense	11	2.7%	8.8	1.6
Totals	406	100.0%	19.9	6.5
Boot Camp Offenders:				
Repeat Drug Offenses and Weapon History	10	43.5%	15	4.5
Repeat Drug Offenses -- No Weapon History	6	26.1%	15	3.7
First Time Drug Offense and Weapon History	0			
First Time Drug Offense	7	30.4%	9.6	2.4
Totals	23	100.0%	13.4	3.7
Non-Delaware Residents:				
Repeat Drug Offenses and Weapon History	5	9.8%	5.2	2.4
Repeat Drug Offenses -- No Weapon History	5	9.8%	8	3.6
First Time Drug Offense and Weapon History	6	11.8%	4.2	1.8
Boot Camp: Repeat Drugs and Weapon	1	2.0%	5	3
No Delaware Drug or Weapon History	34	66.7%	7.8	1
Totals	51	100.0%	2.8	1.6
Total DOC Snapshot Population	480			

Notes: Seven of the Boot Camp offenders have been readmitted to prison and are serving a minimum or minimum mandatory prison sentence.

Detail on the Eleven Delaware First Time Drug Offenders without Weapon History

1. Over 100 grams of cocaine, Trial Guilty.
2. Over 100 grams of cocaine, children involved.
3. Over 100 grams of cocaine.
4. Over 100 grams of cocaine and marijuana, OSS, large amount of money.
5. Over 100 grams of cocaine being transported from NY.
6. Over 100 grams of PCP.
7. 50 to 100 grams in each of two trafficking cases.
8. Trial Guilty, 6 years.
9. Part of an illicit drug trafficking organization, trafficking food stamps.
10. Violated while on probation awaiting Boot Camp.
11. No additional information.

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HOUSE BILL 181 DOC BED IMPACT SCENARIO ONE

WHAT IF, DRUG TRAFFICKING AND PWITD REPEAT OFFENDERS WERE SENTENCED PER SENTAC FELONY C SENTENCING PATTERN?

Under House Bill 181, drug trafficking and PWITD repeat offenders would no longer be sentenced for HB 210 minimum mandatory terms (a minimum of two years minus six months at Level IV for drug trafficking and a minimum of three years minus six months at Level IV for PWITD repeat offenders (except for heroin which remains a three year minimum and five year minimum for repeat PWITD). Instead, all drug traffickers and PWITD offenders would be sentenced as SENTAC violent felony C crimes.

Level V is the SENTAC presumptive sentence for a first conviction of a felony C crime, and at Level V the presumptive term could range between one day in jail to 30 months in prison (SENTAC Benchbook 2005). This means a sentence to Levels I, II, III or IV would be outside the sentencing guidelines. Therefore under HB 181, all drug trafficking and PWITD repeat offenders could be doing some jail or prison time. Furthermore, because prior felony convictions are an aggravating factor, PWITD repeat offenders' presumptive Level V range could increase from 30 months to 60 to 120 months depending on the offenders' conviction histories.

The June 30, 2004 drug trafficking and PWITD repeat offenders DOC population snapshot (a mixture of Pre-HB 210 mandatory sentence and HB 210 minimum sentence offenders) is estimated to number 480. Of these, 408 of the offenders were housed in a Level V facility and 42 in a Level IV facility.

While *not a full* forecast model, one means of examining the potential DOC bed reduction impact would be to “overlay” the Violent Felony C (non drug) sentencing distribution onto the DOC June 30, 2004 population. In 2004 the non-drug violent felony C sentencing pattern shows that about 36 percent of these convicted received a Level V term and 64 percent were sentenced to probation at Levels IV, III, II, I or even to a diversion sentence.

As Table 6, below, shows, if the June 30, 2004 DOC snapshot population matched the 2004 SENTAC violent felony C sentencing pattern, the number of offenders housed at Level V would be reduced from 480 to 174, a decrease of 306. Probably even more telling would be to compare the impact on the number of offenders serving prison time (sentences greater than one year) as shown in the subsection “Level V Sentencing Detail.” In this comparison the number of offenders serving prison time would be reduced from 408 to 79. Even if the “prison treatment” offenders were added to the Scenario One prison count, the prison population reduction would still be dramatic: from 480 to 71, reflecting a potential prison population reduction of 329.

It should be noted that the jail population would probably be about two-thirds of the 79 shown on Table 6, because these offenders would be serving terms shorter than one year. Also, the projected reduction in the DOC drug boot camp population is probably reasonable, because, as it has already been shown in the HB 210 study (DeSAC

forthcoming) that when the reduced HB 210 drug sentences were reduced by about one-half, the number of drug offenders being diverted to DOC boot camp also decreased by about one-half. Therefore, if HB 181 was implemented and Level V terms were reduced even further from the HB 210 levels, there could be greater reduction in the incentive to sentence drug traffickers to boot camp.

Table 7
House Bill 181
DOC Bed Impact: Scenario One
What if, the 2004 DOC Min-Mand Snapshot had been Sentenced as 2004 Felony C's

Sentence Type	June 2004 DOC Snapshot	2004 Felony C Sentencing Distribution	What if, Snapshot Sentenced as 2004 Felony C?
Diversion		5.3%	26
Level I		0.2%	1
Level II		2.7%	13
Level III		30.8%	148
Level IV	42	24.8%	119
Level V	438	36.2%	174
Total	480	100.0%	480

Level V Sentencing Detail			
Boot Camp	30	3.6%	17
Jail <= 1Year	0	16.3%	79
Prison Treatment		5.3%	25
Prison	408	10.9%	53
Total	438	36.2%	174

DeISAC May 2005

HOUSE BILL 181 DOC BED IMPACT SCENARIO TWO

WHAT IF DRUG TRAFFICKING AND PWITD REPEAT OFFENDERS' SENTENCES DID NOT CONFORM TO THE 2004 SENTAC FELONY C SENTENCING DISTRIBUTION?

BUT,

HALF OF THE FELONY C PROBATIONERS STILL RECEIVED PRISON SENTENCES AND 35 PERCENT OF THE OFFENDERS WITH FIREARM AND DEADLY WEAPON HISTORIES RECEIVED MANDATORY MINIMUM FIREARM SENTENCES?

As shown in the previous section, 64 percent of persons convicted in 2004 of a Felony C received probation terms to Level IV, III, II or I or fines. In contrast, under current law (HB 210), all of these offenders have been all sentenced to Level V for a minimum mandatory term of at least 18 to 30 months. It is probably not pragmatic to think that those who are part of the adversarial system would find 64 percent of this group qualified for probation terms with the passage of HB 181. Current law and SENTAC guidelines both recognize the seriousness of many of these crimes. For instance drug trafficking is a Felony B. And any Felony B requires, at least, a minimum two-year sentence. The reduction of these crimes to Felony C may lead to tougher charging and sentencing practices for these crimes than is currently experienced under Felony C. Furthermore, most of the offenders in this group are well into the double-digit range for the number of prior arrests, which indicates the public safety risk of these offenders. This alone could lead prosecutors and judges to seek more punitive sentences.

Scenario Two introduces two variances to the assumption that there would be a full implementation of the Felony C sentencing pattern for drug traffickers and repeat illicit drug sellers. First, what if only one-half of the offenders that were sentenced to probation under a "full" implementation of HB 181 were still sentenced to prison rather than probation? If this were true, Scenario Two would add 140 DOC beds to Scenario One.

As the criminal histories for inmates in the June 30, 2004 Level V "drug seller" population indicates, 54 percent of these offenders have a firearm or deadly weapon charge in their history. This leads to the second HB 181 variant assumption, what if 35 percent of these offenders who went to prison instead of probation received a "gun" minimum mandatory sentence? Today, in some drug trafficking and repeat PWITD cases where there is a minimum mandatory drug sentences, this drug sentence often trumps the possession of a firearm during the commission of a felony charge, as the firearm charge is nol-prossed upon a plea to a drug minimum charge. The second assumption is based on the probability that without the current drug minimum sentences, the weapon, which has a minimum mandatory term associated with it, could begin to trump the Felony C drug conviction. The Possession of a Firearm During the Commission of a Felony [PFDCF 11 §1447A(b)] has a three-year minimum mandatory term and the repeat PFDCF 11 §1447A(c) has a five-year minimum mandatory term.

If 35 percent of the 54 percent (that is, about 19 percent) of the offenders sentenced to prison under Scenario Two received a PFDCF minimum mandatory term (90 percent of these being for the 3 year terms and 10 percent being for the repeat offender 5 year term), Scenario Two would add another 85 DOC Level V beds to Scenario One.

The combined bed impact for both parts of HB 181 Scenario Two would yield a DOC bed population of about 399 (Scenario One 174 Level V beds, plus 140 beds from reducing the number of probation sentences in one-half, plus 85 beds from the increased use of mandatory minimum firearm sentencing).

Scenario Two attempts to simulate some of the possible criminal justice system responses to HB 181, it is, however, not intended to be predictive, but rather indicative. Moreover, Scenario Two also does not purport to cover all possible outcomes of the criminal justice systems reactions to the implementation of HB 181. For instance, in addition to fewer drug traffickers and repeat drug sellers being sentenced to probation and more receiving minimum mandatory sentences for firearm charges, Scenario Two does not consider the possibility of the expanded use of habitual sentencing. Given the extensive criminal history of most of the current pre-HB 210 and HB 210 minimum mandatory drug population, many of these offenders could qualify for 11 §4214(a)(b) habitual criminal sentence. If convicted of a third or fourth qualifying felony (in this case the drug Felony C), these offenders could be sentenced for up to life imprisonment. A more aggressive application of the habitual offender statute could easily erase any DOC beds saving anticipated with the passage of HB 181.

SUMMARY OF FINDINGS

Without HB 210 reduced sentencing terms, the DOC minimum mandatory drug offender population would probably exceed 600.

The forthcoming HB 210 report assessing the implementation of the new drug crime sentencing laws shows a process leading to a 298 DOC Level V beds reduction – resulting in a DOC drug trafficking and repeat PWITD population of about 302.

HB 181, per Scenario One, which would require a full implementation of the current Felony C sentencing pattern including sentencing 64 percent of the drug trafficking and repeat PWITD cases to probation could result in a DOC drug trafficking and repeat PWITD population of about 174.

HB 181, per Scenario Two, which estimates that only 32 percent of the drug trafficking and repeat PWITD cases would be sentenced to probation and about 19 percent of the offenders sentenced to prison would be sentenced for a minimum mandatory weapon charge in lieu of a HB 210 minimum drug selling sentence, could result in a DOC drug trafficking and repeat population (including the tradeoff for weapon minimum mandatory sentence) of about 399.