Alternative Sentencing Options
In
State and Local Correctional Facilities

Chair: Mark C. Curley, Esq., ***Law Offices of John Leonard***
Rome, New York

Presented by: ***Oneida County Bar Association***
Oneida County Supplemental Assigned Counsel Plan
Oneida County Public Defender, Criminal Division
Oneida County District Attorney's Office
New York State Defenders Association, Inc.

Speakers

Alan Rosenthal, Esq., ***Co-Director of Justice Strategies***
Center for Community Alternatives
Syracuse, New York

Joseph Monfiletto, Parole Revocation Specialist
New York State Division of Parole

Tina L. Hartwell, Esq., ***First Assistant Public Defender***
Drug Court Specialist, Major Crimes Section
Oneida County Public Defender, Criminal Division

Saturday, May 21, 20011

Mohawk Valley Community College
IT Room 225
1101 Sherman Drive
Utica, New York 13501

9 A.M. – 12 P.M.

MCLE Credits: (2) Skills + (1) Professional Practice

Criminal Track Programs

Welcome to our Criminal Track Program Series developed with the coordinated efforts of:

Mark Wolber, Esq., Chairman of the CLE Committee of the Oneida County Bar Association and Peter W. Hobaica, Esq., Chairman of the Young Lawyers Section;

Chad DeFina, Esq., the Executive Director of the Oneida County Supplemental Assigned Counsel Program;

Bernard Hyman, Esq., Assistant District Attorney, Oneida County District Attorney's office;

The Staff Training Committee of the Oneida County Public Defender, Criminal Division;

The New York State Defenders Association, Inc. assists us in our efforts to publicize these programs and offers counsel and advice to the committee.

The Criminal Track Program aims to provide specialized and pertinent training programs in the criminal law at low cost to public defenders, assigned counsel, district attorneys and government attorneys who practice anywhere in New York State. Over the two years the program has existed, we have produced over eight programs attracting attorneys from over six counties. Attendance and interest in these programs has been so strong that we are developing a Criminal Law Academy to run two full days and provide 14 CLE credits to attendees. The Academy is scheduled for Saturday, September 24th and Saturday, October 1, 2011 at the Utica Campus of Mohawk Valley Community College. The Academy's goal is to provide training for new lawyers or lawyers inexperienced in the criminal law in the fundamentals of local criminal court and county court practice. We will cover criminal procedure in violation, misdemeanor and felony cases from arraignment to preliminary hearings on Day One and Day Two will cover grand jury practice to sentencing. The projected cost is $175 for both days including lunch. Due to the interest expressed in attending the Academy, registration is required for both days. Any attorney interested in joining the Academy's Development Committee are urged to contact Diane Davis at the Oneida County Bar Association (724-4901) or Frank Nebush at the Public Defender's office (798-5870 or email fnebush@ocgov.net).

We are also interested in your comments about our programs and suggestions for future programs. Please do not hesitate to note your criticisms and suggestions on the evaluation sheet.

All materials are posted on the Oneida County Public Defender, Criminal Division website along with a schedule of future Criminal Track Programs.

http://ocgov.net/oneida/pdcriminal

Be sure to check the Oneida County Bar Association for their schedule of upcoming events and CLE programs in other areas of the law.

http://www.oneidacountybar.org/site/

Alternative Sentencing Options
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Saturday, May 21, 2011

Mohawk Valley Community College
IT Room 225
1101 Sherman Avenue
Utica, New York 13501

8:30 a.m. – 9:00 a.m. **REGISTRATION**

9:00 a.m. – 9:50 a.m. **Alternative Local Sentencing Options**
Tina L. Hartwell, Esq., *First Assistant Public Defender*
Drug Court Specialist, Major Crimes Section
Oneida County Public Defender, Criminal Division

9:50 a.m. – 10:30 a.m. **Effective Sentencing Advocacy Under the DLRA III**
Alan Rosenthal, Esq., *Co-Director of Justice Strategies*
Center for Community Alternatives
Syracuse, New York

10:30 a.m. – 10:45 a.m. **BREAK**

10:45 a.m. – 11:15 a.m. **Effective Sentencing Advocacy (continued)**

11:15 a.m. – 12:00 p.m. **Parole and the Revocation Process**
Joseph Monfiletto, *Parole Revocation Specialist*
New York State Division of Parole

MCLE Credits: (2) Skills + (1) Professional Practice

Speakers

Alan Rosenthal, Esq., ***Co-Director of Justice Strategies***
Center for Community Alternatives, Syracuse, NY

Mr. Rosenthal received his Bachelor of Arts in Economics from Syracuse University in 1970 and his Juris Doctor from the Syracuse University College of Law in 1974. He began his career in the law as a staff attorney for Onondaga Neighborhood Legal Services, leaving in 1976 to become a founding partner of the Syracuse Law Collective. He became a partner in Rosenthal & Drimer, Esqs. in 1991 and joined the Center for Community Alternatives in 2000 as a Co-Director and Counsel for Justice Strategies, a research training and policy initiative of the Center.

From 2000 until 2009, he was responsible for the supervision of all sentencing, mitigation, and capital mitigation work performed by the staff at the Center including conducting client and witness interviews, developing sentencing advocacy strategies and preparing sentencing memoranda as well as supervising, training staff and undertaking research related to capital cases.

Since 2000 he has supervised the staff at the Center on five New York State capital cases and two Federal capital cases; one in New York and one in Connecticut and has supervised and/or co-authored eight presentence memorandum in non-capital homicide cases. He was a co-mitigator on one New York State capital case in 2003.

Alan Rosenthal has also lectured extensively on criminal record barriers to re-entry, collateral consequences of criminal convictions and sentencing advocacy. In addition to his presentations, he has written numerous articles on the subject.

His outstanding work in this area has earned him a number of awards including the:
NAACP Lillian Reiner Memorial Distinguished Service Award in 1988;
Omega Citizen of the Year (1988);
Human Rights Award (Syracuse and Onondaga County) (1990);
FOCUS Award - Firefighters of Color United in Syracuse (1997);
NYCLU Ralph Kharas Award for Distinguished Service (2002);
NYSACDL - Outstanding Service to the Criminal Bar (2006).

Joseph Monfiletto, ***Parole Revocation Specialist, New York State Division of Parole***

Mr. Monfiletto is a graduate of the State University of New York at Potsdam where earned his Bachelor of Arts Degree in Clinical Psychology and Russell Sage College where he was enrolled in the Graduate Public Administration Program from October 1989 to May 1991.

He began his career with New York State Office of Mental Health in 1981 holding various positions in psychiatric outpatient and inpatient services at the St. Lawrence Psychiatric Center in Ogdensburg as Psychology Assistant in a transitional care unit and a secure care unit responsible for the assessment and treatment of psychiatric

patients. He was involved in the development of programs for outpatients in a sheltered workshop and later became an Assistant Residence Manager at a halfway house for outpatients responsible for the daily operations and monitoring of the residence and the supervision of paraprofessional staff.

In 1988, Mr. Monfiletto joined the New York State Department of Correctional Services as a Corrections Counselor at Riverview Correctional Facility in Ogdensburg which at the time was an alternate correctional facility for New York City inmates serving definite sentences. In 1991, he voluntarily transferred to Gouverneur Correctional Facility to gain experience in the operation of a New York State correctional facility. In both cases the facilities were newly-opened requiring the development and implementation of facility policies and procedures.

In December 1996, Mr. Monfiletto transferred to the New York State Division of Parole. He was initially assigned as to the Riverview Correctional Facility as a Facility Parole Officer I where his duties involved the completion of reports and investigations to assist the Board of Parole in making decisions regarding inmate's release and following up with parole field offices as needed to enhance community safety and assisting the parolee to gain a positive reintegration to the community. In 2000 he was promoted to Facility Parole Officer II supervising parole staff in an office located at the Watertown Correctional Facility. In September 2006, Mr. Monfiletto was again promoted, this time to his present position of Parole Revocation Specialist where his duties include representing the Division of Parole in violation of parole hearings and making dispositional recommendations to the Parole Board in accordance with the Division's guidelines.

Among his activities since joining the Division of Parole, Mr. Monfiletto is an Adjunct Instructor for the Parole Officer Recruit Class and is a member of the New York State Division of Parole Manual Revision Field Workgroup.

Tina L. Hartwell, Esq., ***First Assistant Public Defender***
Drug Court Specialist, Major Crimes Section
Oneida County Public Defender, Criminal Division

Tina L. Hartwell, Esq. graduated from Syracuse University in 1991 with dual Bachelor of Science degrees in Political Science and Speech Communication and earned her Masters of Arts in Speech Communication from Syracuse in 1993. In 1999 she obtained her Juris Doctor degree from Albany Law School. In 2001, Ms. Hartwell was appointed an Assistant Oneida County Public Defender, Criminal Division. She is presently a First Assistant Public Defender assigned to the Major Crimes Section and the Utica Drug Treatment Court as a Drug Court Specialist. She is a member of the New York State Bar Association, the New York State Defenders Association and the National Association for Drug Court Professionals.

Alternative Sentencing Options in State & Local Correctional Facilities

Local Sentencing Options

Tina L. Hartwell, Esq.

Assistant Public Defender, Oneida County

Oneida County Bar Association CLE

Saturday, May 21, 2011 9:00-12:00

Mohawk Valley Community College - IT Room 225

Alternative Sentencing Options in State & Local Correctional Facilities

Local Sentencing Options

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Saturday, May 21, 2011 9:00-12:00
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Oneida County Specialty & Diversion Courts

- Domestic Violence Court (DV)
- Integrated Domestic Violence Court (IDV)
- Mental Health Court (MH)
- Utica Drug Treatment Court (DC)

Specialty Courts versus Diversion Courts

Specialty Courts – DV & IDV
- "Designation" court
- No choice – offenders are placed in the Court
- No reward or incentive to complete
- No contract required

Diversion Courts – MH & DC
- "Alternative sentencing" court
- Choice – offenders are offered the opportunity to be placed in the Court
- Reward and incentives to complete
- Contract required

Domestic Violence Court

Hon. Gerald J. Popeo, presiding
Utica City Court
1st Floor - Every Wednesday Afternoon

Court Began: February 2007
Total # Cases: 2357
Current Caseload: 86 cases

DV Staff:
- Dawn Antonette-Luce, Resource Coordinator (OC Courthouse, 3rd Floor) →315.266.4228
- Inv. Elizabeth Shanley, Utica PD DV Unit →315.223.3508
- Holly Pelnick, YWCA Victim Advocate @ Utica PD →315.223.3508

Domestic Violence Court
(continued)

PURPOSE OF DV COURTS

- Specialized domestic violence courts are designed to improve victim safety and enhance defendant accountability.
- To achieve these goals:
  - the assigned Judge presides over cases from arraignment through compliance and monitors the offenders and their compliance with orders of protection and programs
  - the resource coordinator coordinates information with the police, defense counsel, prosecutors and others
  - the on-site victim advocate serves as the primary contact to victims, creates safety plans, coordinates housing counseling, as well as other social services; she also provides victims with information about criminal proceedings and special conditions within their orders of protection.

Domestic Violence Court
(continued)

REQUIREMENT TO BE PLACED IN DV COURT:
the crime(s) charged must be "domestic"

Domestic → "family offense"

Domestic → "members of the same family or household"

Domestic Violence Court
(continued)

Defined by Section 530.11(1) of the Criminal Procedure Law:

(a) Persons related by consanguinity (by blood) or affinity (by marriage) ;

(b) Persons legally married to one another;

(c) Persons formally married to one another regardless of whether they still reside in the same household;

(d) Persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and

(e) Persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.

Domestic Violence Court
(continued)

HOW DOES IT WORK?

•If a case (violation, misdemeanor & some felonies) is designated "domestic" pursuant to statute, after arraignment, the offender will be placed in DV Court. Thereafter, the case will proceed through the normal criminal justice procedures; e.g. pre-trial, report, plea, motion, trial, etc.

•There are no special case managers for the offenders. If there are underlying issues that defense counsel wishes to have considered, a referral to the Forensic Evaluation Unit (FEU) is the path to take. (***Caution*** – next slide.)

•The only additional non-court personnel is the domestic violence advocate who is there to "represent the interests of the victims".

Domestic Violence Court
(continued)

CAUTION!

- Please note that the FEU is a court reporting agency. Although they help your client get into programs that will help address underlying issues, if your client does not follow through with recommendations, they will notify the Court of the non-compliance.
- FEU is located on the 2nd Floor of the Utica City Courthouse.
- The counselors are Adelle Gaglianese, Jaclyn Whitfield and Patricia King.
- They can be reached at 315.735.2281.

Integrated Domestic Violence Court

Hon. Randall Caldwell, presiding

Oneida County Court

3rd Floor - Every Monday

Court Began:_____

Total # Cases:_____

Current Caseload:_____

IDV Staff:

- Dawn Antonette-Luce, Coordinator (OC Courthouse 3rd Floor) →315.266.4228
- Terri Bello-Vecchio, Criminal Clerk (OC Courthouse 4th Floor) →315.266.4250
- Janice Rathbun, Family Clerk (OC Courthouse 3rd Floor) →315.266.4257

Integrated Domestic Violence Court
(continued)

PURPOSE OF IDV COURTS

- IDV Courts operate with the same goals as DV Courts, but in these Courts one judge handles criminal domestic violence cases and related family issues, such as custody, visitation, civil protection orders and matrimonial actions.
- By streamlining and centralizing court processes, integrated courts eliminate contradictory orders and reduce the burden on victims, who must otherwise proceed in multiple jurisdictions.
- By connecting one judge with one family, IDV Courts aim to provide more informed judicial decision-making and greater consistency in court orders, while reducing the number of court appearances.

Integrated Domestic Violence Court
(continued)

REQUIREMENT TO BE PLACED IN COURT:

There must be a pending "domestic" criminal offense *AND* a pending family court matter.

- "Domestic" is defined the same as with DV Court matters
- Family court matters/dockets:
  - N = neglect
  - V = visitation & custody
  - O = orders of protection
  - D or RJI = divorce

Integrated Domestic Violence Court
(continued)

HOW DOES IT WORK?

- Unlike DV Court, IDV Court is not an automatic placement even if your client meets both criteria
- If you have a client who meets both criteria, call IDV Court Coordinator, Dawn Antonette-Luce @ 266-4228.
- Ask for confirmation regarding the family court offense. If confirmed, present "your case" to her as to why your client should go to IDV Court. She will then present the cases to Judge Caldwell for consideration.
- If accepted, IDV will request the criminal court file from the arraigning criminal court, then schedule an appearance before Judge Caldwell.

Mental Health Court

Hon. Ralph J. Eannace, presiding

Utica City Court

1st Floor - Every Other Tuesday Afternoon

Court Began:
Total # Cases:
Current Caseload:

MH Team:

- Case Manager, Adelle Gaglianese (UCC 2nd Floor) →315.735.2281
- District Attorney's Office, ADA Pat Scully (UCC 1st Floor) →315.733.1099
- Defense Attorney, APD Liz Cesari (UCC 1st Floor) →315.735.6671
- Probation Department, Lindy Tuzzolino (Train Station 2nd Floor) →315.798.5914
- Central New York Services, Pam Ashton-Miller (Oneida County Jail) →315.768.4744
- OC Department of Mental Health, Janet Soldato →315.798.5608

Mental Health Court
(continued)

PURPOSE OF MH COURTS

- To link offenders who would ordinarily be jail-bound to long-term community-based treatment (whether in-patient or out patient).
- MH Courts rely on mental health assessments, individualized treatment plans, and ongoing judicial monitoring to address both the mental health needs of offenders and public safety concerns of communities.
- MH Courts seek to address the underlying problems that contribute to criminal behavior by:
  - Utilizing a specialized court docket, which employs a problem-solving approach to court processing in lieu of more traditional court procedures for certain defendants with mental illnesses,
  - Having regular staff meetings at which treatment plans and other conditions are periodically reviewed for appropriateness, incentives are offered to reward adherence to court conditions, and sanctions are imposed on participants who do not adhere to the conditions of participation, and
  - Defining the criteria for a participant's completion of ("graduation" from) the program.

Mental Health Court
(continued)

TO BE CONSIDERED FOR THIS COURT:

- Defendant must be *legally* and *clinically* acceptable.
- To be *legally* acceptable:
  - The crime charged can only be a misdemeanor. (Technically, yes, a violation can be taken, however, the alternate sentence can only be 15 days in jail.)
  - The crimes cannot be/involve:
    - Violent (robbery2+, burglary2+, weapon3+, etc) OR -- involve guns
    - Sex related OR - involve the sales of drugs
    - Arson related OR -- involve death
  - The client cannot have a history that includes:
    - Violence (domestic, resisting arrest, crime charged/convicted)
    - Sex related crimes
    - Arson related crimes
    - Gun possession or sales
    - Sale of drugs
    - Death related crimes

Mental Health Court
(continued)

TO BE CONSIDERED FOR THIS COURT:

- The Defendant must be *clinically* acceptable:
  - the Defendant must have an AXIS I or AXIS II diagnosis
  - the Defendant must be willing and able to enter treatment (which is based on the treatment recommendation made by the case manager) and
  - The Defendant must be willing to comply with all medication orders.
- The Defendant must be approved by the MH Team,
- The Defendant must accept the terms of the pre-trial agreement and the contract, and
- The Defendant must sign a contract (example provided in your written handout)

Mental Health Court
(continued)

How does ***our*** MH Court work?

- During Phase 1: approximately 90 days
  - report to Court every week
  - report to case management supervision every week
  - go to all treatment & counseling appointments
  - comply with all medication orders
- During Phase 2: approximately 180 days
  - report to Court every 2 weeks
  - report to case management supervision every other week
  - go to all treatment & counseling appointments
  - comply with all medication orders
- During Phase 3: approximately 90 days
  - report to Court every 4 weeks
  - report to case management supervision every 2 weeks
  - go to all treatment & counseling appointments
  - comply with all medication orders
- To Be Eligible for Completion/Graduation
  - Be in the program for a minimum of 1 year
  - Met all treatment goals
  - Compliance with all medication orders

Utica Drug Treatment Court

Hon. John S. Balzano, presiding

Utica City Court

2nd Floor - Every Thursday Afternoon

Court Began: October 4, 2001
Total # Clients Considered: 3775
Total # Clients "Not Accepted": 3355
Total # Participants: 420
Total # Graduates: 188 [113 M & 75 F]
Current Caseload: 104

DC Team:

- DC Coordinator, Kathy Spatuzzi (UCC 1st Floor) →315.266.4645
- Case Managers:
  - Robert Fuller (UCC 1st Floor) →315.266.4644
  - Kathie Harris (UCC 1st Floor) →315.266.4643
  - Jaclyn Whitfield, 2nd Felony Offenders →315.735.2281
  - Noreen Usmail, Judicial Diversion →315.266.4642

Utica Drug Treatment Court
(continued)

DC Team continued…

- District Attorney's Office, ADA Stacey Paolozzi (OCOB 9th Floor) →315.798.5573
- Defense Attorney, APD Tina Hartwell (Train Station 2nd Floor) →315.798.5870
- Probation Department (Train Station 2nd Floor) →315.798.5914
  - –Director, Dave Tomidy
  - –PO Matt Caracas
  - –PO Greg Tomidy
- Inv. Dan Sullivan, OC District Attorney's Office (OCOB 9th Floor) →315.731.3440
- Utica Police Department, Inv. Dave Kaminski →315.223.3510
- Central New York Services, Terry Neal (Oneida County Jail) →315.768.4744
- OC DSS, Michele Reid (OCOB 1st Floor) →315.798.5951
- BOCES, Craig Tuttle, Case Manager/GED Examiner (Utica) →315.738.7304
- Public Ombudsman, MaryGrace Petronella

Utica Drug Treatment Court
(continued)

PURPOSE OF DRUG COURTS

- Drug Courts are special courts given responsibility to handle cases involving substance-abusing offenders through comprehensive supervision, drug testing, treatment services and immediate sanctions and incentives.
- Drug Courts offer individuals facing criminal charges for drug use and possession an opportunity to enter a substance abuse recovery program in lieu of straight jail time.
- The requirements of Drug Court are strict because the road to recovery is not easy. A candidate is tested frequently, must attend substance abuse recovery meetings and make regular court appearances in order to abide by the requirements of Drug Court.

Utica Drug Treatment Court
(continued)

TO BE CONSIDERED FOR THIS COURT:

- Defendant must be *legally* and *clinically* acceptable.
- To be *legally* acceptable:
  - –the crimes charged can be a misdemeanor, a felony, or a second felony offense.
  - –the crimes cannot be/involve:
    - Violent (robbery2+, burglary2+, weapon, etc) OR -- involve guns
    - Sex related OR - involve the sales of drugs
    - Arson related OR -- involve death
  - –the client cannot have a history that includes:
    - Violence (domestic, resisting arrest, crime charged/convicted)
    - Sex related crimes
    - Arson related crimes
    - Gun possession or sales
    - Sale of drugs
    - Death related crimes

Utica Drug Treatment Court
(continued)

TO BE CONSIDERED FOR THIS COURT:

- The Defendant must be *clinically* acceptable:
  - the Defendant must admit to and have a drug and/or alcohol problem, and
  - the Defendant must be willing to enter treatment (which is based on the recommendation made by the DC coordinator)
- The Defendant must be approved by the DC Team,
- The Defendant must accept the terms of the pre-trial agreement and the contract, and
- The Defendant must sign a contract (example provided in your written handout)

Utica Drug Treatment Court
(continued)

How does ***our*** DC Court work?

- During Phase 1: approximately 90 days
  - report to Court every week
  - report to case management supervision every week
  - go to all treatment & counseling appointments
  - NO dirty or missed screens
- During Phase 2: approximately 180 days
  - report to Court every 2 weeks
  - report to case management supervision every other week
  - go to all treatment & counseling appointments
  - NO dirty or missed screens
  - complete 60 hours of community service
- During Phase 3: approximately 90 days
  - must be working to enter this Phase
  - report to Court every 4 weeks
  - report to case management supervision every 2 weeks
  - go to all treatment & counseling appointments
  - NO dirty or missed screens
- Phase 4: special time frame
  - reserved for clients who need extra time for restitution payments
  - report to Court every 8 weeks
  - report to case management supervision every 4 weeks
  - continue to work and pay restitution
  - NO dirty or missed screens

Utica Drug Treatment Court
(continued)

To Be Eligible for Completion/Graduation:

- Live in Oneida County;
- Achieve a minimum of 365 Consecutive Clean Days;
- Achieve a GED or Complete Vocational Education Training or Job Club Training;
- Complete 60 hours of Community Service;
- Be OFF Public Assistance by:
  - Having a Full-Time Job,
  - In School Full-Time,
  - Having a Part-Time Job while in School Part-Time, or
  - Receiving Disability.
- Pay Restitution, if applicable;
- Complete all Treatment Recommendations;
- Complete the Drug Court Questionnaire;
- Attend at least 1 DC Alumni Group meeting; and
- Receive Final Approval from Drug Court & your Treatment Provider.

Utica Drug Treatment Court
(continued)

- Drug Courts are the most effective judicial intervention for treating drug-addicted people. Drug Courts reduce drug use, reduce crime, save money, restore lives, save children and reunite families.
- Who pays?! We, the TAXPAYERS, pay no matter where an offender is placed.
- Costs of Treatment versus Incarceration:
  - –inpatient treatment, $45 per day
  - –local incarceration, $85 per day (minimum)
  - –state incarceration, $165 per day
- So why not PREVENT future crime and cost, and help the offenders NOW!

The 2009 Drug Law Reform Act

How to Use the 2009 DLRA for More Effective Sentencing Outcomes

Alan Rosenthal
Co-Director, Justice Strategies
Center for Community Alternatives

www.communityalternatives.org

The 2009 Drug Law Reform Act

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Steps to Effective Sentencing Advocacy

1) Know the legislative history and intent of the 2009 DLRA to effectively fend off attempts to limit eligibility
2) Know the various sentencing options available, as well as the eligibility and exclusion criteria
3) Develop a client-specific, thematic, problem-solving approach that effectively promotes the best disposition for your client

Features of the Rockefeller Drug Laws

- *Punitive*: long prison sentences for possession and sale of even small amounts of drugs
- *Limits to judicial discretion*: mandatory prison sentences for second offenders and for more serious classes of drug offenses; DA gatekeeper to most therapeutic alternatives
- *Impact:* Escalating prison population with no discernable impact on our State's drug problem.

Legislative Intent of 2009 DLRA

Substantive shift away from in-effective *punitive* approach. Two over-arching legislative goals:

1) Therapeutic (Rehabilitative) Approach:

"This legislation was designed to authorize a more lenient, more therapeutic, judicial response to all but the most serious drug crimes." People v. Danton, 27 Misc.2d 638, 644 (Sup. Ct. N.Y. Co. 2010).

2009 DLRA

2) Enhanced Judicial Discretion

"[T]he Legislature, in crafting the 2009 DLRA, wrote a detailed statute which gave courts the discretion to make reasoned judgments and created an adjudicatory process the Legislature deemed fair to both prosecutors and criminal defendants. Given this carefully considered legislative design, it is difficult to understand why the judiciary would impose categorical limitations on its own discretion which the Legislature did not create"

People v. Figueroa, 27 Misc.3d 751, 778 (Sup. Ct. N.Y. Co. 2010)

Utilizing this Legislative History

- DLRA is designed to *enhance* public safety - punishment did not work; treatment holds out best promise for transformation from criminal to law-abiding behavior
- a restrictive interpretation of eligibility undermines legislative intent to enhance judicial discretion
- to fully promote the therapeutic and rehabilitative benefits of the DLRA, must refrain from restrictive interpretation of eligibility requirements

Expanded Sentence Options

- Probationary sentences
- Definite Sentences
- Willard
- Judicial Shock Order (2009 DLRA)
- Judicial CASAT Order (2004 DLRA)

Probation Sentences

A sentence of 5 years probation is now a sentencing option for the following offenses:

- Class B drug offense, first offense (exception, sale to child, PL 220.48); *see PL § 70.70(2)(b)*
- Class C, D, and E drug offense, predicate offenders where prior was non-violent; *see PL § 70.70(3)(c)*

(Formerly, 5 years probation only available for C, D, and E first time offenders).

Definite Sentences

A definite sentence (including a split sentence) is now a sentencing option for the following offenses:

- Class B drug offense, first offense (exception: PL § 220.48); *see PL § 70.70(2)(c)*
- Class C, D, and E drug offense, predicate offenders where prior was non-violent; *see PL § 70.70(3)(e)*

(Formerly definite sentence only available for class C, D, and E first time felony offenders)

Sentence of Parole: Willard

Criminal Procedure Law 410.91

Sentence to be executed as parole supervision, with the first 90 days at Willard, a boot-camp style substance abuse treatment program; joint program between Department of Corrections and Community Supervision (DOCCS) and OASAS.

Sentence of Parole: Willard

Eligibility:

- Second class D or E designated property offenses (listed in CPL § 410.90(5)); *see PL § 70.06(7)*
- Second class C, D, and E drug offenses; *see PL § 70.70(3)(d)*
- First time class B drug offense (except for those convicted under PL § 220.48); *see PL § 70.70(2)(d)*

DA consent no longer required! Subsection (4) of CPL

§ 410.91has been repealed.

Sentence of Parole: Willard

Exclusions:

- current conviction for non-specified offense
- prior conviction for a violent felony offense
- prior conviction for A felony
- prior conviction for B felony other than B drug offense;
- "subject to an undischarged term of prison"

(*What does this mean? See included memo on this issue*)

Alternative to Willard

- DOCCS is required to provide an alternative to Willard if the defendant is in need of medical or mental health care not available at the Drug Treatment Campus.
- The inmate can object to the alternative program and opt to return to the sentencing judge for resentencing.

  See Correction Law § 2(20) (effective May 18, 2010)

Judicial Shock Order

PL § 60.04(7); Correction Law § 865-867

When the person is within 3 years of parole or conditional release, he or she is transferred to one of three Shock Incarceration facilities for a 6 month, boot-camp style program that focuses on discipline, substance abuse treatment and education (GED).

Judicial Shock Order

Eligibility:

- convicted of a drug offense
- between the age of 16 and 50 at time of offense and not yet 50 at time of eligibility for participation in Shock
- meet the eligibility requirements of Correction Law § 865(1)

Judicial Shock Order

Exclusions under Correction Law 865:

- current conviction is A-I felony, violent felony offense, sex, homicide, escape, or absconding offense
- has previous conviction for a VFO for which he/she served a state prison sentence*

  If screening indicates medical or mental heath reasons, must be provided with Alternative-to-Shock program.

** 2010 legislative change (effective August 13, 2010)*

Judicial Shock Order

- Potential Issues – Issue One:

Can the Shock Screening Committee "screen out" an otherwise eligible inmate who has a Judicial Shock Order?

The Shock Screening Committee has traditionally "screened out" eligible inmates where there are indications of violence, predatory behavior, or crimes of sophistication (including crimes involving large amounts of money or drugs).

Judicial Shock Order

The Penal Law and the Shock statute explicitly provide that the Shock Screening Committee can not screen out statutorily eligible inmates who have a Judicial Shock order.

Penal Law § 60.04(7)(b); Correction Law § 867(2-a).

Note on alternative-to-shock incarceration Penal Law § 60.04(7)(b)(i).

Judicial Shock Order

- Practice Tip:

Make sure the Sentence & Commitment clearly indicates that the judge ordered Shock placement pursuant to PL § 60.04(7).

(Not all court clerk offices have updated their Sentence & Commitment forms to reflect the changes in the 2009 DLRA.)

Judicial Shock Order

- Potential Issues – Issue Two:

Can a judge order Shock participation for a defendant whose sentence renders him/her more than 3 years from his/her conditional release date?

- Some judges are reading Correction Law 865's language, "will become eligible for conditional release within 3 years" as limiting their ability to issue a Judicial Shock Order for those with a longer sentence.

Judicial Shock Order

- Potential Issues – Issue Two, cont.

But see Correction Law § 867(2-a): "[A]n inmate sentenced to shock incarceration shall promptly commence participation *when such an inmate is an eligible inmate pursuant to"* Correction Law § 865(1).

DOCCS is reading this to mean that Judicial Shock Orders apply to those with longer sentences who are not eligible for Shock right away.

Judicial CASAT Order

PL § 60.04(6), Correction Law §§ 851-861

A DOCS "wrap-around" substance abuse treatment program with 3 phases: 1) a 6 month prison-based substance abuse treatment program in a DOCS annex; 2) transition to work release with out-patient follow-up treatment; 3) release to parole or PRS with after-care.

Judicial CASAT Order

Eligibility:

- convicted of a drug offense
- to get all three phases, must meet criteria for temporary release program

Those who do not meet the Temporary Release Program criteria will be admitted to phase 1 only (DOCCS CASAT annex) when 6 to 9 months from earliest release.

Judicial CASAT Order

Temporary Release criteria:

- Not convicted of a violent felony, sex offense, homicide, escape, absconding, or aggravated harassment of a DOCCS employee;
- Violent Felony Override may be available where not armed with, did not use, or did not possess with intent to use, a deadly weapon or dangerous instrument and there is no serious physical injury.

(Additional info. about violent felony override avail at www.communityalternatives.org)

Judicial CASAT Order

2009 DLRA change to CASAT:

- The 2004 DLRA included an often over-looked though fully-enforced provision requiring that second felony class B drug offenders must serve at least 18 months of their sentence before achieving CASAT eligibility.
- The 2009 DLRA cut this 18 month mandate in half, so now second felony B drug offenders must at least nine months of their sentence before achieving CASAT eligibility.

Judicial Diversion

The Challenge of Full Implementation

One Goal of Article 216

"This new article…was added in 2009 to create a statewide statutory program for diverting selected felony offenders from the ordinary process of criminal actions…"

Practice Commentaries
Peter Preiser

Another Goal

"…[T]he legislature recognized that the policy of incarceration and punishment of non-violent drug users failed and that expanding the number of nonviolent drug offenders that can be court ordered to drug abuse treatment will help break the cycle of drug use and crime and make our streets…safer."

Judge Susan Capeci
People v. Jordan

Judicial Diversion

New CPL Article 216

For individuals charged (by indictment or superior court information) with a felony drug or substance abuse-driven property crime, Article 216 allows for diversion from a prison sentence to a court supervised substance abuse treatment program.

Judicial Diversion- Overview

CPL Article 216

Eligibility:

- charged with class B, C, D, or E Penal Law Article 220 or 221offense; or
- charged with Willard 'specified offense' (CPL § 410.91(5))
- first and second felony offenders (prior non-violent)

Judicial Diversion- Exclusions

- within preceding 10 years (excluding incarceration time) was convicted of violent felony, class A drug offense, or merit time excluded offense (Correction Law 803(d)(1));
- previously adjudicated a second or persistent violent felon pursuant to PL 70.04, 70.08;

or…

Judicial Diversion Exclusions cont.

– currently charged with a violent felony or merit time excluded offense where prison is mandatory and charge is still pending.

Note: Excluded persons may become eligible upon consent of the District Attorney.

JUDICIAL DIVERSION - ELIGIBLE

- Practice note – a person charged with a Willard eligible felony whose prior violent conviction falls outside the 10 year "look back" is still eligible for Judicial Diversion, even though excluded from Willard (which excludes for a prior violent felony occurring at any time)

Judicial Diversion: Procedure

- Defendant may request the court to order an alcohol and substance abuse evaluation at any time prior to plea or guilty or trial;
- Defendant may decline further participation at any time;
- Evaluation by credentialed evaluator;
- Defendant must sign release authorizing disclosure of evaluation to court, defense, prosecution, and probation;
- Either party may request a hearing.

JUDICIAL DIVERSION

– Report shall include:

- An evaluation as to whether defendant has a history of alcohol or substance abuse or dependence, including "co-occurring mental disorder or mental illness and the relationship between abuse or dependence" and mental condition
- A recommendation whether it could be effectively addressed by diversion
- A recommendation as to the treatment modality, level of care and length of proposed treatment

Judicial Diversion: Procedure

Court must decide if an eligible defendant should "be offered" treatment.

CPL 216.05(3)(a)

The court "shall consider and make findings of fact with respect to" the factors under CPL 216.05(3)(b).

Judicial Diversion: Procedure

- Defendant must plead guilty unless the DA consents or there are "exceptional circumstances" due to severe collateral consequences;
- Court issues a securing order;
- If defendant violates the conditions of diversion, the court must consider using graduated sanctions in recognition of fact that people do relapse.

Judicial Diversion: Procedure

Upon successful completion, court may, among other things:

-Allow defendant to withdraw guilty plea and dismiss indictment or SCI

- Impose interim probation and upon completion, allow defendant to withdraw guilty plea and dismiss the indictment or SCI, or plead guilty to a misdemeanor with a sentence of probation or any other agreed upon sentence.

Conditional sealing is an option upon sentence completion!

Areas for Advocacy within CPL 216

Implementation has varied from county to county and even from Judge to Judge within counties.

What follows is an issue spotting list and suggestions to deal with those issues in order to get better outcomes for your clients.

Preparation of the Defendant to make the decision about judicial diversion

1) Discuss the pros and cons of diversion.
2) Is the defendant ready for treatment?
3) Is court supervised treatment appropriate for this defendant?
4) Conditional sealing.
5) The likely plea agreement – pros and cons.

Preparation of the Defendant for the Alcohol and Substance Abuse Evaluation

1) Clarify use and abuse history.
2) Clarify treatment needs and desire.
3) Obtain documentation as it may help avoid erroneous reporting – value accuracy.
4) Review anticipated questions.
5) Review danger of minimization and exaggeration.

Judicial refusal to refer case to Drug Treatment Part

1) Such a refusal undermines legislative intent.
2) Counsel is not statutorily prohibited from asking for Judicial Diversion at any time, right up until trial or ple of guilty. CPL § 216.05(1).
3) Try to get the court to put its reasons for refusing on the record.
4) Argue that review at this juncture is limited to facial statutory eligibility.

Judicial refusal Cont.

A. All information not available to Court.
B. Get your own evaluation done.
C. Argue the very limited discretion the Court has at this juncture to deny access to mere consideration for diversion (Compare Rules of the Chief Administrator of the Courts § 143.1 (a) and (b) to (c).
D. May only refuse if defendant is not eligible.

Judge refuses to provide a copy of the evaluation to defense counsel.

CPL§216.05(2) states:

"***Upon receipt of the completed alcohol and substance abuse evaluation report, the court shall provide a copy of the report to the eligible defendant and the prosecutor.***"

Eligibility Neutral Offenses

Should NOT exclude potential participants.

See CCA website under Tools for Attorneys for:

a) Eligibility-Neutral Memo of Law

b) People v. Jordan and People v. Kithcart

Manipulation of the Indictment

Be aware of prosecutorial practices that seek to thwart admission into judicial diversion.

a) Prosecutor presents only the non-eligible or excluded offenses to the Grand Jury.

b) Defense must be vigilant to challenge this practice.

Inappropriate Judicial Policies

1) No sale charges shall enter Diversion
2) If the DA objects- No Diversion
3) There are no exceptional circumstances, certainly not for non-citizen defendants.
4) Denial of diversion due to defendant's delay in making request

What due process is required at a CPL 216.05(3)(a-b) hearing?

(And what due process should we be demanding?)

- Either party can request the hearing
- No burden of proof in statute
- Held "as soon as practicable"
- May consider:

  i. Oral and written arguments;

  ii. May take testimony from witnesses offered by either party;

  and…

What due process is required, cont.

- **iii.** May consider "any relevant evidence", including but not limited to:

  a) information that the defendant had been adjudicated within the last 10 years (excluding time spent incarcerated between commission of the YO offense and commission of the present offense) of a YO for a violent felony offense or any offense for which merit time is not available pursuant to Corr. Law §803(1)(d)(2).

  b) Any victim's statement if the charge is for a specified offense defined in CPL §410.91(4). *Should be 410.91(5)!*

What due process is required, cont.

The court shall consider and make findings of fact:

i. the defendant is an eligible defendant as defined in subdivision one of section 216.00 of this article (or prosecutor consents);

ii. the defendant has a history of alcohol or substance abuse or dependence;

iii. such alcohol or substance abuse or dependence is a contributing factor to the defendant's criminal behavior;

iv. the defendant's participation in Judicial Diversion could effectively address such abuse or dependence; and

v. institutional confinement of the defendant *is or may not be necessary for the protection of the public*.

If we allow it, Due Process can be potentially limited by:

- The word "may" (CPL § 216.05(1))
- July 7, 2009 OCA memo:
  - "…the statute gives the court wide latitude in how to conduct the hearing. For instance, although the court can elect to take testimony from witnesses, it can simply rely on the oral or written arguments of the parties."
- General inclination of many courts to avoid hearings of any kind.

Advocacy Suggestions

- Forcefully demand a hearing when it will help,
- Put written arguments into the record (need for hearing and appropriateness for diversion),
- Ask for oral argument and live testimony where appropriate,
- If refused, make an offer of proof about the precluded evidence,

Advocacy Suggestions Cont.

- Use treatment evaluators as allies where possible,
- Consider client testimony where appropriate,
- Use expert testimony when appropriate,
- Be creative with the hearing factors

Are there appeal options regarding the Eligibility Hearing?

- Article 78?
- Direct Appeal under CPL 450.10?

Seek an Agreement with a negotiated cap on sentence if early termination

- Language of the statute itself
- More incentive for defendants to participate
- Peter Preiser's Commentary supports a cap
- Studies suggest defendants are more motivated by certainty of punishment rather than severity of punishment
- Should not be punished for trying

Must client plead to all counts?

"***It is the court that sets the parameters for treatment. Concomitantly, it is the court that has been given the authority to fashion suitable plea bargains. The court has been given control of defendant's treatment program from start to finish… Accordingly, it is the determination of this court that the CPL 216 language…does not mandate a guilty plea to each and every count of a multi-count indictment prior to defendant's entry into the judicial diversion program.***" People v. Taveras, Judge Merrill, Onondaga County Court, 2010

Available at CCA's website and Drug Law Reform Blog

Violation – What Now?

- Is client actually in jeopardy of violating?
  - Failed to show up for diversion monitoring court appearance "WITHOUT REASONABLE CAUSE"
  - Court has "REASONABLE GROUNDS TO BELIEVE" client has failed to comply with a condition of the agreement (tested positive; missed program curfew; etc.)

BE HEARD – Request a Hearing

- Make a record on "reasonable cause" or "reasonable grounds to believe"
- REQUEST a HEARING – cite to CPL §216.05(9)(b), "*the court may conduct a summary hearing consistent with due process and sufficient to satisfy the court that the defendant has, **in fact**, violated the condition."*
- *People v. Fiammegta*, 14 N.Y.3d 91 (2010)

COURT FINDS CLIENT VIOLATED – NOW WHAT?

- **CITE AND USE CPL §216.05(9)(c)!** ***The court may sentence to the agreement or any lesser sentence authorized by Penal Law § 70.70 (b) and (c).*** Note (a) is left out.

The STATUTE controls and invites judicial discretion to be employed.

Effective Sentencing Advocacy

Know your client's needs:

- A substance abuse history
- A mental health history
- Developmental issues

Know you client's strengths:

- work experience
- family support
- education
- motivation for treatment

Sources of Information

- Client
- Client's significant others
- Life history records (educational, treatment, medical, employment)
- Expert (consulting and/or testifying)
- Research

Advocacy Begins at Arrest and Continues Throughout Case

- Pretrial release or detention
- Plea negotiations (charge of conviction can have a profound impact on sentencing options)
- Sentencing

Reintegration as Sentencing Goal

- 2006 amendment to Penal Law 1.05(6) adds to the four traditional goals of sentencing the following:

  "the promotion of [the defendant's] successful and productive reentry and reintegration into society"
- Explain how your proposed disposition promotes your client's successful reintegration

Reduced Recidivism = Enhanced Public Safety

Embrace and promote the public safety benefits of your proposed disposition

Conclusion

Knowing your client and all of the sentencing options available will help you to most effectively advocate for a disposition that is best suited to your client.

2009 Rockefeller Drug Law Reform Sentencing Chart[1]

Class Felony	Determinate Sentence Term	Post-Release Supervision	Probation Permitted	Alternative Definite Sentence Permitted	Y.O. Permitted	Parole Super Violent Sentence	Shock Permitted[2]	Judicially Ordered Shock	CASAT Sentence Permitted	Judicial Diversion[3, 4]
A-I First Offense	8 - 20	5	No	No	No	No	No	No	Yes	No
A-I Major Trafficker	15/25-Life[5]	5[6]	No	No	No	No	No	No	Yes	No
A-I Prior Non-Violent	12 - 24	5	No	No	No	No	No	No	Yes	No
A-I Prior Violent	15 - 30	5	No	No	No	No	No	No	Yes	No
A-II First Offense	3 - 10	5	Yes/life[7]	No	No	No	Yes	Yes[7]	Yes	No
A-II Prior Non-Violent	6 - 14	5	Yes/life[7]	No	No	No	**Yes**	Yes[7]	Yes	No
A-II Prior Violent	8 - 17	5	No	No	No	No	**Yes**	Yes[7]	Yes	No
B First Offense	1 - 9	1 - 3	Yes/5	**Yes 1 yr. or less**	Yes	**Yes[8]**	Yes	Yes[7]	Yes	Yes[7]
B Sale Near School	2 - 9	1 - 3	Yes/5	**Yes 1 yr. or less**	Yes	**Yes[8]**	Yes	Yes[7]	Yes	Yes[7]
B Sale to a Child	2 - 9	1 - 3	Yes/20[9]	No	NA	No	Yes	Yes[7]	Yes	Yes[7]
B Prior Non-Violent	**2** - 12	1 ½ - 3	Yes/life[7]	No	No	No	**Yes**	Yes[7]	Yes[7]	Yes[7]
B Prior Violent	8 -15	1 ½ - 3	No	No	No	No	**Yes**[10]	**Yes**[7, 10]	Yes[7]	No
C First Offense	1 - 5 ½	1 - 3	Yes/5	Yes 1 yr. or less	Yes	No	Yes	Yes[7]	Yes	Yes[7]
C Prior Non-Violent	**1¼** - 8	1 ½ - 3	**Yes/5**	**Yes 1 yr. or less**	No	**Yes[8]**	Yes	Yes[7]	Yes	Yes[7]
C Prior Violent	3 ½ - 9	1 ½ - 3	No	No	No	No	**Yes**	Yes[7]	Yes	No
D First Offense	1 - 2 ½	1	Yes/5	Yes 1 yr. or less	Yes	No	Yes	Yes[7]	Yes	Yes[7]
D Prior Non-Violent	1 ½ - 4	1 - 3	**Yes/5**	**Yes 1 yr. or less**	No	Yes[7]	Yes	Yes[7]	Yes	Yes[7]
D Prior Violent	2 ½ - 4 ½	1 - 3	No	No	No	No	Yes	Yes[7]	Yes	No
E First Offense	1 - 1 ½	1	Yes/5	Yes 1 yr. or less	Yes	No	Yes	Yes[7]	Yes	Yes[7]
E Prior Non-Violent	1 ½ - 2	1 - 3	**Yes/5**	**Yes 1 yr. or less**	No	Yes[7]	Yes	Yes[7]	Yes	Yes[7]
E Prior Violent	2 - 2 ½	1 - 3	No	No	No	No	Yes	Yes[7]	Yes	No

[1] Requires recommendation of DA, material assistance in prosecution of drug offense, and court approval. (Penal Law §65.00(1)(b)).
[2] Excluded if convicted of another felony offense, prior violent felony, a class A or B non-drug or subject to an undischarged term. CPL §410.91 (2).
[3] Eligible if served no state prison time on prior violent felony. (Effective 6/13/10). Less than 50 yrs old. Must be within 3 years to parole or conditional release. Excludes crimes listed in (Corr L. §865(1)).
[4] For terms of more than 3 years must wait for rolling admissions.
[5] Same as ff. note 3. For terms of more than 3 years must wait for rolling admission. (Corr L.§865(2)).
[6] See CPL §216.00(1)(a) for exclusions, but D.A. may consent to include exclusions.
[7] Effective 4/7/09.
[8] Must serve 5 months jail or prison time to be eligible.
[9] Judicial Diversion effective 10/7/09. Applies to crimes committed prior to Act not yet sentenced.
[10] Alternative determinate sentence possible (8-20).
[11] Effective 6/13/13.

Denotes Change as of 04/7/09
Denotes Change as of 6/13/10

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Help

- *Website:* www.communityalternatives.org
- *Blog*: "Make Drug Law Reform a Reality"
- *Monthly, state-wide phone calls*
- *Advice*:

Alan Rosenthal, (315) 422-5638, 227, arosenthal@communityalternatives.org
Jeff Leibo, (315) 422-5638, ext. 260, jleibo@communityalternatives.org
Patricia Warth, (315) 422-5638, ext. 229, pwarth@communityalternatives.org

2009 Rockefeller Drug Law Reform Sentencing Chart[6]

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A-I Major Trafficker	15/25-Life[9]	5[9]	No	No	No	No	No	No	Yes	No
A-I Prior Non-Violent	12 - 24	5	No	No	No	No	No	No	Yes	No
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A-II First Offense	3 - 10	5	Yes/life[1]	No	No	No	Yes	Yes[3]	Yes	No
A-II Prior Non-Violent	6 - 14	5	Yes/life[1]	No	No	No	Yes	Yes[3]	Yes	No
A-II Prior Violent	8 - 17	5	No	No	No	No	Yes	Yes[3]	Yes	No
B First Offense	1 - 9	1 - 2	Yes/5	Yes 1 yr. or less	Yes	Yes[2]	Yes	Yes[3]	Yes	Yes[5]
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B Prior Violent	6 -15	1 ½ - 3	No	No	No	No	Yes[10]	Yes [3, 10]	Yes[7]	No
C First Offense	1 - 5 ½	1 - 2	Yes/5	Yes 1 yr. or less	Yes	No	Yes	Yes[3]	Yes	Yes[5]
C Prior Non-Violent	1½ - 8	1 ½ - 3	Yes/5	Yes 1 yr. or less	No	Yes[2]	Yes	Yes[3]	Yes	Yes[5]
C Prior Violent	3 ½ - 9	1 ½ - 3	No	No	No	No	Yes	Yes[3]	Yes	No
D First Offense	1 - 2 ½	1	Yes/5	Yes 1 yr. or less	Yes	No	Yes	Yes[3]	Yes	Yes[5]
D Prior Non-Violent	1 ½ - 4	1 - 2	Yes/5	Yes 1 yr. or less	No	Yes[2]	Yes	Yes[3]	Yes	Yes[5]
D Prior Violent	2 ½ - 4 ½	1 - 2	No	No	No	No	Yes	Yes[3]	Yes	No
E First Offense	1 - 1 ½	1	Yes/5	Yes 1 yr. or less	Yes	No	Yes	Yes[3]	Yes	Yes[5]
E Prior Non-Violent	1 ½ - 2	1 - 2	Yes/5	Yes 1 yr. or less	No	Yes[2]	Yes	Yes[3]	Yes	Yes[5]
E Prior Violent	2 - 2 ½	1 - 2	No	No	No	No	Yes	Yes[3]	Yes	No

[1] Requires recommendation of DA, material assistance in prosecution of drug offense, and court approval. (Penal Law §65.00(1)(b)).
[2] Excluded if convicted of another felony offense, prior violent felony, a class A or B non-drug or subject to an undischarged term. CPL §410.91 (2).
[3] Eligible if served no state prison time on prior violent felony. (Effective 8/13/10). Less than 50 yrs old. Must be within 3 years to parole or conditional release. Excludes crimes listed in (Corr.L. §865(1)).
[4] For terms of more than 3 years must wait for rolling admissions.
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JUSTICE STRATEGIES
A research, training, and policy initiative of the Center for Community Alternatives

EARLY RELEASE AND OTHER PRISON-BASED PROGRAMS: RECENT CHANGES AS A RESULT OF 2009 DRUG LAW REFORM ACT AND 2010 LEGISLATIVE CHANGES TO SHOCK, WILLARD, AND LCTA PROGRAMS.

Together, the 2009 Drug Law Reform Act and 2010 legislative changes to the Willard Drug Treatment program Shock Incarceration program have resulted in several significant changes to various Department of Correctional Services and Division of Parole programs. Defense lawyers should be aware of these changes to advocate effectively so that their clients are eligible for potential early release possibilities. These changes are described below.

Willard Drug Treatment/Parole Supervision Sentence (CPL §410.91):

A joint program between the Division of Parole (Parole), Department of Correctional Services (DOCS), and the Office of Alcoholism and Substance Abuse Services (OASAS), Willard was originally established to target certain class D and E second felony offenders whose criminal conduct is related to a substance abuse problem. Willard is a sentence of parole supervision, with the first ninety days spent in an intensive drug treatment program. Since its inception in 1995, Willard has been available to second felony offenders convicted of a "specified offense" as defined by CPL § 410.91(5), upon a finding that the defendant has a substance abuse history that is "a significant contributing factor" to his or her criminal conduct, that this substance abuse problem can be addressed by a period of parole supervision, and that "imposition of such a sentence would not have an adverse effect on public safety or public confidence in the integrity of the criminal justice system." CPL § 410.91(3). For class D felony offenders, under prior law, Willard was not available absent consent of the prosecution.

The drug law reform legislation makes several significant changes to CPL § 410.91;

1) The list of "specified offenses" is expanded to include burglary in the third degree, class C drug offenses, and first-time class B drug offenses.

Under the reform legislation, the following are now the "specified offenses" listed in CPL § 410.91(5), with the new offenses in italics:

- *burglary 3rd, PL 140.20*
- criminal mischief 3rd, PL 145.05
- criminal mischief 2nd, PL 145.10
- grand larceny 4th, PL 155.30 (excluding subdivisions 7 and 11)
- grand larceny 3rd, PL 155.35 (excluding offenses involving firearms, rifles and

shotguns)
• unauthorized use of a vehicle 2nd, PL 165.06
• criminal possession of stolen property 4th, PL 165.45 (excluding subdivisions 4 and 7)
• criminal possession of stolen property 3rd, PL 165.50 (excluding offenses involving firearms, rifles and shotguns)
• forgery 2nd, PL 170.10
• criminal possession of a forged instrument 2nd, PL 170.15
• unlawfully using slugs 1st, PL 170.60
• any attempt to commit any of the above-listed offenses
• any *class C*, D or E felony drug offense
• *any class B first-time felony drug offense*

2) Those who have been previously convicted of a Class B Article 220 offense are no longer excluded from Willard eligibility.

Old CPL § 410.91(2) excluded from Willard eligibility all defendants who had previously been convicted of a violent felony offense, a class A felony, and any class B felony. Under the 2009 amendments to this provision, those who have previously been convicted of a class B drug offense and sentenced pursuant PL § 70.70(2)(a) (first time felony offense) are no longer excluded from Willard eligibility.

3) District Attorney approval is no longer needed for class D felony offenders.

CPL § 410.91(4), which required District Attorney approval for class D felony offenders as a prerequisite for a Willard sentence, has been repealed. There is no longer any requirement that the prosecution consent to any Willard sentence.

4) Willard is now available to first time B felony drug offenders.

As explained above, Willard was originally established to target second felony offenders. Thus, subdivision 2 of CPL § 410.91, which generally defines Willard eligibility, formerly read as follows:

> A defendant is an "eligible defendant" for purposes of a sentence of parole supervision when such defendant is a *second* felony offender convicted of a specified offense... (Emphasis added)

With the 2009 drug law reform, the Legislature sought to expand sentencing options available to class B first-time felony drug offenders, and as described above, did so by making a Willard sentence available to this group of defendants. Willard is not viewed as a necessary option for class C, D, and E first-time felony drug offenders because other non-incarcerative and less restrictive sentencing options are available to such defendants. Indeed, the centerpiece of the 2009 drug law reform is judicial authorization for diversion to treatment for felony drug

offenders with an identified substance abuse problem.

In amending CPL § 410.91 to make Willard a sentencing option for class B first-time felony drug offenders, the Legislature added this category of offense to the list of "specified offenses" in subdivision 5 and then omitted the word "second" from subdivision 2, so that this provision now reads as follows:

> A defendant is an "eligible defendant" for purposes of a sentence of parole supervision when such defendant is a felony offender convicted of a specified offense....

As a result, this provision could be misinterpreted as providing that class C, D and E first time felony offenders convicted of one of the "specified offenses" in subsection (5) are eligible for Willard. For first time felony drug offenders, Willard is reserved only the more serious class B offenses.

5) Alternative to Willard for Individuals with Medical or Mental Health Issues: Correction Law § 2(20).

In addition to the changes described above, in May 2010, the Legislature again modified Willard (via updates to Correction Law § 2(20)) to allow for alternative-to-Willard programs for defendants with significant medical or mental health problems. Like the alternative-to-Shock program discussed further below, if a defendant sentenced to Willard "requires a degree of medical care or mental health care that cannot be provided at a drug treatment campus," DOCS must propose an alternative-to-Willard program. If the defendant agrees to participate in this program and successfully completes it, the defendant shall be treated the same as those who successfully complete the 90 day drug treatment program at Willard. If the defendant objects in writing to the proposed alternative-to-Willard program, DOCS must notify the sentencing judge of the proposed alternative, who shall then notify the prosecution and defense counsel. The defendant shall then appear before the sentencing judge, who shall consider any submission from the defendant, defense counsel, and prosecution and also provide the parties an opportunity to be heard on the issue. Ultimately, the sentencing judge may modify the sentence notwithstanding CPL § 430.10 (sentence may not be modified after the sentence has commenced).

Shock Incarceration Program (Correction Law §§ 865-867)

Started in 1987 as a Department of Correctional Services Program, Shock is a 6 month boot-camp-style program that provides intensive substance abuse treatment, education, and an opportunity for a significantly reduced prison sentences for those who successfully complete the program. Those who graduate from the Shock program are awarded an Earned Eligibility Certificate and immediately eligible for parole release (for those serving indeterminate sentences) or conditional release (for those serving determinate sentences). *See generally* Correction Law §§ 865-867. Until the 2009 and 2010 amendments, eligibility for Shock was determined only upon reception at a reception facility and inmates were eligible for Shock only if: within 3 years

of parole eligibility or conditional release at time of reception; at least 16 years of age and not yet 40 at time of reception; not convicted of an A-I felony, violent felony offense, homicide, specified sex offense, or escape or absconding offense; and had no prior conviction for a felony upon which a determinate or indeterminate sentence was imposed. Unlike Willard, decisions regarding placement in Shock were solely the province of DOCS, and sentencing judges had no authority to order defendants placed into the Shock program.

The 2009 and 2010 legislation have resulted in the following significant changes to Shock:

1) Judicially Ordered Shock and Alternative to Shock Programs (PL § 60.04(7) and Correction Law § 867(2-a))

Sentencing judges are now authorized to order Shock placement for those defendants convicted of a controlled substance or marijuana offense which requires a prison sentence. Defendants must still meet the eligibility requirements of the program outlined in Correction Law § 865(1) – that is, be the requisite age and not also be convicted of an A-I felony, violent felony offense, homicide, specified sex offenses, or an escape or absconding offense, and have not previously been convicted of an violent felony offense for which a determinate or indeterminate sentence was imposed.

Defense counsel should note a couple of important points about judicial Shock orders. First, such an order can be issued only upon motion of the defense. Penal Law § 60.04(7)(a). Second, as discussed below, amendments to Correction Law § 865(2) establish a new concept of "rolling admissions" into Shock. According to the statutory interpretation of both the Office of Court Administration (OCA) and DOCS, the rolling admissions established by amendments to Correction Law § 865(2) is applicable to judicially ordered Shock as well as those selected by DOCS without a judicial order. For example, a defendant who receives a 6 year determinate sentence is eligible for a judicial order of Shock, but will have to wait to be placed into the program until after she is within 3 years of her conditional release date.

If a judicially ordered Shock defendant is found ineligible for the program because of a medical or mental health condition, DOCS must propose an alternative-to-shock program. If the defendant agrees to participate in this program and successfully completes it, the defendant shall be treated the same as those who successfully complete the Shock program – that is, he or she shall be awarded an Earned Eligibility Certificate and be immediately eligible for conditional release. If the defendant objects in writing to the proposed alternative-to-shock program, DOCS must notify the sentencing judge of the proposed alternative, who shall then notify the prosecution and defense counsel. The defendant shall then appear before the sentencing judge, who shall consider any submission from the defendant, defense counsel, and prosecution and also provide the parties an opportunity to be heard on the issue. Ultimately, the sentencing judge may modify the sentence notwithstanding CPL § 430.10 (sentence may not be modified after the sentence has commenced).

2) Shock Eligibility Extended Beyond Reception: Rolling Admissions (Correction Law § 865(2))

The Budget Bill extends Shock eligibility beyond reception so that now inmates who were not eligible for Shock at reception because of the lengths of their sentences can *become* eligible for Shock once they are within three years of their parole eligibility (for those serving indeterminate sentences) or conditional release (for those serving determinate sentences). Thus, eligibility is now determined at reception facilities for new inmates *and* general confinement facilities for those who are approaching parole or conditional release.

3) Changes in Exclusions Based on Prior Criminal History (Correction Law § 865)

Prior to 2010, there were two types of exclusions based on prior criminal history. Specifically, individuals who had previously served a state sentence were excluded from Shock as were individuals convicted of a B felony drug offense who had previously been convicted of a violent felony offense. With the 2010 changes to Correction Law § 865, there is now only one exclusion based on prior criminal history – those who were previously convicted of a violent felony offense for which a determinate or indeterminate sentence was imposed (i.e., a state prison sentence), are not eligible for Shock. This change reflects the fact that with rolling admissions, Shock is no longer a program designed for those who are "new to prison."

4) Shock Eligibility: 50 is the New 40 (Correction Law § 865)

The Budget Bill also amends Correction Law § 865 (1) to extend the upper age limit for Shock eligibility from 40 to 50 years of age, proving yet again that 50 is the new 40. Now inmates are eligible for Shock as long as they have not achieved their 50th birthday at the point of eligibility, whether it is reception or a general confinement facility.

Comprehensive Alcohol and Substance Abuse Treatment (Correction Law § 2(18)):

The CASAT program is a three-phased comprehensive substance abuse treatment program that includes prison-based substance abuse treatment, work-release with a community-based treatment component, and parole with substance abuse aftercare. Generally, inmates are eligible for CASAT if eligible for Temporary Release, which means the inmate must be within two years of his or her parole or conditional release date. The 2004 DLRA expedited CASAT eligibility by 6 months for those convicted of a Penal Law Article 220 or 221 offense. However, the 2004 DLRA also included an often-overlooked, though fully enforced, provision requiring that second felony class B drug offenders must serve at least *18 months* of their sentence before achieving CASAT eligibility. This 18 month mandate has been halved so that now second felony class B drug offenders now must serve at least *nine months* of their sentence before achieving CASAT eligibility.

Limited Credit Time Allowance for Those Convicted of a Violent Felony Offense (Correction Law § 803-b)

For years advocates have called for the expansion of the merit time program so that people in prison serving non-drug determinate sentences could earn merit time in the same way as others serving indeterminate sentences and drug determinate sentences. It was also hoped that a person whose controlling sentence was a non-violent one would not be determined ineligible to earn merit time by a non-controlling sentence for a violent felony. The credit limited time allowance in the 2009 legislation, however, is nothing short of disappointing and will prove nearly impossible for inmates to achieve. This legislation amends the Correction Law by adding a new section 803-b, described below.

At the outset, section 803-b excludes individuals convicted of murder in the first degree, any sex offense, or any attempt or conspiracy to commit these offenses.

Otherwise, "eligible offenders" are defined as: 1) those subject to an indeterminate sentence for any class A-I felony other than criminal possession of a controlled substance in the first degree (PL § 220.21) or criminal sale of a controlled substance in the first degree (PL § 220.43), or any attempt or conspiracy to commit these offenses; 2) those subject to an indeterminate or determinate sentence imposed for a violent felony offense as listed in Penal Law § 70.02(1); and 3) those subject to an indeterminate or determinate sentence for any Penal Law Article 125 offense. A person is not eligible if he or she is returned to DOCS on a revocation of presumptive release, parole, conditional release, or post release supervision. Moreover, a person is eligible for only one limited credit time allowance, no matter how many sentences he or she is serving.

The effect of the limited credit time allowance differs depending on the type of sentence the individual is serving. Individuals serving an indeterminate life sentence are eligible for parole consideration 6 months prior to completion of their minimum term. All other individuals are eligible for conditional release 6 months prior to their regular conditional release date, provided of course, that DOCS determines that they have earned their full amount of good time. If this 6 month time allowance moves the individual's conditional release date to *before* his or her parole eligibility date, the limited credit time will essentially move the parole eligibility date up so that it coincides with the advanced conditional release date.

Actually earning this limited credit time allowance is no small feat. A person must achieve an Earned Eligibility Certificate in accordance with Correction Law § 805 and achieve "significant programmatic accomplishment" which is defined in Correction Law 803-b as: participation in at least two years of college programming; obtaining a masters or professional studies degree; successful participation as an inmate program associate for no less than two years; receiving certification from the State Department of Labor for successful participation in an apprenticeship program; successfully working as an inmate hospice aid for a period of two years; successfully working in DOCS industries' optical program for two years and receiving a certification from the American board of opticianry; receiving a Department of Labor asbestos

handling certificate and then working in DOCS industries' asbestos abatement program as a hazardous materials removal worker or group leader for 18 months; successfully completing the course requirements for and passing the minimum competency screening process performance examination for a sign language interpreter and then working as a sign language interpreter for one year; successfully working in the puppies behind bars program for two years. (Note: This list is current up until January 2011. It is worth reading the most recent version of Correction Law 803-b to determine if additional programs have been are added to this list).

As hard as it is to achieve the limited credit time allowance, it is very easy to lose. A person can be disqualified from eligibility for this time allowance by being deemed to have a "serious disciplinary infraction" or "overall poor institutional record"[1] or by being deemed to have filed a "frivolous lawsuit" as defined in CPLR 8303 or Fed. R. Civil Procedure, Rule 11. In addition, the DOCS Commissioner can revoke this limited credit time allowance for any disciplinary infraction or failure to successfully participate in the assigned work and treatment program, and this revocation can occur even after the individual has been awarded an Earned Eligibility Certificate.

New Parole Release Factor for Those Serving Old Rockefeller Indeterminate Sentences:

Executive Law § 259-i(2)(c)(A) lists the factors that the Parole Board must consider in deciding whether or not an individual is to be released to parole supervision. These factors are:

> (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department of correctional services and any recommendation regarding deportation made by the commissioner of the department of correctional services pursuant to section one hundred forty-seven of the correction law; and (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated.

The 2009 legislation amends this provision by requiring the Parole Board to also consider the length of the determinate sentence individuals serving time for a drug offense would be serving if sentenced under the new provisions. Specifically, the Parole Board is now directed to also consider the following:

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[1] The legislation requires the DOCS Commissioner to define "serious disciplinary infraction" and "overall poor institutional record," and states that these need not be defined the same as otherwise defined under regulations enacted pursuant to Correction Law § 803.

(vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law.

Medical Parole (Executive Law § 259-r)

Medical parole was originally implemented in 1992 for terminally ill individuals in DOCS's custody. *See* Executive Law § 259-r. Over the years, it has been primarily used by individuals over the age of 55, who are considered to have the lowest recidivism rates. As the prison population has aged, more and more imprisoned people are suffering from debilitating physical and cognitive impairments, increasing the costs associated with imprisonment.

The Legislature has sought to address these skyrocketing costs by expanding eligibility for medical parole and streamlining the application process. In general, the 2009 amendments to Executive Law § 259-r: authorize the release of individuals to parole supervision who suffer from significant and non-terminal conditions that render them so physically or cognitively debilitated that they do not present a danger to society; allows individuals who have been convicted of certain violent felonies to be eligible for medical parole consideration if they have served at least one-half of their sentence, except that inmates convicted of first-degree murder or an attempt or conspiracy to commit first-degree murder are not eligible; and allows individuals who are ambulatory, but who suffer from significant disabilities that limit their ability to perform significant normal activities of daily living to be eligible for consideration.

In deciding whether a client is eligible for medical parole, defense lawyers should read the amended provisions carefully.

JUSTICE STRATEGIES

A research, training, and policy initiative of the Center for Community Alternatives

EARLY RELEASE CHECKLIST: DETERMINATE SENTENCES

Program	Eligibility	Exclusions	Impact	Impact on Client
Willard	CPL § 410.91; specified 2d D & E property offenses; 2d C, D, & E drug offenses; 1st B drug offense (except CSCS to a Child)	Not currently convicted of non-specified offense; no prior VFO, class A or B non-drug felony conviction; not under jurisdiction of or currently awaiting delivery to DOCS	Sentenced to parole supervision, with first 90 days spent at Willard	
Shock	Correction Law §§ 865-867; b/w 16 and 50 years old; within 3 years conditional release	Not currently convicted of A-I felony, VFO, sex, homicide, escape, or absconding. No prior VFO w/ state prison sentence. Must be screened by Shock screening committee (which look for indications of violence, predatory behavior, or crimes of sophistication; medical or mental health problems)	Graduates of 6 month program earn Earned Eligibility Certificate (see Correction Law § 805) and are immediately parole eligible	
Judicial Shock	PL§ 60.04(7); same as above, but must also be convicted drug offense	Same as above, but screened *only* for medical/mental health problems; if exist, alternative-to-Shock program must be made available.	same as above	
Temporary Release (includes CASAT)	Correction Law §§ 851-861; within 24 months of earliest release (30 months for drug offenses) and requisite time in (generally 6 months; 9 months for second B felony drug offense)	Not currently convicted of VFO, sex offense, homicide, escape, absconding, or aggravated harassment of DOCS employee. Violent felony override may be avail (see www.communityalternatives.org/pdf/temporaryrelease.pdf	Release to community for extended periods of time for work, education, etc.	
Judicial CASAT	PL § 60.04(6); conviction for drug offense	For CASAT annex and work release, must not have any of above exclusions. If above exclusions apply, will only get CASAT annex 6-9 months prior to earliest release.	If TR eligible, will enter CASAT annex for 6 months and then work release.	
Presumptive Release	Correction Law § 806; have achieved an EEC (§ 805)	Not currently convicted of A-I felony, VFO, specified homicide, sex offense, incest, sex performance of child, hate crime, terrorism, or aggravated harassment of employee; no serious disciplinary infraction or frivolous lawsuit	Released at earliest release opportunity	
Merit Release	Correction Law § 803; achieve EEC one of 4 program objectives.	Not currently convicted of A-I non-drug felony, VFO, specified homicide, sex offense, incest, sex performance of child, or aggravated harassment DOCS employee; no serious disciplinary infraction or frivolous lawsuit	1/7 off minimum *in addition to* the 1/7 off for conditional release.	
Conditional Release	all determinate sentences	poor institutional record	1/7 off determinate sentence	

Post Release Supervision: 1-5 for non sex felonies (PL § 70.45(2)); 3 to 25 years for felony sex offenses (PL § 70.80).

JUSTICE STRATEGIES

A research, training, and policy initiative of the Center for Community Alternatives

EARLY RELEASE CHECKLIST: INDETERMINATE SENTENCES

Program	Eligibility	Exclusions	Impact	Impact on Client
Willard	CPL § 410.91; specified 2d D & E property offenses; 2d C, D, & E drug offenses; 1st B drug offense (except CSCS to Child)	Not currently convicted of non-specified offense; no prior VFO, class A or B non-drug felony conviction; not under jurisdiction of or currently awaiting delivery to DOCS	Sentenced to parole supervision, with first 90 days spent at Willard	
Shock	Correction Law §§ 865-867; b/w 16 and 50 years old; within 3 years parole eligibility	Not currently convicted of A-I felony, VFO, sex, homicide, escape, or absconding. No prior VFO w/ state prison sentence. Must be screened by Shock screening committee (which look for indications of violence, predatory behavior, or crimes of sophistication; medical or mental health problems)	Graduates of 6 month program earn Earned Eligibility Certificate (see Correction Law § 805) and are immediately parole eligible	
Judicial Shock	PL§ 60.04(7); same as above, but must be convicted drug offense	Same as above, but screened *only* for medical/ mental health problems; if exist, alternative-to-Shock program must be made available	same as above	
Temporary Release (includes CASAT)	Correction Law §§ 851-861; within 24 months of earliest release (30 months for drug offenses) and requisite time in (generally 6 months; 9 months for second B felony drug offense)	Not currently convicted of VFO, sex offense, homicide, escape, absconding, or aggravated harassment of DOCS employee. Violent felony override may be avail (see www.communityalternatives.org/pdf/temporaryrelease.pdf)	release to community for extended periods of time for work, education, etc.	
Judicial CASAT	PL § 60.04(6); conviction for drug offense	For CASAT annex and work release, must not have any of above exclusions. If above exclusions apply, will only get CASAT annex 6-9 months prior to earliest release date	If TR eligible, will enter CASAT annex for 6 months and then work release.	
Presumptive Release	Correction Law § 806; have achieved an EEC (§ 805)	Not currently convicted of A-I felony, VFO, specified homicide, sex offense, incest, sex performance of child, hate crime, terrorism, or aggravated harassment of employee; no serious disciplinary infraction or frivolous lawsuit	Released at earliest release opportunity without having to appear before Parole Board.	
Merit Release	Correction Law § 803; achieve EEC one of 4 program objectives.	Not currently convicted of A-I non-drug felony, VFO, specified homicide, sex offense, incest, sex performance of child, or aggravated harassment DOCS employee; no serious disciplinary infraction or frivolous lawsuit	1/6 off minimum sentence (1/3 for A-I drug felonies)	
Supplemental Merit Release	L. 2005, Ch. 736, § 30; drug offense conviction prior to 2004; same as above, but must complete 2 of 4 program objectives.	same as above, but A-I felony drug offenses excluded.	an additional 1/6 off min.	
Conditional Release	all indeterminate sentences	poor institutional record	1/3 off maximum	

WILLARD ELIGIBILITY:
UNDERSTANDING THE LIMITATION
"SUBJECT TO AN UNDISCHARGED TERM OF PRISON"

Criminal Procedure Law (CPL) § 410.91(2), which defines those who are eligible for a sentence of Willard, excludes those who are "subject to an undischarged term of incarceration." On its face, this limitation seems to apply to those who are under parole supervision when convicted of the Willard eligible offense. Yet, Willard has traditionally been imposed for parole violators, so if read in this manner, this limitation makes no sense.

In fact, this language was never intended to exclude from Willard eligibility those who were on parole at the time of commission of the Willard eligible offense. When he was Deputy Commissioner and Counsel for the Department of Correctional Services, Anthony Annucci reiterated this point in a letter to the Office of Court Administration, stating as follows: "*The language in question was never intended to exclude from Willard the defendant who is on parole or conditional release from a prior term of imprisonment when the present crime is committed, and is otherwise eligible to receive a sentence of parole supervision.*"

In enacting the 2004 Drug Law Reform Act (L. 2004, ch. 738), the Legislature sought to clarify this limitation as well by changing Penal Law § 70.06(7) to eliminate the language "subject to an undischarged term of imprisonment" and to substitute the clarifying language "is not under the jurisdiction of or awaiting delivery to the department of correctional services." Thus, Penal Law § 70.06(7) now provides that only those who are in state prison or "awaiting delivery" to the Department of Correctional Services for another crime are excluded from Willard eligibility. It can only be assumed that the failure to similarly change this language in CPL § 410.91 was a legislative oversight. Nonetheless, the changes to Penal Law § 70.06(7) makes it clear that only those who commit a new crime while in state prison or who commit a new crime while having just been sentenced to state prison (and are awaiting delivery to the Department of Correctional Services) are ineligible for Willard.

Print Form

UNIFORM SENTENCE & COMMITMENT

UCS-854 (2/2010)

STATE OF NEW YORK

County COURT, COUNTY OF _____

PRESENT: HON _____

Court Part: _____

Court Reporter: _____

Superior Ct. Case #: _____

The People of the State of New York -vs-			
Defendant			
Male			
SEX	D.O.B.	NYSID NUMBER	CRIMINAL JUSTICE TRACKING NUMBER

Accusatory Instrument Charge(s):	Law/Section & Subdivision:
1	
2	
3	
4	

Date(s) of Offense: _____ To _____

THE ABOVE NAMED DEFENDANT HAVING BEEN CONVICTED BY [◉PLEA *OR* ○VERDICT], THE MOST SERIOUS OFFENSE BEING A [◉FELONY *OR* ○MISDEMEANOR *OR* ○VIOLATION], IS HEREBY SENTENCED TO:

Crime	Count No.	Law Section and Subdivision	SMF, Hate or Terror	Minimum Term	Maximum Term	☐Definite (circle: D, M or Y) ☐Determinate (in years) * *	Post-Release Supervision
1				____ years	____ years	____ years	____ years
2				____ years	____ years	____ years	____ years
3				____ years	____ years	____ years	____ years
4				____ years	____ years	____ years	____ years
5				____ years	____ years	____ years	____ years

* * **NOTE: For each DETERMINATE SENTENCE imposed, a corresponding period of POST-RELEASE SUPERVISION MUST be indicated [PL § 70.45].**

☐Counts _____ shall run **CONCURRENTLY** with each other ☐Count(s) _____ shall run **CONSECUTIVELY** to count(s) _____

☐Sentence imposed herein shall run **CONCURRENTLY** with _____ and/or **CONSECUTIVELY** to _____

☐Conviction includes: **WEAPON TYPE**: _____ and/or **DRUG TYPE**: _____

☐ Charged as a **JUVENILE OFFENDER**—age at time crime committed: _____years

☐ Adjudicated a **YOUTHFUL OFFENDER [CPL § 720.20]**

☐ Execute as a sentence of **PAROLE SUPERVISION [CPL § 410.91]**

☐ Re-sentenced as a **PROBATION VIOLATOR [CPL § 410.70]**

☐ Court certified the Defendant a **SEX OFFENDER [Cor. L § 168-d]**

☐ **CASAT** ordered **[PL § 60.04(6)]**

☐ **SHOCK INCARCERATION** ordered **[PL § 60.04(7)]**

As a: ○Second ○Second Violent ○Second Drug ○Second Drug w/prior VFO ○Predicate Sex Offender ○Predicate Sex Offender w/prior VFO ○Second Child Sexual Assault ○Persistent ○Persistent Violent **FELONY OFFENDER**

Paid	Not Paid	Deferred—court must file written order [CPL § 420.40(5)]		Paid	Not Paid	Deferred—court must file written order [CPL § 420.40(5)]	
○	◉	○	Mandatory Surcharge $_____	○	◉	○	Crime Victim Assistance Fee $_____
○	○	○	Fine $_____	○	○	○	Restitution $_____
○	○	○	DNA Fee $_____	○	○	○	Sex Offender Registration Fee $_____
○	○	○	DWI/Other: _____ $_____	○	○	○	Supplemental Sex Off. Victim Fee $_____

THE SAID DEFENDANT BE AND HEREBY IS COMMITTED TO THE CUSTODY OF THE:

○ NYS Department of Correctional Services (NYSDOCS) until released in accordance with the law, and being a person sixteen (16) years or older not presently in the custody of NYSDOCS (the County Sheriff) (New York City Dept. Of Correction) is directed to deliver the defendant to the custody of NYSDOCS as provided in 7 NYCRR Part 103.

○ NYSDOCS until released in accordance with the law, and being a person sixteen (16) years or older and is presently in the custody of NYSDOCS, said defendant shall remain in the custody of the NYSDOCS.

○ NYS Office of Children and Family Services in accordance with the law being a person less than sixteen (16) years of age at the time the crime was committed.

○ _____ County Jail/Correctional Facility

TO BE HELD UNTIL THE JUDGMENT OF THIS COURT IS SATISFIED.

REMARKS: _____

Commitment, Order of Protection & Pre-Sentence Report received by Correctional Authority as indicated:

_____
Official Name

_____
Shield No.

Pre-Sentence Investigation Report Attached: ◉YES ○NO ☐ **Amended Commitment:**

Order of Protection Issued: ○YES ○NO Original Sentence Date _____

Order of Protection Attached: ○YES ○NO

_____ _____ by: _____ _____

Date **Clerk of the Court** **Signature** **Title**

CENTER FOR COMMUNITY ALTERNATIVES
INNOVATIVE SOLUTIONS FOR JUSTICE

The 2009 Drug Law Reform Act: Steps to Effective Sentencing Advocacy

Alan Rosenthal
Patricia Warth
Co-Directors, Justice Strategies
Center for Community Alternatives, Inc.

Three Basic Steps to Using the 2009 for Effective Sentencing Advocacy:

1) Know the legislative history and intent of the 2009 Drug Law Reform Act (DLRA) to effectively fend off attempts to limit eligibility.
2) Know the various sentencing options available, as well as the eligibility and exclusion criteria.
3) Develop a client-specific, thematic, problem-solving approach that effectively promotes the best disposition for your client.

Step One: Know the History and Intent of the 2009 DLRA

1) Features of the Rockefeller Drug Laws

• *Punitive:* the Rockefeller Drug Laws provided for long prison sentences for possession and sale of even small amounts of drugs.

• *Limits to judicial discretion*: The Rockefeller Dug Laws mandated prison sentences for second felony offenders and for first time offenders convicted of more serious drug offenses; the District Attorney was the gatekeeper for the few therapeutic sentencing options that were available.

• *Impact*: The Rockefeller Drug Laws resulted in an escalating prison population with no discernible impact on our State's drug problem.

2) The 2009 DLRA Was Intended to Address These Negative Features

The 2009 DLRA reflects a substantive shift away from an ineffective *punitive* approach that left judges with little discretion. Underlying this statute are two over-arching legislative goals:

• *Therapeutic (Rehabilitative) Approach to Drug-Related Offenses*:
"This legislation was designed to authorize a more lenient, more therapeutic judicial response to all but the most serious drug crimes." People v. Danton, 27 Misc.3d 638, 644 (Sup. Ct. N.Y. Co. 2010).

• *Enhanced Judicial Discretion*:
"[T]he Legislature, in crafting the 2009 DLRA, wrote a detailed statute which gave courts the discretion to make reasoned judgments and created an adjudicatory process the Legislature deemed fair to both the prosecutor and criminal defendants. Given this carefully considered legislative design, it is difficult to understand why the judiciary would impose categorical limitations on its own discretion which the Legislature did not create." People v. Figueroa, 27 Misc.3d 751, 778 (Sup. Ct. N.Y. Co. 2010).

3) Utilize This Legislative History When Advocating for Your Client

This legislative history gives rise to three principles that underlie effective advocacy:

• The DLRA is designed to *enhance* public safety by more effectively treating the behavior that leads to crime; punishment did not work, but treatment holds out the best promise for transformation from criminal to law-abiding behavior.

• A restrictive interpretation of the 2009 DLRA and programmatic eligibility requirements undermines the Legislative intent to enhance judicial discretion.

• To fully promote the therapeutic and rehabilitative benefits of the 2009 DLRA, we must refrain from a restrictive interpretation of its eligibility requirements.

Step Two: Know the Available Sentencing Options

Overview of Expanded Sentence Options

- Probation sentences
- Definite sentences
- Willard
- Judicial Shock Order (2009 DLRA)
- Judicial CASAT Order (2004 DLRA)

1) Probation Sentences

A sentence of 5 years probation is now a sentencing option for the following offenses:

- Class B drug offense, first offense (exception for *sale to a child under Penal Law § 220.48)* – see Penal Law (PL) § 70.70(2)(b)

- Class C, D, and E drug offense, predicate offenders where prior was non-violent – see § PL 70.70(3)(c)

(Formerly, a 5 year probation sentence was only available for C, D, and E first time offenders.)

2) Definite Sentences

A definite sentence (including a split sentence) is now a sentencing option for the following offenses:

- Class B drug offense, first offense (exception for *sale to a child under PL § 220.48)* – see PL § 70.70(2)(c)

- Class C, D, and E dug offense, predicate offenders where prior was non-violent – see § PL 70.70(3)(e)

(Formerly, a definite sentence was only available for C, D, and E fist time offenders.)

3) Sentence of Parole: Willard

Criminal Procedure Law (CPL) § 410.91

What is a Willard sentence?

It is a sentence that is to be executed as parole supervision, with the first 90 days at Willard, a boot-camp style substance abuse treatment program; joint program between the Department of Corrections and Community Supervision (DOCCS) and the Office of Alcohol and Substance Abuse Services (OASAS).

Who is eligible for a Willard sentence?

Those convicted of a:

- second class D or E designated property offenses (listed in CPL § 410.90(5)) - see § PL 70.06(7)
- second class C, D, and E drug offenses - see PL § 70.70(3)(d)
- first time class B drug offense (except for those convicted under PL § 220.48) - see PL § 70.70(2)(d)

Note: District Attorney consent no longer required! Subsection (4) of CPL §410.91has been repealed.

Who is excluded from eligibility for a Willard sentence?

Anyone with:

- a current conviction for non-specified offense
- a prior conviction for a violent felony offense

• a prior conviction for A felony
• a prior conviction for B felony other than B drug offense
• who is "subject to an undischarged term of prison"
(*What does this mean? See attached memo on this issue.*)

Is There an Alternative- to-Willard program?
• DOCCS is required to provide an Alternative-to-Willard if the inmate is in need of medical or mental health care not available at the Drug Treatment Campus.
• The inmate can object to the alternative program and opt to return to the sentencing judge for re-sentencing.
See Correction Law § 2(20), which was updated May, 2010 to include this Alternative-to-Willard.

4) Judicial Shock Order
PL § 60.04(7); Correction Law § 865-867

What is a Judicial Shock Order?
When the person is within 3 years of parole or conditional release, he or she is transferred to one of three Shock Incarceration facilities for a 6 month, boot-camp style program that focuses on discipline, substance abuse treatment and education (GED).

Who is eligible for a Judicial Shock Order?
Anyone who:
• is convicted of a drug offense;
• is between the ages of 16 and 50 at time of offense and not yet 50 at time of eligibility for participation in Shock; and
• meets the eligibility requirements of Correction Law § 865(1)

Who is excluded from Shock eligibility under Correction Law §865(1)?
Anyone:
• whose current conviction is for an A-I felony, violent felony offense, sex, homicide, escape, or absconding offense
• who has previous conviction for a violent felony offense for which he or she served a state prison sentence (this was a 2010 legislative change)

Is there an Alternative-to-Shock program for those with a Judicial Shock Order?
If screening indicates medical or mental heath reasons, DOCCS must provide an Alternative-to-Shock program. See more below.

Are there potential issues that defense attorneys should be aware of?
There are two potential issues:

Issue One:

• The Shock Screening Committee has traditionally "screened out" eligible inmates for medical or mental health reasons or where there are indications of violence, predatory behavior, or crimes of sophistication (including crimes involving large amounts of money).

• But the 2009 DLRA amended the Penal Law and Shock statute to explicitly provide that the Shock Screening Committee can not screen out statutorily eligible inmates who have Judicial Shock Orders. If there are medical or mental health limitations, the inmate must be provided with an Alternative-to-Shock program.

Penal Law § 60.04(7)(b) states as follows:

(i) In the event that an inmate designated by court order for enrollment in the shock incarceration program requires a degree of medical care or mental health care that cannot be provided at a shock incarceration facility, the department, in writing, shall notify the inmate, provide a proposal describing a proposed alternative-to-shock-incarceration program, and notify him or her that he or she may object in writing to placement in such alternative-to-shock-incarceration program. If the inmate objects in writing to placement in such alternative-to-shock-incarceration program, the department of corrections and community supervision shall notify the sentencing court, provide such proposal to the court, and arrange for the inmate's prompt appearance before the court. The court shall provide the proposal and notice of a court appearance to the people, the inmate and the appropriate defense attorney. After considering the proposal and any submissions by the parties, and after a reasonable opportunity for the people, the inmate and counsel to be heard, the court may modify its sentencing order accordingly, notwithstanding the provisions of section 430.10 of the criminal procedure law.

(ii) An inmate who successfully completes an alternative-to-shock-incarceration program within the department of corrections and community alternatives shall be treated in the same manner as a person who has successfully completed the shock incarceration program, as set forth in subdivision four of section eight hundred and sixty-seven of the correction law.

Correction Law § 867(2-a) states as follows:

Subdivisions one and two of this section shall apply to a judicially sentenced shock incarceration inmate only to the extent that the screening committee may determine whether the inmate has a medical or mental health condition that will render the inmate unable to successfully complete the shock incarceration program, and the facility in which the inmate will participate in such program. Notwithstanding subdivision five of this section, an inmate sentenced to shock incarceration shall promptly commence

participation in the program when such inmate is an eligible inmate pursuant to subdivision one of section eight hundred sixty-five of this article.

Practice Tip: Make sure the Sentence and Commitment clearly indicates that the judge ordered (and not merely recommended) placement in Shock pursuant to PL § 60.04(7). Not all courts are using the new Sentence and Commitment form OCA has issued that reflects the Judicial Shock Order. (See attached OCA Sentence and Commitment form).

Issue Two:
• Some judges are reading Correction Law § 865's language, "will become eligible for conditional release within 3 years" as limiting their ability to issue a Judicial Shock Order for those with a longer sentence.
• In such cases, defense attorneys must point out Correction Law § 867 (2-a), which states: "[A]n inmate sentenced to shock incarceration shall promptly commence participation *when such an inmate is an eligible inmate pursuant to*" Correction Law § 865(1).
• DOCCS is reading this to mean that Judicial Shock Orders apply to those with longer sentences who are not eligible for Shock right away. This is consistent with the 2009 DLRA amendments to Correction Law § 865(2) that allows for "rolling admissions" to Shock.

5) Judicial CASAT Order
PL § 60.04(6); Correction Law § 851-861

What is CASAT?
The Comprehensive Alcohol and Substance Abuse Treatment program (CASAT) is a DOCCS "wrap-around" substance abuse treatment program with 3 phases: 1) a 6 month prison-based substance abuse treatment program in a DOCCS annex; 2) transition to work release with out-patient follow-up treatment; and 3) release to parole or Post Release Supervision with after-care.

Who is Eligible for a Judicial CASAT Order?
Anyone who is convicted of a drug offense
But: To participate in all three phases, the inmate must meet the criteria for the Temporary Release Program. Those who do not meet the Temporary Release Program criteria will be admitted to phase 1 only (DOCCS CASAT annex) when 6 to 9 months from their earliest release.

What is the Temporary Release Program criteria?
• The inmate must not be convicted of a violent felony, sex offense, homicide, escape, absconding, or aggravated harassment of a DOCCS employee; however, a Violent Felony Override may be available for an inmate convicted of a violent felony offense if the individual was not armed with, did not use, or did not possess with intent to use, a deadly weapon or dangerous instrument and there is

no serious physical injury. Additional information about violent felony override is attached.
• In addition, the inmate must score the requisite number of points in the point system set forth in 9 NYCRR 1900.4 (often called the "Vera point system" because this point system was established by the Vera Institute of Justice in 1976).

Did the 2009 DLRA include any changes to CASAT?
One small change:
•The 2004 DLRA included an often-overlooked though fully-enforced provision requiring that second felony class B drug offenders must serve at least 18 months of their sentence before achieving CASAT eligibility.
• the 2009 DLRA cut this 18 month mandate in half, so now second felony B drug offenders must serve at least 9 nine months of their sentence before achieving CASAT eligibility.

Step Three: Effective Sentencing Advocacy

1) Get to know your client

Know your client's needs – examples include:
• a substance abuse history
• a mental health history
• developmental issues

Know your client's strengths – examples include:
• work experience
• family support
• education
• motivation for change

2) Sources of Information

• client
• client's significant others
• life history records (educational, treatment, medical, employment, etc.)
• use of experts (to consult and/or testify)
• research

3) Advocacy begins at arrest and through….

• pretrial release or detention
• plea negotiations (remember that the charge of conviction can have a profound impact on sentencing options)
• sentencing

4) Reintegration as a Sentencing Goal

• A 2006 amendment to Penal Law § 1.05(6) adds the following to the four traditional goals of sentencing:

"the promotion of [the defendant's] successful and productive reentry and reintegration into society."

• In advocating for your client, explain how your proposed disposition promotes your client's successful reintegration into the community.

• Remember that reduced recidivism means enhances public safety – embrace and promote the public safety benefits of your proposed disposition.

5) Assistance available from the Center for Community Alternatives

• Webstite: www.communityalternatives.org.

• Blog: "Making Drug Reform a Reality"
http://makingreformreality.blogspot.com/

• Updates and Brainstorming: monthly state-wide telephone calls

• People:

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ATTACHMENTS

• 2009 Rockefeller Drug Law Reform Sentencing Chart

• Early Release and Other Prison-Based Program: Recent Changes as a Result of the 2009 DLRA and 2010 Changes to the Shock, Willard, and LCTA Programs

• 2009 Early Release Checklist: Determinate Sentences

• 2009 Early Release Checklist: Indeterminate Sentences

• Willard Eligibility: Understanding the Limitation "Subject to an Undischarged Term of Prison."

• Temporary Release Eligibility Further Restricted: Update on the Violent Felony Override

• Updated OCA Sentence and Commitment form

CPL Article 216 Judicial Diversion Issues: *Strategies for Effective Advocacy*

By Andy Correia, Alan Rosenthal, and Patricia Warth*

Introduction

The 2009 Drug Law Reform Act (2009 DLRA) included the addition of Criminal Procedure Law (CPL) Article 216, which establishes the procedure for participation in judicial diversion programs. CPL § 216.00(1) provides that any person who is charged with a class B, C, D, or E felony offense listed in Penal Law Article 220 or 221 or an offense listed in CPL § 410.91(4) (the "Willard offenses") is eligible to participate in judicial diversion. *See* CPL § 216.00(1). This section goes on to provide, however, that an otherwise eligible defendant is excluded from judicial diversion eligibility if the defendant: 1) is also currently charged with a violent felony or merit time excluded crime for which state prison is mandatory; 2) has, within the preceding ten years, been convicted of a violent felony offense, a merit time excluded offense, or a Class A drug offense; or 3) has previously been adjudicated a second or persistent violent felony offender under Penal Law §§ 70.04 or 70.08. *See* CPL § 216.00(1)(a), (b).

Below are some issues that trial attorneys have encountered since the implementation of CPL Article 216 and some suggested strategies for dealing with these issues.

1. Refusal By Trial Judges to Refer the Case to the Eligibility Screening Part and/or Sua Sponte Diversion Denial

Some superior court judges around the State have refused to refer statutorily eligible [CPL § 216.00(1)] defendants to the Superior Court for Drug Treatment for a hearing and determination of whether such defendants are appropriate for Article 216 judicial diversion. [*"Appropriate" is used here to mean statutorily eligible and should be offered alcohol or substance abuse treatment as determined by considering the criteria in CPL § 216.05(3)(b)*]. Other courts have simply stated that the particular client is not appropriate for judicial diversion without going through any aspect of the CPL Article 216 process. Depending on the jurisdiction, there may not be any separate screening part at all. Arraignment counsel needs to be aware of the local practice and be prepared to advocate that the "non-treatment" superior court should only consider statutory eligibility for judicial diversion. Counsel can request an evaluation and ask that the case be transferred to the court that has been designated under the local OCA administrative implementation as the Superior Court for Drug Treatment for hearing determination of Article 216 cases. Refusal to even consider an eligible, and thus potentially appropriate, case for diversion undermines the broad discretion given to the courts in these matters and overlooks the inclusive and ameliorative intent of the 2009 DLRA. The correct procedure is for the "non-treatment" superior court judge to simply order an "alcohol and substance abuse evaluation" if requested to do so by a statutorily eligible defendant. By ordering the evaluation the case is automatically transferred to the Superior Court for Drug Treatment.

The court rules indicate a very strict procedure for the ordering of the evaluation and the transfer, which is not being followed in some parts of the State. *Rules of the Chief Administrative Judge* § 143(2)(c) states:

> "Where a superior court orders an alcohol and substance abuse evaluation pursuant to section 216.05(1) of the Criminal Procedure Law to determine whether the defendant should be offered judicial diversion for alcohol and substance abuse treatment under Article 216, the case shall be referred for further proceedings to:
>
> 1) the Superior Court for Drug Treatment or
>
> 2) any other part in superior court designated as a drug treatment court part by the administrative judge . . . ." If the person does not enter judicial diversion, the case can be adjourned to any part designated by the administrative judge.

Some courts appear to be following this procedure and some are not. Defense counsel should become familiar with the process in each jurisdiction in which they practice and formulate an approach to this issue accordingly.

2. Refusal By Trial Judges to Order the CPL § 216.05(1) Evaluation

Some courts have refused to order the "alcohol and substance abuse evaluation" as defined in CPL § 216.00(2) after the arraignment of a statutorily eligible defendant. The refusals are often based on purely arbitrary rationales and serve to frustrate the sweeping ameliorative purpose of the diversion statute. The difficulty arises from the permissive language in CPL § 216.05(1) which provides that after the arraignment of an eligible defendant, but prior to a plea or commencement of trial, "the court at the request of the eligible defendant, may order an alcohol and substance abuse evaluation." (*emphasis supplied*)

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If your judge is making such decisions at arraignment, you can try:

A. Pointing out that right now the trial court does not have all the information necessary to make an informed decision about whether the defendant should participate in any diversion program. Ordering an evaluation does not commit the court to making an offer of diversion to the defendant; it does serve the very legitimate purposes of providing the court with information necessary to make the decision under CPL § 216.05(3)(b) and the parties the opportunity to address the question of whether the defendant is appropriate for judicial diversion. Try to get the court to articulate its reasons for refusing to even order the evaluation.

B. Consider, if possible, arranging for your own alcohol and substance abuse evaluation of the defendant.[†] Your evaluation expert should meet the statutory credentialing requirements of CPL § 216.00(2) and make the findings required by CPL § 216.00(2)(a)-(d). Then ask for your hearing under CPL § 216.05(3).

C. Advance the underlying policy of the Drug Law Reform Act favoring treatment over incarceration to convince the court that an evaluation should be ordered. See Governor Paterson's signing statement, which states:

> We are reforming these laws to treat those who suffer from addiction and to punish those who profit from it. But to be successful we must not only overhaul the drug laws, we must also provide an infrastructure to ensure that we successfully rehabilitate those who are addicted with programs like this one at Elmcor which exemplifies our approach to focus on treatment, not punishment.
>
> The laws will give judges the discretion to divert non-violent drug addicted individuals to treatment alternatives that are shown to be far more successful than prison in ending the cycle of addiction.

To convince the court that an evaluation should at least be ordered, use the information posted on CCA's website (www.communityalternatives.org/) to make the argument that treatment is a more effective and cost-efficient way than incarceration to improve public safety. Then use that same information to argue that the defendant should be found appropriate to be "offered" treatment under CPL § 216.05(3)(a).

[†] Defense counsel with questions about County Law § 722-c applications for expert services may contact NYSDA's Public Defense Backup Center at 518-465-3524.

3. Judge Refuses to Provide Counsel with a Copy of the Evaluation

Assume that a CPL § 216.00(2) evaluation has been ordered and the defendant has been referred to the Superior Court for Drug Treatment. Then, the court summarily decides that the defendant, although statutorily eligible, is not appropriate to participate in judicial diversion. To compound matters, the court either does not or refuses to provide counsel and the defendant with a copy of the evaluation. In fact, some courts have even destroyed the evaluation at this point under the theory that they must do so to protect the client's confidentiality.

CPL § 216.05(2) states:

> "Upon receipt of the completed alcohol and substance abuse evaluation report, the court shall provide a copy of the report to the eligible defendant and the prosecutor."

If you encounter a judge refusing to disclose the evaluation, you should make the record as clear as possible about what has occurred. This disclosure is not a mere formality, but is critical to the entire process created by CPL Article 216. Defense counsel must have the evaluation in order to decide whether or not to request a hearing under CPL § 216.05(3)(a). The report is essential to assist defense counsel in determining what the key issues are that need to be addressed and what evidence should be introduced at the hearing.

This kind of judicial conduct could be addressed by filing an Article 78 under CPLR § 7803(1), a Writ of Mandamus, stating that the court has failed to perform a duty "enjoined upon it by law."

4. Eligibility-Neutral Offenses Should Not Exclude Potential Participants

CPL § 216.00(1) lists the charged offenses that make a person eligible for judicial diversion. The statute goes on to list certain conditions that can result in exclusion, absent prosecutorial consent, and the offenses for which the defendant, if currently charged, will be excluded from eligibility for judicial diversion. An issue has arisen when defendants are charged in the same indictment with charges that are eligible offenses and at least one charge which is neither an eligible offense nor an exclusion offense, hereinafter referred to as an *eligibility-neutral offense*. Some prosecutors have argued that the presence of an eligibility-neutral offense in the charging document renders such defendant ineligible for judicial diversion. From reports we have received from around the State, it appears that most diversion courts are rejecting this prosecutorial gambit. The few written decisions from trial courts have split on the issue. CCA's website (see link below) has links to the reported and unreported decisions on this issue.

One persuasive argument to consider is that the overall plain reading of the statute does not indicate eligibility-neutral offenses are a bar to participation. The Legislature saw fit to list the specific exclusions to participation in diversion, and even those exclusions can be overcome with prosecutorial consent. There is no reason to believe that the Legislature intended the sweeping, ameliorative reforms to be thwarted by the mere presence of eligibility-neutral charges not specifically listed in CPL § 216.00. Such an interpretation would also allow the prosecution to control eligibility for diversion simply by adding an eligibility-neutral offense to the indictment. If nothing else is clear about the legislative intent, what is clear is that the Legislature intended to restore judicial discretion over appropriateness for treatment and remove the prosecution as the gatekeeper. Eligibility should not turn on the manipulation of the charging decision.

See the Eligibility Issues section of the CCA webpage, Tools for Defense Attorneys, Defense of Drug Offense Cases, at www.communityalternatives.org/publications/drugCases.html for a memo on the issue and the latest cases.

5. Inappropriate Judicial Policies

Some judges exhibit a strong reluctance to divert defendants, often relying on certain reoccurring themes. There has also been a judicial reluctance to employ the "exceptional circumstances" exception under CPL § 216.05(4) allowing entry into diversion without a plea, most often for defendants who likely face immigration consequences upon a guilty plea. In several jurisdictions, judges and prosecutors have embraced the exception, rejecting the knee-jerk anti-immigrant posture. There is always the possibility that certain unstated, subtle, and off-the-record policies are at work. Advocates must be persistent in pointing out the legislative intent of the DRLA. You will need to be prepared to make arguments regarding certain predictable positions. For example:

A. Inappropriate policy: *No defendant charged with a sale shall enter diversion*.

"Your client doesn't have a use problem, he has a distribution problem."

As we all know, many people sell drugs as a means to access drugs and pay for their addiction. For some, the drug trade is the only way they can afford a very expensive drug dependence. Judges who take a dogmatic position that sellers should not be in diversion fail to grasp the realities of the drug trade and undermine the broad ameliorative intent of the statute. At the very least defense counsel should have an opportunity to present the facts surrounding the defendant's dependency so the court can ascertain appropriateness for diversion on an informed case-by-case basis. CCA will also post resources on our website related to the often murky distinction between a buyer and seller.

B. Inappropriate policy: *If the prosecution objects, no diversion*: Some judges still want a prosecutorial gatekeeper. We understand that this judicial policy is often stated subtly and off the record. Nonetheless, whenever possible counsel should remind the judge that the legislative history of the 2009 DLRA makes it clear that it was the Legislature's intent to empower judges to make their own decisions. As one court poignantly observed:

> The Legislature in crafting the 2009 DLRA wrote a detailed statute which gave courts the discretion to make reasoned judgments and created an adjudicatory process the Legislature deemed fair to both the prosecution and the criminal defendants…. Given this carefully considered legislative design, it is difficult to understand why the judiciary would impose categorical limitations on its own discretion which the Legislature did not create.

See People v Figueroa, 27 Misc 3d 751, 894 NYS2d 724 (Sup. Ct., New York Co. 2010).

The trial advocate can point out that diversion has been implemented in jurisdictions around the state over the objections of district attorneys and, so far, no judge has been forcibly removed from office.‡ Defense counsel should be persistent in arguing for the exercise of judicial discretion. It is that constant reminder that will some day bear fruit. Without it, the policy will metastasize into the time-worn and institutionally-reliable refrain: "that is just how we do it around here."

C. Inappropriate policy: *There are no "exceptional circumstances"; certainly not for non-citizen defendants*.

The legislative history specifically points to immigration issues as the prime example of circumstances in which the court should consider allowing the defendant to participate without pleading guilty. Many defenders have put forth great effort to avoid a plea or any admissions that could be used in the immigration context. Some have been able to position their undocumented clients to finish diversion as a way to improve their chances when they apply for Lawful Permanent Resident status. Joanne Macri of NYSDA is available to consult on these issues and to write advisory letters that spell out your client's specific

‡ CCA would like to hear from defenders around the State as to which jurisdictions and judges are requiring prosecutorial consent in order to offer a defendant judicial diversion. We would like to document those jurisdictions in which this problem of implementation of judicial diversion exists so that it might be addressed in a larger forum.

immigration situation and explain in detail how judicial diversion could help your client earn his or her way to a better situation with immigration. Joanne can be reached at (716) 913-3200 or JMacri@nysda.org.

6. Due Process is Required at a CPL Article 216 Eligibility Hearing

CPL § 216.05(3)(a)-(b) sets forth the following hearing procedure.

A. Upon receipt of the evaluation report, either party "may request a hearing" on the issue of whether this defendant should be offered diversion. There is no burden of proof attributed to either side in this statute.

B. The "proceeding" should be held "as soon as practicable" to facilitate early intervention if the defendant is found to need treatment.

C. The court may:

i. consider oral and written arguments;
ii. take testimony from witnesses offered by either party;
iii. consider "any relevant evidence", including but not limited to:
a) information that the defendant had been adjudicated a YO within the preceding 10 years (excluding time spent in jail on the YO or the instant offense) for a violent felony offense or any offense for which merit time is not available pursuant to Corr. Law § 803(1)(d)(2).
b) in the case of a "Willard-eligible" specified offense (CPL § 410.91), any victim statement.

D. Upon completion of the "proceeding," CPL § 216.05(3)(b) directs that "the court shall consider and make findings of fact with respect to whether:

i. the defendant is an eligible defendant as defined in subdivision one of section 216.00 of this article;
ii. the defendant has a history of alcohol or substance abuse or dependence;
iii. such alcohol or substance abuse or dependence is a contributing factor to the defendant's criminal behavior;
iv. the defendant's participation in judicial diversion could effectively address such abuse or dependence; and
v. institutional confinement of the defendant is or may not be necessary for the protection of the public."

(emphasis supplied)

E. *Problems Related to the Eligibility Hearing*

Unfortunately, while many courts are conducting full-fledged hearings with exhibits and witness testimony, other courts are making short-shrift of the CPL § 216.05(3) hearing process, finding encouragement to make quick work of the hearing in an Office of Court Administration (OCA) memo sent out to the judges and dated July 7, 2009. In that memo, OCA describes eligibility hearings as follows:

> Either party has the right to a hearing on the issue of whether the court should grant diversion, but the statute gives the court wide latitude in how to conduct the hearing. For instance, although the court can elect to take testimony from witnesses, it can also simply rely on the oral or written arguments of the parties.
>
> OCA Memo, by Michael Colodner, at 2 (7/7/2009).

As a result, some courts are making the determination of whether a defendant is appropriate for judicial diversion at a "hearing" that resembles an advocacy free zone. Counsel should attempt to fortify the record by:

i. Making arguments in writing and making sure such documents are a part of the record.
ii. Submitting supporting documentation.
iii. Asking for oral argument and live testimony where appropriate.
iv. Making an offer of proof, if the judge rebuffs your attempt to conduct a hearing at which testimony is taken and exhibits are offered.
v. Forming relationships with the local substance abuse evaluators and transforming them into advocates for your clients where possible.

The court cannot make reliable findings of fact on these issues absent the professional input of treatment providers, especially factors ii. through v. of CPL § 216.05(3)(b). These factors contain concepts best explained at length by treatment providers on the witness stand. If their favorable opinions withstand judicial scrutiny and DA cross-examination, you may at least strengthen any potential issue for appeal, as well as educating the judge further about these issues.
vi. Giving consideration to calling the defendant as a witness. In some jurisdictions this has been done with a modicum of success, but obviously requires time to prepare the defendant for questioning about these issues. There are, of course, dangers involved with having the defendant testify which need to be carefully weighed.

7. Why the Court Should Use a Plea Agreement that Caps the Potential Sentence

CPL § 216.05 subsections (8), (9)(c), (9)(e), and (10) all make specific reference to an "agreement" between the court and the defendant. This agreement can be on the record or in writing. It shall include a specified period of treatment and may include periodic court appearances,

urinalysis, and a requirement to refrain from criminal behaviors. The statute implies, but does not explicitly direct, that the plea agreement contain the agreed upon disposition and sentence to be imposed in the event the defendant successfully completes diversion (CPL § 216.05(10)) and the agreed upon sentence that will be imposed if the defendant is unsuccessful in diversion. *See* CPL § 216.05(9)(c), (e). If the defendant's participation in judicial diversion is terminated before successful completion "*… the court may impose any sentence authorized … in accordance with the plea agreement, or any lesser sentence… .*"

Despite the plain implications of the statute there still are some jurisdictions in which judges have refused to cap the sentence for a diversion participant in the plea agreement. These courts insist on retaining the authority to sentence a participant to the maximum sentence if the defendant is terminated from diversion.

There are several reasons, both statutory and practical, why courts should include sentence caps in the plea agreement:

A. The language of the statute can be construed to require or at least strongly imply that the plea agreement should include an agreement as to the disposition and sentence in the event of successful completion of treatment or unsuccessful termination. CPL § 216.05(9)(c) refers to sentencing in "accordance with the [plea] agreement." Every other aspect of the statute regarding the agreement takes pains to give the court options to tailor the terms of diversion participation to the specific defendant based upon that individual defendant's problems and needs of service. There is every reason to believe that the Legislature intended the court to also individuate the sentence based upon the participant's prior record, individual characteristics, and the facts of the case before it. Every case is different, and in recognition of that fact the Legislature encouraged courts to make the specific plan, including potential punishment, fit each different case.

B. There is much less incentive for potential participants to sign up for the challenge of judicial diversion if they face the potential maximum punishment for a failed attempt at treatment. Generally in criminal cases defense counsel is able to negotiate a plea bargain that exchanges an admission of guilt for a sentence less than the maximum sentence, often much less. Such a negotiated plea should provide a baseline for the client's sentencing exposure while participating in diversion. Many clients will be reluctant to participate in diversion absent a negotiated cap. Many defense lawyers will be reluctant to advise clients to participate in diversion if the maximum sentence remains available to the treatment court simply because the client has opted to try treatment and failed.

C. Peter Preiser's Commentary in McKinney's CPL Article 216 indicates strong support for the requirement of a sentence cap as part of the plea agreement to enter diversion:

> "And in consideration of the defendant's agreement the court will make a commitment as to the ultimate disposition of the criminal charge if defendant abides by the conditions of the program and an alternative sentence if the defendant does not… ."

Preiser's analysis of the statutory language clearly contemplates that the court is obliged to commit to the disposition and sentence for both successful completion and unsuccessful termination in exchange for the defendant's agreement to participate in the diversion program. Preiser also seems to express a preference that the conditions of this agreement be put in writing prior to any guilty plea.

D. There are studies that suggest defendants are more motivated by certainty of punishment rather than severity of punishment. *See* *Deterrence in Criminal Justice-Evaluating Certainty vs. Severity of Punishment* (November 2010 Sentencing Project Report summarizing research on the limited value of severe sentences.) Caps on sentences, along with a system of supervision that creates a certainty of detection for violations, are more effective in gaining compliance with supervision than more lengthy periods of incarceration.

E. Some diversion courts use plea agreements which cap the sentence, but the participant is informed on the record that if he or she is arrested for a new offense while in diversion, or if a bench warrant has to be issued at any point, the cap on sentence will be removed and the full range of the authorized sentence becomes available. Although there is still a question about whether a failure in treatment warrants an enhanced sentence that is more than what the defendant would have received at the beginning of the case, at least in those jurisdictions the defendant is somewhat protected from the maximum sentence.

If such contracts are not being used in your jurisdiction, counsel can produce their own written contract, and include a provision for a cap on sentence. Even if rejected this could at least open discussions about such a cap. A sample contract from Monroe County can be found on the CCA website at www.communityalternatives.org/publications/drugCases.html.

8. Must the Defendant Plead to all Counts to Enter Diversion?

CPL § 216.05(4) states that the "*eligible defendant shall be required to enter a plea of guilty to the charge or charges….*" Absent an agreement from the prosecution to drop

charges, does this statute mean that the defendant must plead guilty to all charges in the charging document for the judge to issue an order granting judicial diversion?

At least one court has said no. The court in *People v Adolfo Taveras* (County Ct., Onondaga Co., J. Merrill, 1/4/2010) held that CPL Article 216 controls the plea limitations found in CPL § 220.10 and does not require DA consent to dismiss aspects of the indictment when a diversion court is fashioning a plea agreement with the eligible defendant. The court relied heavily on the sweeping, inclusive, and ameliorative intent of the Legislature in passing CPL Article 216 and encouraging diversion cases.

This case can be found on the CCA website at www.communityalternatives.org/publications/drugCases.html.

9. Refusal By Trial Judges to Offer Judicial Diversion to a Defendant Who Delays His or Her Request for an Alcohol and Substance Abuse Evaluation

Some judges have "punished" defendants for a delay in making the request to be considered for judicial diversion by refusing to either order an evaluation or refusing to offer judicial diversion. This refusal is apparently based upon the questionable assumption that the defendant is not sincere about seeking treatment and is manipulating the system. CPL § 216.05(1) authorizes the defendant to make the request for judicial diversion "[a]t any time after the arraignment…but prior to the entry of a plea of guilty or the commencement of trial… ." There is nothing in the statute that requires the defendant to quickly opt in to judicial diversion.

Defense counsel may have many reasons to advise the defendant to delay the request for diversion, including the need to review discovery, conduct an investigation, file appropriate motions, obtain a private evaluation, and have informative discussions with the defendant about the pros and cons of judicial diversion. When confronted by a judge who fits this *modus operandi,* defense counsel should run interference for the defendant. Explain to the judge that the delay was caused by counsel and not by the defendant.

Conclusion

With persistence and well-considered advocacy, trial counsel can help realize a more robust implementation of the Drug Law Reform of 2009 reflective of the full legislative intent of CPL Article 216, and help to foster a more therapeutic, less-punitive response to drug offenses. ⚖

CENTER FOR COMMUNITY ALTERNATIVES
INNOVATIVE SOLUTIONS FOR JUSTICE

Judicial Diversion:
Eligibility When Charged with an Eligible Offense and
An Eligibility-Neutral Offense[1]

I. Introduction

The 2009 Drug Law Reform Act (2009 DLRA) included the addition of Criminal Procedure Law (CPL) Article 216, which establishes the procedure for participation in Judicial Diversion programs. CPL § 216.00(1) provides that any person who is charged with a class B, C, D, or E felony offense listed in Penal Law Article 220 or 221or an offense listed in CPL § 410.91(5) (the "Willard offenses") is eligible to participate in Judicial Diversion. See CPL § 216.00(1). This section goes on to provide, however, that an otherwise eligible defendant is excluded from Judicial Diversion eligibility if the defendant: 1) is also currently charged with a violent felony or merit time excludable crime for which state prison is mandatory; 2) has, within the preceding ten years, been convicted of a violent felony offense, a merit time excludable offense, or a Class A drug offense; or 3) has previously been adjudicated a second or persistent violent felony offender under Penal Law §§70.04 or 70.08. See CPL § 216.00(1)(a),(b). The intent of these provisions is clear – to exclude from Judicial Diversion individuals charged with a class A drug felony as well those who have a recent history of violence or a history of repeated violence.

Of course, there are numerous non-violent offenses that fall outside both the list of eligible offenses and the list of excludable offenses. These "eligibility-neutral" offenses include all misdemeanors (including drug and property misdemeanors), as well as other non-violent, merit time eligible felonies.

In an attempt to limit eligibility for Judicial Diversion, prosecutors have argued that a defendant who is charged with an eligible offense is excluded from Judicial Diversion eligibility if the defendant is also charged with one of the many "eligibility-neutral" offenses. Thus, argues the prosecution, a defendant who stands charged with criminal possession of a controlled substance 3rd (an eligible offense) and criminal possession of a controlled substance 7th (an eligibility-neutral offense) is not eligible for Judicial Diversion.

This prosecutorial argument gives rise to the following questions:

(1) Does the statute's language and intent support the notion that a defendant who is otherwise eligible for Judicial Diversion becomes excluded from Judicial

1 This document was prepared in consultation with and a review of motions and arguments prepared by Roger Brazil, Office of the Public Defender, Monroe County, and Joanne M. Dwyer, New York, NY.

> Diversion simply because the defendant also stands charged with an "eligibility-neutral" offense; and
> (2) If not, what are the diversion court=s sentencing options if the defendant successfully completes the program?

As discussed in more detail below, the answer to the first question is a resounding "no." With regard to the second question, the statute itself provides a simple, straight-forward answer.

II. The plain language of CPL § 216.00(1) clearly provides that an otherwise eligible defendant is not excluded from Judicial Diversion simply because he or she is also charged with an "eligibility-neutral" offense.

It is well-established that when interpreting a statute, the starting point must always be the plain language of the statute itself. See Pultz v. Economakis, 10 N.Y.3d 542, 547 (2008) ("The starting point is always to look to the language itself, and where the language of a statute is clear and unambiguous, courts must give effect to the plain language.") (quoting State of New York v. Patricia II., 6 N.Y.3d 160, 162 (2006)). Adherence to the plain language rule prevents courts from legislating under the guise of interpretation. People v. Finnegan, 85 N.Y.2d 53 (1995).

There is nothing in the plain language of the Judicial Diversion statute, CPL § 216.00, to support the prosecution's argument that defendants who are otherwise eligible for Judicial Diversion are rendered ineligible simply because they also stand charged with an eligibility-neutral offense. Indeed, by explicitly specifying exclusions, the statute on its face makes it clear that there is a limited list of offenses that exclude an otherwise eligible defendant from Judicial Diversion participation.

CPL § 216.00(1) defines an eligible defendant as "*any* person who stands charged … with a class B, C, D or E felony offense defined in Article two hundred twenty or two hundred twenty-one of the penal law or any other specified offense as defined in subdivision four of section 410.91 of this chapter." (Emphasis added). Nothing in the statute explicitly states or even implicitly suggests that the defendant must be charged *solely* with one of these offenses. Instead, the statute goes on to set forth an explicit list of additional offenses a defendant may also stand charged with that would exclude an otherwise eligible defendant from Judicial Diversion. Specifically, CPL § 216.00(1)(b) states that an otherwise eligible defendant is excluded from eligibility if, among other things, the defendant:

> also stands charged with a violent felony as defined in section 70.02 of the penal law or an offense for which merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law for which a court must, upon the defendant's conviction thereof, sentence the defendant to incarceration in state prison…CPL § 216.00(1)(b).[2]

2 An otherwise eligible defendant can also be excluded from eligibility based on prior criminal conviction history,

Importantly, the prosecution can consent to Judicial Diversion participation for those defendants charged with an eligible offense and a violent felony offense or a merit time excluded offense. CPL § 216.00(1)(b).

By ignoring the language in CPL § 216.00(1)(b) regarding defendants who also stand charged with violent felonies or merit time excluded offenses, the prosecution seeks to craft additional eligibility restrictions onto the statute. Their attempt to do so violates the statute's clear and explicit language.

The prosecution's argument also violates other core principles of statutory construction. For example, it is a well-established rule of statutory construction that a statute must be read in a manner that gives meaning and effect to all its words and phrases. See Freidman v. Connecticut General Life Ins. Co., 9 N.Y.3d 105, 114 (2007) ("A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent, and where possible, should 'harmonize all parts of a statute with each other and give effect and meaning to the entire statute *and every part or word thereof*.") (quoting McKinney's Statutes § 98) (emphasis added). See also McKinney's Statutes § 97 ("A statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine legislative intent."). The prosecutorial argument that a defendant who also stands charged with any eligibility-neutral offense is ineligible for Judicial Diversion would render meaningless the language of CPL § 216.00(1)(b) regarding eligibility limitations only for those who also stand charged with a violent felony or merit time excludable offense.

Similarly, it is:

> "A universal principle in the interpretation of statutes that *expressio unius est exclusio alterius*. That is, to say, the specific mention of one person or thing implies the exclusion of other person or things. As otherwise expressed, where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded. Thus, where the statute creates provisos *or exceptions* as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of other not mentioned."

People v. Figueroa, 27 Misc.3d 751, 769 (Sup. Ct., N.Y. Co., 2010) (quoting McKinney's Statutes § 240) (emphasis in original). Here, CPL § 216.00(1)(b) specifically excepts from Judicial Diversion eligibility those individuals who stand charged with an eligible offense *and also* a violent felony offense or a merit excludable offense for which prison time is mandatory. This explicit exception creates the "irrefutable inference" that the Legislature specifically did not intend to except from Judicial Diversion otherwise eligible defendants who also stand charged

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such as a conviction for a violent felony offense within the preceding ten years or a prior adjudication as a second or persistent violent felony offender.

with non-violent, merit time eligible offenses.

It is also well-established that a statute should not be interpreted in such a way as to create "absurd consequences." Long v. State, 7 N.Y.3d 269 (2006). The prosecution's proposed interpretation of CPL § 216.00(1) would lead to the absurd result that while an otherwise eligible defendant who also stands charged with a violent felony offense could still participate in Judicial Diversion with prosecutorial consent, see CPL 216.00(1)(b), the statute does not explicitly provide for prosecutorial consent for an otherwise eligible defendant who also stands charged with an eligibility-neutral offense.[3]

Finally, it is also a well-established rule of statutory construction that "'remedial statutes ... are liberally construed to spread their beneficial result as widely as possible.'" Figueroa, at 772 (quoting McKinney's Statutes § 321). There is no question that the 2009 DLRA is a "remedial" statute that warrants liberal construction. Id. ("[I]t is obvious that the 2009 DLRA is a 'remedial statute' which was created to remedy perceived defects and injustices which were inherent in the sentencing system previously applied to low-level drug offenders.").

The prosecution's argument here - which essentially asks the Court to ignore the statute's plain language while simultaneously violating several well-established principles of statutory interpretation - is nothing more than a thinly veiled attempt to usurp the Legislature's role and rewrite the Judicial Diversion statute to significantly decrease the number of eligible defendants. Worse, as discussed in detail below, limiting eligibility in the manner the prosecution proposes would allow prosecutors through their charging decisions to determine who is and is not eligible for Judicial Diversion, thereby diminishing the carefully crafted discretion the Legislature gave to the courts in making decisions regarding Judicial Diversion participation.

As of May 2011 there was only one reported case that addressed this issue. In People v. Jordan, 29 Misc.3d 619 (Westchester Co. Ct. 2010), the court thoroughly analyzed the statute's construction and concluded that "based upon the plain language of the statute" a defendant is not rendered ineligible for Judicial Diversion by the inclusion of an eligibility-neutral offense in the indictment when there is an eligible offense included in the same indictment. "Had the legislature intended to exclude defendants from eligibility from judicial diversion because of the inclusion of non-qualifying offenses in the indictment, it could have provided for that in the statute, but did not. Id. at 621.

III. Limiting Judicial Diversion eligibility to those defendants who stand charged *solely* with an eligible offense would undermine the overall intent of the 2009 DLRA.

Like the previous Drug Law Reform Acts of 2004 and 2005, the 2009 DLRA is intended to ameliorate the harsh and overly punitive sentences mandated by the Rockefeller Drug Laws.

[3] Of course, the fact that the statute does not explicitly provide for prosecutorial consent to Judicial Diversion participation for an otherwise eligible defendant who also stands charged with an eligibility-neutral offense provides yet further proof that the Legislature never intended that such individuals be excluded from Judicial Diversion in the first place.

The 2009 DLRA accomplishes this by expanding the scope of non-incarcerative sentences for non-violent drug offenses, ultimately designing "a more lenient, more therapeutic, judicial response to all but the most serious drug crimes." People v. Danton, et al., 27 Misc.3d 638, 644 (Sup. Ct., N.Y. Co. 2010).

Establishing the Judicial Diversion procedure, as set forth on CPL Article 216, is a core part of the 2009 DLRA. A critical feature of the Judicial Diversion statute is the discretion it gives to courts to decide who should participate. To be sure, CPL Article 216 carefully and thoughtfully guides this discretion by specifically excluding a discrete number of otherwise eligible defendants, establishing a specific procedure by which courts are to determine who should participate, providing an opportunity for the prosecution and the defense to submit information and advance arguments to the court, and identifying factors courts must consider in ultimately deciding whether or not an eligible defendant should participate. This thoughtful and specific adjudicatory process intentionally makes courts - not the prosecution - the final arbiter of who should participate in Judicial Diversion. See People v. Figueroa, 27 Misc.3d 751, 778 (Sup. Ct., N.Y. Co., 2010) ("[T]he Legislature, in crafting the 2009 DLRA wrote a detailed statute which gave courts the discretion to make reasoned judgments and created an adjudicatory process the Legislature deemed fair to both the prosecution and criminal defendants."). To go beyond the statute's plain language and to craft additional Judicial Diversion eligibility exclusions would fly in the face of the Legislature's express efforts to expand, not contract, the use of judicial discretion for those charged with non-violent drug offenses.

The prosecution's proffered interpretation of CPL § 216.00(1) does not merely limit eligibility for Judicial Diversion, but it does so in a manner that gives the prosecution, through the charging decision, complete control over who is able to participate in Judicial Diversion programs. Any time a defendant is charged with an eligible offense, the prosecution need merely add a misdemeanour or conspiracy charge to render this eligible defendant ineligible for Judicial Diversion. Yet the statute itself defines the limited circumstances in which a prosecutor can assert control over Judicial Diversion participation, providing that an otherwise eligible defendant who is excluded because of prior criminal history or because he or she also stands charged with a violent felony or a merit time excludable offense can still participate in Judicial Diversion if the prosecution consents. CPL § 216.00(1)(b). The court in People v. Jordan was particularly concerned about the manipulation of the charging decision by the prosecution as a means to thwart the very purpose of the statute, stating: "To read the statute to exclude individuals on the basis that they are also charged with non-qualifying offenses would allow the People to undermine the purpose of the statute by including a non-qualifying offense in the indictment, and thereby render the defendant ineligible." Jordan, 29 Misc.3d at 622.

Expanding prosecutorial control beyond that specifically identified in the statute surely undermines the Legislative intent regarding Judicial Diversion specifically and the 2009 DLRA as a whole. It simply does not make sense to adopt an interpretation of CPL § 216.00(1) that is not only contrary to its plain language, but also corrupts an important Legislative goal – to enhance judicial discretion. See e.g., People v. Figueroa, 894 N.Y.S.2d at 743 ("Given this carefully considered legislative design, it is difficult to understand why the judiciary would

impose categorical limitations on its own discretion which the Legislature did not create."). The Jordan court carefully analyzed the underlying purpose of the Judicial Diversion statute, including the legislature's recognition that "the policy of incarceration and punishment of non-violent drug users had failed" and that "expanding the number of nonviolent drug offenders that can be court ordered to drug abuse treatment will help break the cycle of drug use and crime and make our streets, homes and communities safer." With the legislative purpose clearly in mind, the Jordan court concluded that the statute must be read in accordance with its plain meaning and so as not to exclude from Judicial Diversion those defendants charged with both eligible and eligibility-neutral offenses. Jordan, 29 Misc.3d at 621-22.

IV. Allowing eligible defendants who are also charged with eligibility-neutral offenses to participate in Judicial Diversion does not open the door to allowing those charged with class A drug felonies to participate in Judicial Diversion.

The prosecution's primary support for its proffered interpretation of CPL § 216.00(1) is the notion that permitting defendants charged with eligible and eligible-neutral offenses would open the door to allowing defendants who are charged with class A felony drug crimes to participate in Judicial Diversion. See e.g., People v. Sheffield, Decision and Order dated February 4, 2010 (Nunez, J.) Supreme Ct., N.Y. Co. Ind. # 4364/09.

This assertion is wholly without merit. The plain language of CPL § 216.00(1) makes it clear that class A drug felonies are *not* "eligibility-neutral" offenses. Not only are class A drug offenses omitted from the list of drug offenses that render a person eligible for Judicial Diversion at the outset, they are also specifically included in the list of prior convictions that exclude a defendant from Judicial Diversion participation. See CPL § 216.00(1)(b). The statute's specific omission of class A drug felonies from the classes of felony drug offenses that render a defendant eligible for Judicial Diversion in addition to the inclusion of class A drug offenses as a prior conviction that renders a defendant ineligible for Judicial Diversion is a clear indication that the Legislature did not intend for those charged with class A felony drug offenses to participate in Judicial Diversion. Thus, allowing defendants who also stand charged with eligibility-neutral offenses would have no impact on the statute's explicit bar of those individuals charged with class A drug felonies.

V. Judicial decisions regarding the effect of eligibility-neutral offenses in the indictment.

As noted above, there is only one published decision on this issue, People v. Jordan, athough there are three prior written, unpublished decisions that address the issue. Anecdotally it appears that in the months following the effective date of Judicial Diversion, October 7, 2009, judges in many jurisdictions readily rejected the prosecution argument from the bench, seeing no need to analyze what appeared to be a meritless argument. In those jurisdictions, the early bench decisions ended further attempts by the prosecution to limit access to Judicial Diversion and treatment.

Of the written decisions, Jordan is not only the most recent but it is also the most thorough and best-reasoned. After addressing statutory construction, plain language of the statute, and the underlying purpose of the 2009 Drug Law Reform Act the Jordan court concluded that inclusion of an eligibility-neutral offense in an indictment which contains a Judicial Diversion eligible offense, and no exclusion offense, does not render a defendant ineligible for Judicial Diversion. In so doing, the court effectively addressed and refuted the flawed reasoning of two earlier written decisions holding that the inclusion of an eligibility-neutral offense in an indictment does exclude an otherwise eligible defendant from Judicial Diversion.

The unreported cases should also be noted. The first of these unreported decisions is a case that arose in Onondaga County. In People v. Kithcart, Decision and Order dated January 19, 2010 (Merrill,J.), County Ct., Onondaga Co., Index # 09-0347 the court held that the inclusion of a eligibility-neutral offense in the indictment does not render a defendant ineligible for Judicial Diversion. Sandwiched between Kithcart and Jordan were two poorly reasoned cases holding that the inclusion of an eligibility-neutral offense in an indictment forecloses the benefit of Judicial Diversion and thus treatment. (See People v. Sheffield, Decision and Order dated February 4, 2010 (Nunez, J.), Supreme Ct., N.Y. Co. Ind. # 4365/09) and People v. Jaen, Decision and Order dated March 19, 2010 (Coin, J.), Sup. Ct., N.Y. Co. Ind. # 5704-2008).[4]

Given that the Jordan court had the benefit of these three decisions, and that it is the best reasoned decision of the four written decisions, it may be safe to assume that Jordan has permanently resolved this issue in a manner that honors the statute's plain meaning and the Legislative intent underlying CPL Article 216.

VI. Sentencing options for eligible defendants who also stand charged with an eligibility-neutral offense.

The Judicial Diversion statute sets forth the range of appropriate dispositions available upon successful completion of the Judicial Diversion program. See CPL § 216.05(10). This provision provides, in relevant part, as follows:

> Upon the court's determination that the defendant has successfully completed the required period of alcohol or substance abuse treatment and has otherwise satisfied the conditions required for successful completion of the judicial diversion program, the court shall comply with the terms and conditions it set for final disposition when it accepted the defendant's agreement to participate in the judicial diversion program. Such disposition may include, but is not limited to: (a) requiring the defendant to undergo a period of interim probation supervision and, upon the defendant=s successful completion of the interim probation supervision term, ***notwithstanding the provision of any other law***, permitting the defendant to withdraw his or her guilty plea and dismissing the indictment; or (b)

[4] Links to the unreported decisions can be found on the CCA website @ Tools for Attorneys > Defense of Drug Offense Cases > 2009 DLRA – Judicial Diversion > Eligibility Neutral Cases Chart.

> ... permitting the defendant to withdraw his or her guilty plea, enter a guilty plea to a misdemeanor offense and sentencing the defendant as promised in the plea agreement, which may include a period of probation supervision pursuant to section 65.00 of the penal law; or (c) allowing the defendant to withdraw his guilty plea and dismissing the indictment.

(Emphasis added). As the Jordan court noted, the emphasized language in this section means that defendants who participate in the Judicial Diversion Program are to be sentenced in accordance with CPL § 216.05. See Jordan, 29 Misc.3d at 622-23. Thus, at the time the defendant initially agrees to participate in Judicial Diversion, there should be an agreement that upon successful completion of the program, the Court will permit the defendant to withdraw his plea to both the eligible and eligible-neutral offenses and either dismiss the indictment or superior court information or allow him to plead guilty to misdemeanors. Of course, since the defendant will have pleaded guilty to the indictment or superior court information as part of his participation in Judicial Diversion (unless the prosecution consents or there is a finding of "exceptional circumstances" due to collateral consequences), the agreement can and should also specify the sentence the defendant will face if he does not successfully complete the Judicial Diversion program.

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MEMORANDUM

July 7, 2009

TO: All Supreme Court Justices and County Court Judges
Exercising Criminal Jurisdiction

FROM: Michael Colodner

SUBJECT: Rockefeller Drug Law Reform

As you know, on April 7, 2009, Governor Paterson signed into law a bill that significantly overhauled the Rockefeller drug laws (L 2009, ch 56). A copy of the relevant provisions of chapter 56 is attached. Many of the changes became effective upon signing, and applied not only to offenses committed on or after that date, but also to offenses committed before then where the defendant had not yet been sentenced. Those changes to the law were the subject of a memo from Counsel's Office dated April 14, 2009 (a copy is attached). The present memorandum summarizes the highlights of the remaining portions of the new law.

CPL Article 216 - Judicial Diversion *(effective October 7, 2009)*

The mainstay of the legislation is a new Article 216 of the Criminal Procedure Law, which authorizes a court to divert an eligible defendant to an alcohol or substance abuse treatment program as an alternative to prison. If the defendant is eligible, and is found by the court after an independent evaluation to be suitable for diversion, the court may take a guilty plea and defer sentence while the defendant undergoes treatment. Consent of the District Attorney is not required. If the defendant successfully completes treatment, he or she will return to court for imposition of whatever agreement was made at the time of the plea. The court has a full range of options, including dismissing the case or replacing a felony plea with a misdemeanor conviction and imposing interim probation supervision, straight probation or any other sentence authorized as part of the plea agreement.

To be eligible for diversion, the defendant must be charged in an indictment or superior court information with a class B, C, D or E felony drug offense under Penal Law Article 220 or 221, or a "specified offense" under CPL 410.91(5) [1] (i.e., a Willard eligible offense). Both first and second

[1] In two places the new law incorrectly references CPL 410.91(4), which was repealed by the new law (see CPL 216.00(1); 216.05(3)(c)(ii)). The reference should be to CPL 410.91(5).

felony offenders are eligible. A defendant meeting these threshold requirements is nonetheless ineligible if, within the preceding ten years, he or she was convicted of any number of disqualifying offenses, including a violent felony, a class A felony, or any offense which would disqualify the defendant for a merit time allowance under the Correction Law.[2] The 10-year time calculation excludes any time the defendant spent incarcerated. A defendant is also not eligible if previously adjudicated a second violent felony offender or a persistent violent felony offender. Further, if a defendant has other pending charges that include one of the disqualifying offenses, judicial diversion is not available while those charges are pending. There is an override mechanism, however, that allows the court to judicially divert an otherwise eligible defendant with a disqualifying offense if the prosecutor consents to the diversion.

Judicial diversion is triggered by a defendant's application made after arraignment and before any plea of guilty or commencement of trial. If the court is willing to consider judicial diversion, it must order that the defendant be evaluated by a substance abuse expert,[3] who is then required to submit a written report to the court on the issue of the defendant's suitability for judicial diversion. The report must cover several areas: an evaluation of whether the defendant has a history of alcohol or substance abuse or dependence as those terms are defined in the diagnostic and statistical manual of mental disorders; a recommendation on whether judicial diversion can effectively address defendant's alcohol or substance abuse dependence; a treatment recommendation for the defendant; and "any other information, factor, circumstance, or recommendation deemed relevant by the assessing entity or specifically requested by the court."

Once the report is delivered to the court, a copy must be given to both the prosecutor and the defendant. Either party has the right to a hearing on the issue of whether the court should grant diversion, but the statute gives the court wide latitude in how to conduct the hearing. For instance, although the court can elect to take testimony from witnesses, it can also simply rely on the oral or written arguments of the parties. At the conclusion of the hearing, the court is required to make findings of fact with respect to whether: i) the defendant is eligible for judicial diversion; ii) has a history of alcohol or substance abuse or dependence; iii) the defendant's abuse or dependence is a "contributing factor" to the defendant's criminal behavior; iv) judicial diversion could effectively address the abuse or dependence; and v) prison "is or may not be necessary for the protection of the public."

If the court subsequently agrees to offer the defendant judicial diversion, the statute anticipates that the defendant will plead guilty to the charges and enter into a plea arrangement that sets forth the court's promised outcome should the defendant successfully complete treatment, as well as the consequences if the defendant fails one or more of the conditions of the plea. The statute does not set limits on any plea agreement; thus, the court has extraordinary flexibility in developing

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[2] A merit time allowance is not available for a violent felony offense, manslaughter in the 2nd Degree, vehicular manslaughter in the 1st or 2nd degrees, criminally negligent homicide, felony sex offenses under PL Article 130, incest, sexual performance by a child under PL Article 263, aggravated harassment of an employee by an inmate and any non-drug crime for which a defendant received a life sentence (Correction Law 803(1)(d)(ii)).

[3] The evaluation must be made "by a court-approved entity or a licensed health care professional experienced in the treatment of alcohol and substance abuse, or by an addiction and substance abuse counselor credentialed by the office of alcoholism and substance abuse services" [OASAS](CPL 216.00(2)).

conditions appropriate to the defendant's circumstances. For instance, the statute expressly provides that after successful completion of treatment, the court may allow the defendant to withdraw the guilty plea, be placed on interim probation supervision and, if the defendant successfully completes interim supervision, dismiss all charges. But alternative dispositions are equally permissible, and the court may prefer that the defendant enter a guilty plea to a misdemeanor or even a felony. As evidence of the broad discretion provided the court in fashioning an appropriate agreement for judicial diversion, the statute also authorizes the court to order diversion without first entering a guilty plea in cases where the court finds "exceptional circumstances" or has the consent of the prosecutor. "Exceptional circumstances" include situations where the very act of taking a plea would cause "severe collateral consequences" to the defendant, presumably in those cases where a plea itself would trigger adverse proceedings involving the defendant's immigration status, public housing or the like. Finally, along with the order of judicial diversion, the court must issue a securing order releasing the defendant on any conditions the court elects for monitoring the defendant's progress in drug treatment (CPL 216.05(6)).

If the defendant violates a condition of his or her release, for example by relapsing or committing a new crime, the court has a full range of options. The violation procedure is similar to a violation of probation procedure (see CPL 410.70), and involves a summary hearing consistent with the defendant's due process rights.[4] Following the hearing, if the court finds that the defendant violated a condition, it may sentence the defendant in accordance with the guilty plea. On the other hand, and consistent with the expansive discretion afforded judges under the new law, the statute expressly makes plain that the court may take into account all relevant circumstances surrounding the violation and consider "a system of graduated and appropriate responses or sanctions." Further, where the court elects to terminate the defendant's participation in judicial diversion, it is not bound by the plea agreement but may also impose "any lesser sentence authorized to be imposed on a felony drug offender."[5]

In cases where defendant successfully completes the treatment program, the court must adhere to the terms of any plea agreement or understanding reached at the time of the diversion, although there is nothing in the statute to prohibit the court from adopting different terms if the defendant consents.

CPL Article 160.58 - Conditional Sealing *(effective June 7, 2009)*

The law also adds a new Criminal Procedure Law § 160.58, that gives the sentencing court the discretion to conditionally seal "all official records and papers relating to the arrest, prosecution

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[4] Although the court must afford the defendant due process at such a hearing, a summary hearing does not trigger strict evidentiary rules or all the procedural safeguards available to a defendant in a criminal action. What is required is that the court provide the defendant with formal notice of the charges, along with an opportunity to be heard. This likely allows the defendant to call and cross-examine witnesses (*see* CPL 410.70(3) [setting forth procedures for violation of probation proceedings], *c.f. People v Oskroba*, 305 NY 113).

[5] Interestingly, a strict interpretation of this provision allows a court to use the drug sentencing provisions when sentencing a defendant for an eligible non-drug "Willard" offense (see CPL 410.91(5)). Thus, a court can sentence a predicate offender who pleaded guilty to a non-drug class D felony (i.e., burglary in the third degree) and failed judicial diversion, to a determinate term of as little as 1½ years, a definite sentence of one year or less, or probation. Normally, the minimum range for a class D second felony offender would be an indeterminate term from 3-6 years.

and conviction" which resulted in judicial diversion. A motion for conditional sealing can be made either by the defendant or by the court on its own. To be eligible, the defendant must have successfully completed a judicial diversion program,[6] been convicted of an offense defined in PL Article 220 or 221 or a "specified offense under CPL 410.91 (i.e., a Willard crime); and completed any sentence imposed in connection with the conviction.

Where the court conditionally seals the records of the judicially diverted case, it may also seal up to three of the defendant's prior misdemeanor drug offenses.[7] Before sealing, the court or defendant is required to identify the misdemeanors that qualify for conditional sealing and must document that any sentence imposed has been completed (CPL 160.58(1)(b) and (c)). If the court does not have documentary evidence that the defendant has completed any previously imposed sentence, it may rely on an affidavit. Presumably, the defendant's own affidavit would qualify. However, where the court is considering sealing any prior misdemeanor drug offenses, it must notify the prosecutor and the court of record in the jurisdiction where the misdemeanor occurred. The court must then provide the prosecutor with not less than 30 days to comment and submit materials to the court on the issue of whether the court should exercise its discretion to conditionally seal any qualifying convictions.

In any case where the court is considering conditional sealing, the court must have a current criminal record history of the defendant from the Division of Criminal Justice Services and the FBI. Unlike most rap sheets received by courts, the statute requires that the criminal record history display all of the defendant's sealed or suppressed cases. The defendant or the prosecutor, including the prosecutor for any prior misdemeanor drug cases the court is considering sealing, may ask the court to conduct a hearing on whether to conditionally seal. Unlike the hearing that is mandatory on the issue of judicial diversion (*see* CPL 216.05(3)(a)), a hearing on the issue of conditional sealing is discretionary (CPL 160.58(3)).

The statute identifies several factors the court should consider on the issue of sealing:

1) Circumstances and seriousness of offense;
2) Character of defendant;
3) Prior criminal history, and;
4) Public safety.

Where the court orders conditional sealing, it is a limited sealing, and records remain available to the defendant, federal or state law enforcement agencies, gun licensing agencies, prospective employers of police or peace officers, and qualified agencies under the Executive Law acting in

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[6] Conditional sealing is available not only to cases arising under CPL Article 216, but also to cases diverted to "one of the programs heretofore known as drug treatment alternative to prison [D-tap] or another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision" (CPL 160.58(1)). Because the D-tap program started in 1990, any defendant who successfully completed a D-tap or similar program and who is otherwise eligible for conditional sealing may request sealing pursuant to CPL 160.58.

[7] The statute requires a conviction and conditional sealing of the judicially diverted case before the court may conditionally seal any prior misdemeanor drug cases.

the course of their law enforcement duties.[8]

The conditionally sealed cases are automatically unsealed if the defendant is subsequently re-arrested for any new offense, not just a drug offense. However, if the new arrest later ends with the case being sealed under CPL 160.50 or 160.55, then the conditional seal is re-instated. It is therefore conceivable for defendants who have successfully completed judicial diversion to have certain drug convictions sealed, unsealed and later resealed, perhaps several times. Once a defendant is subsequently convicted of a crime, however, any case conditionally sealed is permanently unsealed.

The new law also impacts on employers or prospective employers. Executive Law §296(16) has been amended to make it an unlawful discriminatory practice for an employer to ask "in connection with the . . . employment . . . [of] such individual" about a conviction that was conditionally sealed. Further, the law significantly expands the circumstances where a defendant is lawfully permitted to withhold information pertaining to a sealed case, and a defendant is now permitted to withhold information about youthful offender adjudications sealed pursuant to CPL 720.35 and cases sealed pursuant CPL 160.55 or conditionally sealed pursuant to CPL 160.58.

Resentencing provisions *(effective October 7, 2009)*

Certain state prisoners are allowed to apply for resentencing under the more lenient sentence provisions permitted under the new law (*see* CPL 440.46). Eligibility, however, is limited. The defendant must be serving an indeterminate sentence with a maximum term of more than three years for a class B drug felony offense that was committed before January 13, 2005. If, along with the B drug felony, the defendant is also serving a sentence for a C, D, or E drug felony imposed at the same time or as part of the same order of commitment, the defendant can also move, as part of the application, to be resentenced on those drug offenses as well.

However, the statute disqualifies from resentencing a defendant who has previously been convicted of an "exclusion offense" (see CPL 440.46(5)). An "exclusion offense" is defined as prior conviction within the past ten years for a violent felony offense (*see* PL § 70.02) or an offense for which "merit time" is not allowed (*see* Correction Law 803(1)(d)(ii)).[9] The ten-year period is extended by any time the defendant was incarcerated between the commission of the previous felony and the commission of the present one. A defendant is also ineligible for resentencing if he has ever been convicted and adjudicated a second violent or persistent violent felony offender.

When an eligible defendant applies to the court for resentencing, the court is to apply the same procedures as was done when class A-1 drug offenders were allowed to apply for resentencing (*see* L. 2004, ch 738). In addition, though, the court is now permitted to consider the institutional record of the defendant while incarcerated, including the defendant's willingness, or lack thereof,

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[8] Qualified agencies are defined as "courts in the Unified Court System, the Administrative Board of the Judicial Conference, the Department of Probation, District Attorneys, the Department of Correctional Services, the Insurance Frauds Bureau of the State Department of Insurance, the Office of Professional Medical Conduct, Child Protective Services, Medicaid Inspector General, Temporary State Commission of Investigation, Banking Department Criminal Investigations Bureau, and the Onondaga County Center for Forensic Sciences Lab" (Executive Law § 835(9)).

[9] See footnote 2 *supra*, for a list of crimes for which "merit time" is not allowed.

to participate in eligible treatment or other programming while incarcerated. The court may also consider the defendant's disciplinary history.

New Crimes *(effective October 7, 2009)*

Two new crimes were created under the new law. The first, "operating as a major trafficker," is New York State's version of a drug kingpin statute, and is directed at those who engage in large scale drug operations as gauged by the aggregate value of the drugs sold or possessed over a six-month or one-year time frame (PL § 220.77). The legislation introduces three new terms to the Penal Law: "controlled substance organization," "director" of a controlled substance organization, and "profiteer" (PL § 220.00(18), (19) and (20) respectively). To qualify as a "controlled substance organization," there must be four or more people involved in the operation sharing a common purpose to engage in conduct that constitutes or advances a drug felony. The "director" of such an organization is the principal administrator, organizer or leader of the organization, or one of them, and a "profiteer" is the director or a member of the organization with "managerial responsibility," or a person who arranges, devises or plans one or more transactions constituting a felony. The statute expressly excludes from the definition of "profiteer" one who is only acting as an employee or to accommodate a friend, or a person who is "acting under the direction and control of others and exercises no substantial, independent role in arranging or directing the transactions in question."

The crime of operating as a major trafficker occurs in one of three ways. A person acting as director of the organization commits the crime when, over a one-year period, the organization makes one or more drug sales of controlled substances with proceeds collected of an aggregate value of $75,000 or more. A profiteer commits the crime when, over a six-month period, the profiteer sells narcotic drugs and the proceeds collected have an aggregate value of $75,000 or more. Finally, a profiteer also commits the crime when, over a six-month period, the profiteer possesses narcotic drugs with intent to sell them, and the aggregate value of those drugs is $75,000 or more. The crime is an A-1 felony. Note that the attempt to commit the crime is a class B drug felony and would therefore be eligible for judicial diversion.

The other new crime added by the legislation is "criminal sale of a controlled substance to a child" (PL § 220.48). The crime occurs when a person over the age of 21 commits the crime of criminal sale of a controlled substance in the third or fourth degree, and the person to whom the controlled substance is sold is less than 17 years old. Although this crime is a class B drug felony, a probation sentence is not permitted unless the prosecutor recommends probation on the ground that the defendant has provided "material assistance" (see PL § 65.00(1)(b)). If the prosecutor does make that representation, and the court agrees to sentence the defendant to probation, the term of probation is 25 five years (see PL § 65.00(3)).

Interim Probation Supervision *(effective April 7, 2009)*

Two provisions within the new law impact on sentences of interim probation supervision.

When a defendant is participating in a substance abuse drug treatment program as part of drug court, the court may now extend interim probation supervision for an additional one year with the defendant's consent and upon good cause shown (CPL 390.30(6)).

Further, when a defendant is sentenced to probation after the defendant has successfully completed interim probation supervision, the period of probation will be offset by giving the defendant credit for the time served on interim probation supervision. As a practical matter, when a court sentences a defendant to probation following the defendant's successful completion of interim probation supervision, the court must engage in a time calculation to provide the ending date of probation.

Any questions regarding this matter may be referred to Paul McDonnell in Counsel's Office at (212) 428-2165.

cc: Hon. Ann T. Pfau
Hon. Michael V. Coccoma
Hon. Fern Fisher
Larry Marks
Paul McDonnell

PART 142. CRIMINAL DIVISION OF SUPREME COURT IN BRONX COUNTY

§ 142.1. Establishment of a Criminal Division of Supreme Court in Bronx County

The Chief Administrator of the Courts, following consultation with and agreement of the Presiding Justice of the First Judicial Department, may establish, by administrative order, a Criminal Division of Supreme Court in Bronx County and assign one or more justices to preside therein. Subject to the further limitations prescribed in this part, such Criminal Division shall be devoted to the hearing and determination of all criminal cases commenced in or transferred to the courts sitting in Bronx County provided at least one felony or misdemeanor is charged.

§ 142.2. Transfer of Criminal Cases to the Criminal Division of Supreme Court

Where the Chief Administrator establishes a Criminal Division of Supreme Court in Bronx County pursuant to section 142.1 of this Part:

(a) Each criminal case then pending or thereafter commenced in the Supreme Court in such county, and each criminal case thereafter transferred to Supreme Court in such county from Supreme Court in another county, shall be referred for disposition to such Criminal Division and further proceedings in such case shall be conducted in a part established therein.

(b) All criminal cases then pending or thereafter commenced in the Criminal Court of the City of New York in Bronx County, in which at least one felony or misdemeanor is charged, shall, following arraignment, be transferred therefrom by the Administrative Judge for the Supreme Court in Bronx County to the Supreme Court in such county upon a finding that transfer of these cases would promote the administration of justice, and thereupon such cases shall be referred for disposition to such Criminal Division and further proceedings in such cases shall be conducted in the parts established therein. Provided, however, that no criminal case may be transferred pursuant to this subdivision where such case is returnable in a summons part of the Criminal Court and no felonies or class A misdemeanors are charged therein.

§ 142.3. Procedure Upon Transfer of a Criminal Case Hereunder

Each case transferred from the Criminal Court of the City of New York to the Supreme Court and referred for disposition to the Criminal Division thereof pursuant to section 142.2 of this part shall be subject to the same substantive and procedural law as would have applied to it had it not been transferred.

PART 143. SUPERIOR COURTS FOR DRUG TREATMENT

§ 143.1. Establishment of Superior Courts for Drug Treatment

Following consultation with and agreement of the Presiding Justice of the Judicial Department in which a county is located, the Chief Administrator of the Courts, by administrative order, may establish a Superior Court for Drug Treatment in Supreme Court or County Court in such county and assign one or more justices or judges to preside therein. Each such Superior Court for Drug Treatment shall have as its purpose the hearing and determination of:

(a) criminal cases that are commenced in the court and that are identified by the court as appropriate for disposition by a drug treatment court;

(b) criminal cases that are commenced in other courts of the county, and that are identified as appropriate for disposition by a drug treatment court and transferred to the court as provided in section 143.2 of this Part; and

(c) criminal cases that are commenced in superior court where such court orders an alcohol or substance abuse evaluation pursuant to the judicial diversion program of Article 216 of the Criminal Procedure law, where the administrative judge for the judicial district in which the county is located has designated the Superior Court for Drug Treatment to adjudicate such cases.

§ 143.2. Transfer of cases to Superior Courts for Drug Treatment; How Effectuated

(a) Transfer of cases pending in local criminal courts.

1. A local criminal court in a county in which a Superior Court for Drug Treatment has been established in the Supreme or County Court thereof may, upon motion of the defendant and with the consent of the district attorney, cause copies of papers and other documents filed in such local criminal court in connection with a criminal action or proceeding pending therein to be sent to the Superior Court for Drug Treatment:

(i) upon or after arraignment of defendant on a local criminal court accusatory instrument by which such action or proceeding was commenced; or

(ii) upon or after commencement of a proceeding brought against defendant for the violation of a condition of a sentence of probation or a sentence of conditional discharge.

2. Not later than five days following receipt of the papers and other documents, the justice or judge presiding in the Superior Court for Drug Treatment shall determine whether or not a transfer of the action or proceeding to the court would promote the administration of justice. If the justice or judge presiding in the court determines that it would, he or she may order such transfer, in which event the action or proceeding shall be transferred to the Superior Court for Drug Treatment, all originating papers shall then be sent from the originating court to the Superior Court for Drug Treatment, and all further proceedings shall be conducted therein. If the justice or judge determines that a transfer of the action or proceeding would not promote the administration of justice, he or she shall notify the local criminal court from which the reference was received of such determination, whereupon all further proceedings in such action or proceeding shall be conducted in accordance with law.

(b) Transfer of cases pending in a superior court.

1. At any time while a criminal action or proceeding is pending in a superior court in a county in which a Superior Court for Drug Treatment has been established, including a proceeding brought against defendant for the violation of a condition of a sentence of probation or a sentence of conditional discharge, a judge or justice of the court in which the action or proceeding is pending may, upon motion of the defendant and with the consent of the district attorney, cause copies of papers and other documents filed in such court in connection with the action or proceeding to be sent to the judge or justice presiding in the Superior Court for Drug Treatment for review of the appropriateness of the transfer.

2. Not later than five business days following receipt of the papers and other documents, the judge or justice presiding in the Superior Court for Drug Treatment shall determine whether or not a transfer of the action or proceeding to the court would promote the administration of justice. If such judge or justice determines that it would:

(i) he or she, if sitting in Supreme Court, may order such transfer, in which event the action or proceeding shall be referred for disposition to the Superior Court for Drug Treatment, all original papers shall be sent to the Superior Court for Drug Treatment, and all further proceedings in such action or proceeding shall be conducted therein; or

(ii) he or she, if sitting in County Court, shall so notify the justice of the court who caused the papers and other documents to be sent to him or her, and such justice may thereupon order such transfer, in which event the action or proceeding shall be referred for disposition to the Superior Court for Drug Treatment, all original papers shall be sent from the originating court to the Superior Court for Drug Treatment, and all further proceedings in such action or proceeding shall be conducted therein. If the judge or justice presiding in the Superior Court for Drug Treatment determines that a transfer of the action or proceeding would not promote the administration of justice, he or she shall notify the originating court of such determination, whereupon all further proceedings in such action or proceeding shall be conducted in accordance with law.

(c) Transfer of cases pursuant to CPL Art. 216

Where a superior court orders an alcohol and substance abuse evaluation pursuant to section 216.05(1) of the Criminal Procedure Law to determine whether the defendant should be offered judicial diversion for alcohol and substance abuse treatment under Article 216, the case shall be referred for further proceedings to:

1. the Superior Court for Drug Treatment or

2. any other part in superior court designated as a drug treatment court part by the administrative judge for the judicial district in which the county is located or other part in superior court designated to adjudicate such cases by the administrative judge where the judge or justice presiding in the part, by virtue of the structure, caseload and resources of the part and the judge or justice's training, is in the best position to provide effective supervision over cases eligible for judicial diversion. If, following the alcohol and substance abuse evaluation and subsequent proceedings under CPL § 216.05, the defendant does not enter judicial diversion, the case may be adjourned to any part designated by the administrative judge.

§ 143.3. Procedure in a Superior Court for Drug Treatment upon Transfer of Case Thereto

Each action or proceeding transferred from a local criminal court to a superior court and referred for disposition to a Superior Court for Drug Treatment thereof shall be subject to the same substantive and procedural law as would have applied to it had it not been transferred.

PART 144. NEW YORK STATE PARENT EDUCATION AND AWARENESS PROGRAM

§ 144.1 Scope of Program

The New York State Parent Education and Awareness Program ("Program") provides information to parents about the impact of parental breakup or conflict on children, how children experience family change, and ways in which parents can help their

CENTER FOR COMMUNITY ALTERNATIVES
INNOVATIVE SOLUTIONS FOR JUSTICE

Judicial Diversion: The Challenge of Full Implementation

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I. The Challenge of Full Implementation

1. One of the challenges is that this new, state-wide, statutory scheme for treatment and diversion is being implemented in the wake of treatment courts, a system without uniform rules.

2. A second challenge arises in those jurisdictions in which the prosecution is reluctant to relinquish their role as gatekeeper.

3. The final challenges occurs in those jurisdictions in which the return of judicial discretion is not welcome.

4. Since Judicial Diversion reflects public policy, the challenge that we face is to develop approaches that will push forward full implementation.

II. Eligibility and Procedure

WHO IS ELIGIBLE?

Eligible Offenses:

- all class B, C, D, and E Article 220 offenses
- all class B, C, D, and E Article 221 offenses

● Willard eligible offenses, CPL ' 410.91(5) (burglary third, criminal mischief third, criminal mischief second, grand larceny fourth (excluding subdivisions 7 and 11), grand larceny third (excluding offenses involving weapons), unauthorized use of a vehicle second, CPSP fourth (excluding subdivisions 4 and 7), CPSP third (excluding offenses involving weapons), forgery second, criminal possession of a forged instrument second, unlawfully using slugs first, and any attempt to commit the foregoing offenses.

Exclusions:

● anyone who, within the preceding 10 years (excluding time incarcerated) has been convicted of:

i. a violent felony offense;
ii. any offense for which merit time allowance is not available (see Correction Law 803(d)(1))
iii. a Class A drug offense

● anyone previously adjudicated a second or persistent violent felony offender (under Penal Law §§ 70.04, 70.08)

● anyone currently charged with a violent felony or merit time ineligible crime for which state prison is mandatory, while such charges are pending.

Note: Excluded persons may become eligible upon consent of the district attorney.

WHAT ARE THE PROCEDURES?

1) At any time prior to trial or plea, the defendant may request that the court order an "alcohol or substance abuse evaluation" to be completed by a credentialed evaluator. The defendant must sign a written release authorizing disclosure of the evaluation results to the court, defense counsel, the prosecution, and probation. The evaluation must include the following information:

i. a determination as to whether person has a history of alcohol or substance abuse or dependence and whether the person has co-occurring mental disorder or mental illness;

ii. a recommendation as to whether the history of abuse or dependence can be addressed by diversion;

iii. a recommendation as to treatment modality, level of care and length of treatment;

iv. any other information that may be relevant.

2) The court provides this evaluation to the prosecution and defense, and upon receiving it, either party may request a hearing. During the hearing, the court may consider any relevant evidence, and may also consider: 1) evidence that the defendant had been, within the past 10 years (excluding incarceration time), adjudicated a Y.O. for a violent felony offense or an offense for which merit time is not available; and 2) in the case of Willard eligible offenses, a victim statement.

3) The court must make findings of fact with respect to whether:

i. the defendant is statutorily eligible for judicial diversion;

ii. the defendant has a history of alcohol or substance abuse or dependence;

iii. the history of abuse or dependence is a contributing factor to the defendant=s criminal behavior;

iv. the defendant=s participation in judicial diversion could effectively address such abuse or dependence;

v. institutional confinement of the defendant is or may not be necessary for the protection of the public.

4) The court enters an order granting judicial diversion; prior to this the defendant is required to plead guilty to either an indictment or superior court information unless:

i. the prosecution and court consent;

ii. there is a finding of "exceptional circumstances" due to severe collateral consequences.

5) The defendant must agree on the record to abide by release conditions the court sets after taking into consideration the views of the credentialed evaluator and other health care professionals involved in defendant=s treatment.

6) The court and defendant may have an agreement that provides for terms of disposition upon successful completion including, but not limited to, the following:

i. A term of interim probation - upon successful completion of this term, allow the defendant to withdraw guilty plea and dismiss the indictment or SCI;

ii. A term of interim probation - upon successful completion of the term, allow the defendant to withdraw guilty plea and plead guilty to a misdemeanor with a sentence of probation or any other agreed upon sentence;

iii. Withdraw guilty plea and dismiss indictment or SCI

7) The court shall issue a securing order providing for bail or ROR.

8) If the court determines that the defendant violated the established conditions, the court may:

i. modify the conditions;
ii. reconsider ROR or bail; or
iii. terminate with participation in diversion and proceed with sentencing in accordance with agreement.

In making this decision, the court must consider the views of the prosecution, the defense, and treatment providers. The court shall also consider using a system of graduated sanctions as well as "the extent to which persons who ultimately successfully complete a drug treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse or by failing to comply fully with all requirements imposed by the treatment program."

9) When a defendant=s participation in diversion is terminated (or the defendant voluntarily withdraws), the court may impose:

i. any sentence authorized by the plea agreement; or
ii. any lesser sentence authorized by Penal Law § 70.70(2)(b) or (c), "taking into account the length of time the defendant spent in residential treatment and how best to continue treatment while the defendant is serving that sentence."

III. Preparation of the Defendant

1. Preparation of the defendant to make the decision about Judicial Diversion.

● Judicial Diversion is not for everyone. The decision to ask to be offered Judicial Diversion should not be made without a full discussion.

● Some of the issues that should be discussed before a defendant makes the decision about Judicial Diversion include:

- the pros and cons of diversion
- is the defendant ready for treatment?
- is court supervised treatment appropriate for this defendant?
- what are the advantages of conditional sealing?
- the likely plea agreement – pros and cons.

2. Preparation of the defendant for the alcohol and substance abuse evaluation.

● Experience from these evaluations and the resulting judicial findings lead to the inescapable conclusion that preparation of the defendant is important.

● Some of the issues that should be part of the preparation include:

- clarify use and abuse history
- clarify treatment needs and desire
- obtain documentation as it may help avoid erroneous reporting – value accuracy
- review anticipated questions that will be asked at the evaluation
- review the dangers of minimization and exaggeration

IV. Emerging Issues

1. Judicial refusal to order an alcohol and substance abuse evaluation or to refer the case to the Drug Treatment Part.

● There are several arguments that can be made by defense counsel in response.

- refusal to order an evaluation at this juncture undermines the legislative intent of Article 216

- review at this juncture is limited to facial statutory eligibility – to make this argument using the language of the Rules of the Chief Administrator of the Courts § 143.1, comparing subsections a and b to c. Subsection c pertains to Judicial Diversion and does not contemplate the court making any determination about the defendant's appropriateness for Judicial Diversion prior to order and evaluation.
- all the information upon which a decision should be based is not yet available.

2. Judge refuses to provide a copy of the evaluation to defense counsel

   ● CPL § 216.05(2) requires that a copy of the report be given to the eligible defendant and the prosecutor. There is no room for any other procedure.

3. Some prosecutor's have advanced the notion that a defendant who is charged with an eligibility-neutral offense along with an eligible offense is not eligible for Judicial Diversion.

   ● This has emerged as one of several methods that prosecutors in some jurisdictions have used to block eligibility for Judicial Diversion. If such argument were accepted, it would allow the prosecutor to include a misdemeanor charge in every indictment for which they sought to block Judicial Diversion.

   ● An extensive eight page memo is attached to this outline addressing this issue. As explained in the memo, there has only been one reported decision on this issue. In People v. Jordan, 29 Misc.3d 619 (Westchester Co. Ct. 2010) the court undertakes a very thorough analysis of the plain meaning of the statute and the legislative intent, and soundly rejects the notion that an eligibility-neutral offense which is included in the accusatory instrument could render an otherwise eligible defendant ineligible for Judicial Diversion. The memo also cites to the other three unreported decisions and helps the reader locate them on CCA's website.

4. A second type of manipulation of the accusatory instrument has emerged in an attempt to bar eligibility for Judicial Diversion. In cases where defendant was initially charged with both an eligible offense and an eligibility-neutral offense, prosecutors have dropped the eligible offense from their Grand Jury presentation. No Court has yet to address this issue in a reported decision. Defense counsel should be alert to this gambit.

V. Effective Advocacy

1. What due process is required at a CPL § 216.05(3) hearing. Either party may request this hearing to determine whether the defendant is appropriate for Judicial Diversion. The statute contemplates a hearing to determine whether "the eligible defendant should be offered alcohol and substance abuse treatment pursuant to this article." The problem arises when considering what the hearing will actually look like. In the appropriate case the best advocacy can be accomplished with a full hearing at which testimony is taken and a full record is developed. Unfortunately this can be a struggle. In some jurisdictions a full hearing is not uncommon. In other jurisdictions this hearing is given short-shrift. The challenge is to ensure that the defendant gets a fair opportunity to present his or her case for Judicial Diversion.

   ● CPL § 216.05 leaves the door open as to what this hearing might look like. "[T]he court may consider oral and written arguments, may take testimony from witnesses offered by either party, and may consider any relevant evidence…" A memo from OCA, attached to these materials, seems to encourage Judges to simply rely on oral or written arguments. The challenge for defense counsel will be to push for a full hearing.

   ● Keep in mind that these hearing are an opportunity to be creative in meeting the factors that the Judge is required to consider and "any relevant evidence."

   ● Consider having the defendant or defendant's family members testify. Be careful to prepare the witness thoroughly or problems may result.

2. The plea agreement

   ● Arguing for caps on the sentence in the event of early termination is critical. Some jurisdictions do this as a matter of practice while other Judges are resistant. Although some Judges have become entrenched in their "home made" procedures, persistence and advocacy may move them to consider changing:

      - use the language of the statute itself which contemplates a plea agree with regard to successful completion and early termination.
      - there is more incentive for the defendant to participate
      - Peter Preiser's practice commentaries support using caps
      - the defendant should not be punished for trying

3. Violation of conditions of Judicial Diversion

● CPL § 216.05 (9) sets out the procedure to be followed in such cases. Be familiar with this procedure and use it in your advocacy. Subsection (9)(b) contemplates a hearing to determine whether the defendant has violated a condition of the program.

● Even when a violation is found there is need for advocacy as to the appropriate disposition. The statute provides options for the zealous advocate.

● People v. Fiammegta, 14 N.Y.3d 91 (2010), although a pre- Judicial Diversion case, may be of some help in arguing for a hearing.

ATTACHMENTS

- **Powerpoint Presentation**
- **DLRA Sentencing Chart**
- **Early Release and Other Prison-Based Programs**
- **Early Release Checlist: Determinate Sentences**
- **Early Release Checklist: Indeterminate Sentences**
- **Willard Eligibility**
- **Updated Uniform Sentence & Commitment**
- **Outline – Steps to Effective Sentencing Advocacy**
- **Defense Practice Tips**
- **Memo on Eligibilty: Eligibility-Neutral Offense**
- **Unified Court System Memo – July 7, 2009**
- **Rules of Chief Administrator of the Courts**

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Parole and the Revocation Process

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Parole and the Revocation Process

Introduction:

As of 4/1/11 the New York State Division of Parole was merged with the New York State Department of Corrections. The agency is now known as the New York State Department of Corrections and Community Supervision (DOCCS).

The Board of Parole is independent and Administrative Law Judges are now under the Board of Parole.

The procedures and guidelines regarding parole and the revocation process can be found in Executive Law 259 I and Title 9 New York Code Rules and Regulations Sections 8004 to 8005.

Definitions:

Administrative Law Judge: An individual appointed by the Board of Parole to Conduct final Revocation of Parole Hearings.

Parole Revocation Specialist: An individual that had the duty of represent the agency in final violation of parole hearing.

Indeterminate Sentence: A sentence imposed by the sentencing court with a minimum and maximum amount of time to serve. Release is either granted by the Board of Parole or after the inmate has served 2/3 of the maximum sentence.

Determinate Sentence: A fixed period of incarceration imposed by the court. Release is automatic unless there is a loss of good time

Parole: A period of supervision that is a continuation of an indeterminate sentence after release.

Post Release Supervision: A period of supervision imposed by the sentencing court. They period of supervision imposed is based on the sentences that can be imposed based on penal law.

Good Time: A period of time granted to an inmate prior to release. For an indeterminate sentence that period is 1/3 of the maximum sentence. For a determinate sentence that period is 1/7 of the sentence.

Delinquent Time: The period of time between the earliest violative behavior and the date of the lodging of the warrant.

Judicially Sanctioned: A sentenced is imposed, however upon completion of the Willard Drug Treatment Program, the subject can serve the remainder of that sentence under supervision.

Shock: The individual serves six months in a Shock Incarceration Facility. Upon release they can serve the remainder of their sentence under supervision.

Local Conditional Release: An individual serving a definite sentence of one or more years in a county correctional facility can apply to be released a serve the remainder of the sentence under supervision.

Willard Drug Treatment Campus (WDTC): A 90-day program, which is an intensive drug treatment program and is modeled on the shock incarceration program. Note: The 90 days starts when the subject arrives at Willard, not at reception.

"K" Calendar: An open-ended adjournment requested by the defense so that a felony matter can be resolved prior to a parole violation is completed.

The Violation Process:

Parole Officer determines there has been a violation of one or more the conditions of the subject's supervision.

Case conference is held with the Senior Parole Officer and reviewed by the Area Supervisor.

If it is determined that the violation may be serious then a Parole Warrant of Arrest is issued.

The subject is then taken into custody and lodged at the local county correctional facility. Upon service of the violation report, given the opportunity to have a Preliminary Hearing (probable cause) or waive that.

Final is scheduled. The division then has 90 day to complete the hearing UNLESS the parolee or defense request an adjournment.

Categories:

Category I

There is more than one way to be considered a Category I.

Present conviction (Instant Offense) is a violent felony offense and subject was conditionally released. Note: Every determinate sentence is a conditional release.

Instant offense is a sex offense or a conviction for a felony sex offense that falls within the "ten year" rule.

Subject has a violent felony offense that involved the use or threatened use of a weapon within in the "ten year" rule.

The current violative behavior involves the use or threatened use of a weapon or dangerous instrument, infliction or attempt of physical injury to another, possession of a firearm (operable or not), threats to parole staff or peace officers (this includes police officers).

Possible dispositions are a minimum hold of 15 months (can be reduced to 12 with a plea and mitigating circumstances) all away up to maximum expiration. Subject can be offered the Alternate Department of Corrections Program. A hold is imposed, however if they complete the alternate program the hold is converted to a revoke and restore. If they do not complete the program, then the time assessment is imposed.

Any hold imposed begins with the date the parole warrant was lodged.

Category II

These are mandatory Willard cases. The subject is serving a sentence for a drug conviction or one or more the allegations is for drug or alcohol use when there is a no alcohol condition. This includes those serving a shock sentence.

Exemptions: Pending felony, history of severe mental health problems, severe medical problems. If exempt revert to Cat III **EXCEPT THOSE SERVING A SHOCK SENTENCE OR JUDICIALLY SANCTIONED.**

Category III

Non-violent felony offenders with no drug or alcohol allegations or exempt from Category II. Will return to custody for a period of three months from the date of the final hearing.

Persistent

Non-violent offenders that have at least two prior sustained violations of parole. Can be held for up to twelve months. The hold begins from the lodging date of the warrant. A prior revoke and restore is considered a sustained violation.

Special Cases:

Shock Sentences: These subjects are sentence to a term, however after completing six months of a shock incarceration program they are afforded a review by the Board of Parole. If released they serve the remainder of their sentence under parole supervision. If a violation is sustained, can be made to serve the court-imposed sentence.

Judicially Sanctioned: These subjects are sentence to term, however in accordance with CPL 410.91 the court can direct the sentence be executed as a term of parole supervision. If a violation is sustained, may be made to serve the court-imposed sentence.

Alternatives to Incarceration

Alternatives are generally addressed prior to the violation process begins. Parole Officers will make referrals before submitting a Violation of Release Report.

Any parolee facing a violation can be considered for a revoke and restore to a program. A revoke and restore is a considered a violation of parole.

If the defense feels that a revoke and restore is appropriate then they should be prepared to present the information regarding the program at the hearing. Adjournments may be granted if needed. An Administrative Law Judge can not "court order" any parolee to a program

If all parties agree to the revoke and restore, generally a letter from the program is needed with an available admission date. The parolee then goes directly from custody to the program.