

Testimony of
The Legal Aid Society of the City of New York

at a joint public hearing on

Implementation and Funding of the
Rockefeller Drug Law Reform Legislation

Presented to:

Assembly Standing Committee on Codes
Assembly Standing Committee on Correction
Assembly Standing Committee On Alcoholism and Drug Abuse

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The Legal Aid Society welcomes this opportunity to testify at this joint hearing to explore implementation and funding of the Rockefeller Drug Law Reform Legislation.

Since 1876, The Legal Aid Society has provided free legal services to New York City residents who are unable to afford private counsel. Annually, through our criminal, civil and juvenile offices in all five boroughs, our staff handles some 300,000 cases for low-income families and individuals. The services we provide reflect the entire gamut of the needs of our clients, from immigration representation for the newest arrivals, to health care benefits for the oldest New Yorkers. By contract with New York City, the Society serves as the primary defender of low-income people prosecuted in the State court system. Last year we represented New Yorkers in 230,000 trial-level criminal cases. Through this practice we have gained extensive experience with the application of Rockefeller Drug Law reform. Our Special Litigation Unit has been particularly active in advocating for drug law reform and we have assisted in many cases concerning its application over the past year and a half. We are appearing today to report our experience with the Rockefeller Drug Law reform.

1. ROCKEFELLER REFORM SUCCESSES

No fair assessment of the Rockefeller Drug Law reform of 2009 would be complete without noting the many significant accomplishments it has produced. Under the Rockefeller Drug Laws prisons were populated with thousands of non-violent drug offenders serving long sentences. With the new reform the expanded opportunities for drug treatment, as opposed to mandatory State prison, mean that more effective and less expensive alternatives are now available to the sentencing court. The central idea of the reform was to allow the Judge the discretion to divert appropriate non-violent offenders into treatment programs.

By almost any measure drug law reform has been a success. Today far more people who are involved in the criminal justice system are receiving treatment for drug addiction than ever before. The Division of Criminal Justice Services¹ reports dramatically increased admissions to the treatment programs monitored by our drug courts. In the year and a half since passage of the reform law drug court admissions have doubled in New York City and tripled outside of the City, where some counties for the first time have opened a treatment court. The Office of Court Administration² reports that there are over 1,200 more people in drug treatment.

Increased treatment opportunities are in part facilitated by the additional resources that were provided to the court system. Following passage of drug law reform new drug courts were set up in Westchester, Nassau, Suffolk, Madison, Dutchess and St. Lawrence counties. Existing drug courts were expanded in Manhattan, Brooklyn, Queens, Bronx and Staten Island.

The expanded range of sentencing alternatives has had a dramatic impact on the number of people being sent to state prison. Statewide over 1,400 fewer drug offenders were sentenced to State prison in the past year. The most dramatic change occurred outside of New York City, with 440 fewer commitments to State prison from the City and 978 fewer commitments from outside of New York City. The decrease in State prison drug commitments reflects an acceleration of a long term trend. DCJS attributes a decrease of around 600 commitments to the long-term trend, 300 to the elimination of mandatory prison sentences, and 500 to the availability of diversion. Statewide there were 8.6% fewer felony drug arrests in 2010 than 2009. In New York City drug arrests are down 12.2% over the past year.

¹ New York State Division of Criminal Justice Services 2009 *Drug Law Reform Update*, November 5, 2010, , available at <http://www.criminaljustice.state.ny.us/drug-law-reform>. Unless otherwise noted the statistics provided in this testimony were derived from this report.

²Walder, Noreen "Courts Cope with Rise in Caseload from Judicial Diversions Under Eased Rockefeller Laws," *New York Law Journal*, Dec. 13, 2010, p.1 col. 4.

Not all of the decrease in State prison sentences, however, is due to the diversion to treatment sentence option. A DCJS analysis of New York City cases where the initial indictment was for a first or second B level felony shows that there was a greater likelihood of receiving a shorter jail definite sentence when compared to prior practice. In addition to the treatment option, a taste of jail sentence appears to be an increasingly used option.

In spite of the fact that jail sentences are more frequently used as a punishment for drug offenses in New York City, the Rikers Island population of sentenced drug offenders has remained steady. Due to the decrease in drug arrests, the number of pre-trial prisoners with pending drug charges is actually down 11%.

2. AREAS OF CONCERN

A. Judicial Diversion

Continuing opposition from District Attorneys to implementation of many of the parts of the drug law reform has impeded the goals of reform and caused it to fail to reach its full potential. While sentencing Judges now have greater discretion, input from the prosecutors continues to have a significant impact on the decision-making process and the prosecutors' position prevails in many instances. In New York City, the prosecutors object to many requests for diversion and courts have then often offered DTAP (prosecutor-run drug treatment) but not a judicial diversion program.

Some recent court rulings have accepted the prosecutors' objections to treatment by excluding from eligibility entire categories of people, e.g., people who have failed a prior treatment program, by creating new eligibility requirements not found in the statute. Failure to meet the subjective standard will result in a denial of a drug treatment evaluation. For the defense, the evaluation is vitally important to allow the court to understand the client and his or her individual need for treatment. Because many of the cases are assigned to a few Judges, an

adverse ruling in one case can have a dramatic impact on the practice in that borough. In New York City, almost 90% of all drug court admissions are permitted only after the prosecutor has consented.

If the intent of CPL 216.05(1) was to give the sentencing Judge the discretion to make an appropriate disposition it makes sense to require an evaluation for all eligible defendants so that all of the facts regarding the need for drug treatment are available to that court. The evaluation itself should be a mandatory step in the process, particularly in cases where the screening Judge is not the Judge who will ultimately impose the sentence.

Whether a person is admitted to a prosecutor-controlled DTAP program or a court supervised diversion program makes a real difference. Some DTAP programs establish such arbitrary rules that graduation becomes difficult. A recent case from the Office of Special Narcotics Prosecutor DTAP program illustrates the problem.

A Legal Aid client was charged with a drug offense in 2005; he accepted placement into an in-patient DTAP treatment program in July of 2006. During the course of treatment there was one relapse for which he was remanded to jail for one week. He remained in inpatient status until October 2009 when he got a job at a local municipal corporation and was transferred to the out-patient DTAP program. He did well with the program and at one point had saved \$3,000. As he moved out on his own, however, his expenses for such things as rent and food increased. He spent some of the savings. He graduated from the out-patient part of the program in July of 2010 but the Special Narcotics Prosecutor's DTAP program would not release him because it said he needed to save an additional \$1,500. He was told he should stop receiving cable television and get another job to raise the money. At an hour long negotiation in August 2010 his Legal Aid lawyer produced a list of his actual living expenses and the amount was reduced to

\$500. In the months that followed he was able to save that amount. Unfortunately, the program kept charging him for his weekly drug tests. Last week, the client was released from DTAP after he produced proof that he had \$450 and an offset for the remaining \$50 for the cost of the drug testing. The case has been pending for over 5 years, it involved only one positive drug test, and no re-arrests.

In New York County several rulings have agreed with the prosecution's arguments that severely undermine judicial discretion and give the District Attorney a powerful tool to exclude large numbers of people from the diversion program. People v. Jaen, March 10, 2010, Sup. Ct. N.Y. Co., Ind. 5704/08 (Coin J.), and People v. Sheffield, Feb. 4, 2010, Sup. Ct. N.Y. Co., Ind. 4364/09 (Nunez J.), both held that an accusatory instrument that contains any charge that is not on the diversion-eligible list, including any misdemeanor among the diversion-eligible felony charges, renders the defendant ineligible for judicial diversion. The decisions allow the prosecution to add marginal charges solely for the purpose of excluding the possibility of judicial diversion.

Just this month, I received a call seeking assistance from a private attorney who had been insisting on diversion and not the DTAP program for his client. The District Attorney threatened to add non-diversion-eligible misdemeanor charges because they would render the client ineligible for diversion. In contrast, courts upstate have generally taken the view that the inclusion of non-qualifying offenses do not disqualify a person from eligibility for diversion. People v. Jordan, 29 Misc. 3d 619 (August 24, 2010 S. Ct. West. Co.).

Based on this experience, we recommend that the diversion statute be clarified so that only the inclusion of disqualifying offenses in an accusatory instrument renders a defendant ineligible for diversion.

B. Exceptional Circumstances Plea Exception

Similarly, prosecution opposition to use of the statutory exception to the requirement of a plea has severely limited its utility. Criminal Procedure Law §216.05(4) authorizes the court to divert defendants who are substance abusers into a treatment program when such a program can effectively address such abuse or dependence. In most cases the referral requires a guilty plea. An exception to the plea requirement was created for situations where the prospect of “severe collateral consequences” create “exceptional circumstances.” In the proper case, consequences such as the loss of housing, benefits, and the threat of deportation could be considered exceptional circumstances.

In case after case prosecutors have strongly objected to the plea waiver and several of their arguments indicate that may be opposed to any use of this provision. A pending case in New York County is an example. The defendant is a lawful permanent resident and has been in this country for the past 22 years. He has no prior criminal history but he has used drugs for 23 years. After the treatment staff evaluator found that the defendant’s history of drug use qualified him as a substance abuser, the prosecution objected to the finding and requested a hearing. Following the hearing the Court found that the defendant was a substance abuser and was suitable for treatment.

The drug crime in question was clearly an aggravated felony under the Immigration and Nationality Act, which could lead to deportation if the defendant pled guilty to it. However, the prosecutor objected that the issue of whether a plea of guilty under New York’s Judicial Diversion law is an aggravated felony is an unsettled federal question that should only be decided by a federal court. He also objected that any application of the exception for a legal immigrant placed that person in a superior position to a United States citizen, that the

effectiveness of treatment is undermined without a plea, and that a plea allows for a broader range of sanctions. Each of these arguments is, in reality, an argument against any use of the exceptional circumstances exception. The court properly rejected these objections.

The prosecutor next insisted on a sworn statement of guilt from the defendant, a waiver of his speedy trial rights, a waiver of all motions, hearings, right to a jury trial, any appeal, and a waiver of all claims that would challenge the voluntariness of such waivers. While the defendant is willing to freeze the status quo of the case pending treatment, he has grave concerns about the requirement of an admission of guilt. Such admissions have been interpreted by the federal Board of Immigration Appeals as constituting a conviction under the Immigration and Nationality Act. The case is on next week for a decision and it has been pending since July 18, 2009.

C. Sealing

Newly enacted Criminal Procedure Law 160.58 allows the defendant to file a motion to seal the conviction upon presentation of proof that he or she has successfully completed a treatment program. Sealing arrest and conviction information gives people a second chance and helps minimize the employment consequences of a criminal conviction. Since enactment of the law, however, only 18 cases have been sealed Statewide. The low number may be partially due to the delay in eligibility for sealing while the treatment program proceeds. We should consider ways that make the sealing motion a more automatic part of the criminal practice. A court appearance following a reported successful completion of a judicial diversion or DTAP program that would present the defense or the court with an opportunity to initiate the sealing process might encourage more sealing applications.

Thank you again for this opportunity to testify and we are happy to answer any questions that the Committees may have.