



## Memorandum in Support

May 13, 2022

S. 2881-B  
A. 8524-A

By: Senator Ramos  
By: M. of A. Forrest  
Senate Committee: Alcoholism and Substance Abuse  
Assembly Committee: Codes  
Effective Date: 180 days after it shall have  
become a law

**AN ACT** An act to amend the criminal procedure law and the judiciary law, in relation to judicial diversion programs; and to repeal certain provisions of the criminal procedure law relating thereto.

### THE NEW YORK STATE BAR ASSOCIATION SUPPORTS THIS LEGISLATION

The New York State Bar Association (NYSBA) strongly supports the Treatment Not Jails (TNJ) legislation (S.2881B & A.8524A). This proposed legislation amends Judicial Diversion as codified in Criminal Procedure Law Article 216, to go beyond the eligible substance use disorders and limited specified crimes. If the TNJ amendment is passed, CPL 216 would also be available to people accused of *any* charge under the penal law and to those who have mental health diagnoses or other “functional impairments.”<sup>1</sup> The TNJ bill would also expand judicial powers to grant diversion, offer pre-plea participation in treatment, ensure clinical and scientific individual-oriented and harm-reduction based models of treatment rather than punitive ones, embrace “procedural justice,” and create diversion parts in every county in New York State.

Poverty frequently exacerbates mental health and developmental problems which in turn prevent individuals and families from leaving poverty, creating an intergenerational cycle of poverty and poor health.<sup>2</sup> Poverty in childhood is associated with lower school achievement; worse cognitive, behavioral, and attention-related outcomes; higher rates of depressive and anxiety disorders; and higher rates of almost every psychiatric disorder in adulthood. Poverty in adulthood is linked to depressive disorders, anxiety disorders, psychological distress, and suicide.<sup>3</sup> Approximately 1 in 4 individuals with serious mental illness also have a substance use disorder.<sup>4</sup>

People living in poverty with mental illness and substance use challenges are less likely to be able to access therapeutic services.<sup>5</sup> The criminalization of mental illness and substance use is evidenced by the fact that jails and prisons have become larger mental health providers than psychiatric hospitals.<sup>6</sup> Notably, more than half (52%) of the people in NYC DOC custody have received mental health services, up from 44% in 2016.

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<sup>1</sup> Functional impairments include mental health, intellectual, neurocognitive and physical disabilities as defined by the DSM-5.

<sup>2</sup> McLoyd VC. Socioeconomic disadvantage and child development. *Am Psychol.* 1998; 53:185-204.

<sup>3</sup> <https://www.psychiatrytimes.com/view/addressing-poverty-and-mental-illness>

<sup>4</sup> <https://www.drugabuse.gov/publications/research-reports/common-comorbidities-substance-use-disorders/part-1-connection-between-substance-use-disorders-mental-illness>

<sup>5</sup> [For example](#), among children experiencing poverty who need mental health care, less than 15% receive services, and even fewer complete treatment.

<sup>6</sup> <https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness>

In 2020, an average of 17% were diagnosed with a “serious mental illness,” up from 10% four years earlier.<sup>7</sup> Statistics for counties outside of New York City reveal similar patterns. “Nearly 1 in 5 women and 1 in 10 men entering New York jails has a serious mental illness. The Cost of Incarceration in New York State shows that 1 in 9 women and 1 in 10 men entering New York jails has a serious mental illness.”<sup>8</sup>

Per a January 2021 report by the Vera Institute:<sup>9</sup>

“Much of the problem lies at the feet of State government. Although most spending on social services, mental health, and public health flows through - and is reflected in - county budgets, the bulk of the money in those categories comes from state aid, not money the county itself raises or controls. From 2011 to 2019, New York State: cut aid to counties for behavioral health and social services by 8 percent — from \$12.3 billion to \$11.3 billion; and reduced state spending (that does not flow through county budgets) on human services by 21 percent from 2011 to 2017 and by 26 percent from 2017 to 2018.”

Vera’s report states further: “These deep cuts in funding for social services, mental health, and public health have left counties without sufficient resources to provide treatment, care, and supports that help people get and stay healthy. Even before the coronavirus hit...75 percent of counties reported that they needed more heroin- and opioid-related programs and services; 68 percent of counties said they did not have enough drug crisis services; 74 percent of counties — particularly those in rural areas where there is little to no public transportation — reported that they needed more resources to help people travel to drug treatment; and 84 percent of counties reported that they did not have enough housing for people with behavioral health issues, leaving many to live on the street or in substandard rentals, including places without heat or utilities. The State requires counties to fund public health, mental health, and emergency assistance for families in addition to county jails. But last year, counties collectively spent approximately 11 times as much on jails as they spent on community mental health.”

There is no statute affording Judicial Diversion in New York State for persons with mental health disorders or cognitive or intellectual disabilities charged with crimes despite the fact that public safety is notably increased by expanded opportunities as reflected by lower rates of recidivism for graduates.

Criminal Procedure Law 216 was enacted in 2009. This statute allows Judicial Diversion for persons with alcohol or substance use disorders who are charged with a select number of drug and property-related non-violent class B, C, D or E felonies and who have no violent felony convictions within the last ten years.<sup>10</sup>

Even when they otherwise meet the criteria for admission under Criminal Law Procedure 216, people with psychiatric disorders are generally excluded from such treatment courts, based on the recommended practices of the Office of Court Drug Treatment Programs.<sup>11</sup> Even with the recommended addition of new “mental health tracks” in Manhattan Drug Court, as an example, this does not change the fact that a limited number of charges are eligible for statutory judicial diversion. All other applicants for court mandated mental health treatment must rely on the complete discretion of prosecutors.

However, there is presently no statute delineating Judicial Diversion for persons with mental health disorders or cognitive or intellectual disabilities. As such, mental health treatment courts are not available in every county in New York: only 26 criminal courts statewide have ad hoc mental health treatment courts which

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<sup>7</sup> New York City Comptroller. (March 2021). [FY 2022 Agency Watch List: Department of Correction.](#)

<sup>8</sup> New York State Office of Mental Health, [“Mental Health Resource Handbook Chapter 2: Providing Mental Health Services in Local Detention/Correctional Facilities”](#)

<sup>9</sup> [The Cost of Incarceration in New York State \(vera.org\)](#)

<sup>10</sup> Criminal Procedure Law 216, Judicial Diversion Program for Certain Felony Offenders.

<sup>11</sup> <https://rockinst.org/wp-content/uploads/2018/05/5-23-18-Drug-Court-Report.pdf>

solely rely on prosecutorial gatekeeping.<sup>12</sup>

Yet in New York State, one in 5 people have a mental health diagnosis.<sup>13</sup> Moreover, more than 50% of individuals experiencing mental health challenges will also experience a substance use disorder, and vice versa.<sup>14</sup>

New York State's jails and prisons have replaced hospitals and community treatment providers as the primary facility for people with mental illness. New York State incarcerates more people with serious mental illnesses in its jails and prisons than it treats in hospitals<sup>15</sup>, and there are more people with serious mental illness living in Rikers Island than in any psychiatric hospital in the United States.<sup>16</sup>

Additionally, the rate in jails and prison of people with mental health or other disabilities is higher than that in communities.<sup>17</sup> For example, the number of people incarcerated in NYC jails receiving ongoing mental health care in jail (designated "Brad H" because of the court settlement of the same name) outnumber incarcerated people without mental health issues. At the end of July 2021, 49.6% of incarcerated people were designated with Brad H status by the City Department of Correction.<sup>18</sup> Barry Virts, Wayne County sheriff and president of the New York State Sheriffs' Association has reported that "Sheriffs have increasingly found that individuals are coming to their jail facilities with serious medical, mental health, and substance use issues."<sup>19</sup>

The numbers of people with mental health challenges and other disabilities are expected to rise as we see the impact of the collective trauma of the COVID-19 pandemic. This has exacerbated existing mental health challenges as well as created its own challenges via post-pandemic-stress-syndrome and cognitive issues related to long-haul- COVID.<sup>20</sup>

Additionally, many jails are at an extraordinary level of chaos and disorder – for example the situation at Riker's Island has been aptly described as a humanitarian crisis. In addition to the high rates of force and violence, there is an alarming level of staff absenteeism that is causing demonstrably dangerous disruptions to both security and basic services to people in custody from the moment they arrive at a reception facility.<sup>21</sup>

Critics of treatment courts may claim that they do not protect public safety or reduce crime. However, mental health courts throughout New York have reportedly been proven successful in lowering recidivism for its graduates.<sup>22</sup>

As the trends of the past three decades also indicate, more jail does not equal more safety. To the contrary, an emerging body of research indicates that the overuse of jail, while temporarily incapacitating people, can actually lead to more criminal activity and risks undermining the health of individuals, families, and entire neighborhoods. Those who go into jail or prison with challenges— substance use, mental health concerns, joblessness, unstable housing, etc.—tend to come out with those challenges worsened. Jail also comes at

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<sup>12</sup> [New York State Mental Health Courts, A Policy Study](#). Center for Court Innovation, 2015.

<sup>13</sup> [https://www.health.ny.gov/prevention/prevention\\_agenda/mental\\_health\\_and\\_substance\\_abuse/mental\\_health.htm](https://www.health.ny.gov/prevention/prevention_agenda/mental_health_and_substance_abuse/mental_health.htm)

<sup>14</sup> NIH National Institute on Drug Abuse, [Common Comorbidities with Substance Use Disorders Research Report](#).

<sup>15</sup> [Treatment Advocacy Center. "New York"](#).

<sup>16</sup> [Serious Mental Illness Prevalence in Jails and Prisons - Treatment Advocacy Center](#)

<sup>17</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5008459>

<sup>18</sup> Source: [Vera Institute of Justice](#).

<sup>19</sup> [ID. \(The Cost of Incarceration\)](#)

<sup>20</sup> <https://www.psychiatrytimes.com/view/post-covid-stress-disorder-emerging-consequence-global-pandemic>

<sup>21</sup> On August 24, 2021, the court-appointed federal Monitor in *Nuñez* filed a special report advising the court of "grave concerns about the conditions and pervasive high level of disorder and chaos in the New York City jails." Available [here](#).

<sup>22</sup> <https://ps.psychiatryonline.org/doi/10.1176/appi.ps.201700107>

tremendous financial cost: incarcerating one person on Rikers for a year costs a staggering \$556,000.<sup>23</sup> In June 2020 there were more than 10,000 fewer people in jail in counties outside New York City than on any givenday in 2012. If counties build on their commitment to decrease jail populations and take steps to turn those transformations into savings, New York State could free up valuable dollars during this fiscal crisis - dollars that could be key to addressing behavioral health crises, mitigating the surge in unemployment and housing instability that is already underway, and investing in building healthy, safe communities.<sup>24</sup>

Thus, TNJ promotes public safety, relying on a robust body of research that consistently shows that jailing those entangled in the criminal legal system leads to *more* - not less - criminal involvement. As the research and our collective experience demonstrates, incarceration is a profoundly destabilizing and traumatizing experience. That is especially true for those with mental health and substance use challenges, who are often brought into the criminal legal system precisely because of a fundamental lack of basic services, like stable housing, treatment and community supports. In our current carceral system, these individuals lose whatever semblance of stability they previously possessed when they become confined, and emerge from jail even more unmoored and unsupported, and by extension, more likely to be rearrested.”

Mental illness, substance use disorders and other disabilities have disparate impacts along race, income, gender/gender identity, geographic and ethnic lines including disproportionate involvement by these groups in the criminal legal system; this can be addressed by expanding the reach and revising the structure of problem-solving courts.

While codification of Judicial Diversion under CPL 216 in 2009 was intended to address systemic inequities, over a full decade later, it is apparent it did not go far enough. The 2021 TNJ bill aims to make those corrections to protect and improve the lives of vulnerable people who intersect with the criminal legal system in NYS often a result of their behavioral health challenges.

This legislation would amend the current codification of judicial diversion to include individuals who have mental health diagnoses or other disabilities regardless of criminal history or offense charged.

Much of the prevailing “wisdom” driving treatment court exclusion of people with mental illness or people previously convicted of or charged with violent crimes has been proven false. People with mental health challenges are no more violent than the general population and in fact more likely to be the victims of violent crime rather than the perpetrators.<sup>25</sup> Studies show that people accused of violent charges are as likely to succeed in community-based treatment as those charged with non-violent charges.<sup>26</sup>

TNJ would also expand the authority of judges to accept people into Judicial Diversion when there are clinical and scientific bases for doing so, and implement due process safeguards against arbitrary rejection, punishment and expulsion. This would help ensure that people who are most in need receive treatment, streamlining the process. CPL 216 currently permits eligibility when there is a showing that “the defendant has a history of substance abuse or dependence,” “such alcohol or substance abuse or dependence is a contributing factor to the defendant’s criminal behavior,” “the defendant’s participation in judicial diversion could effectively address such abuse or dependence” and “institutional confinement of the defendant may or may not be necessary for the protection of the public.” TNJ would effectively replace this outdated and exclusive language by requiring a showing that “the defendant’s functional impairment (e.g., mental illness, disability and/or substance use disorder) is likely a contributing factor to their current or future involvement in the criminal legal system”; “the defendant’s participation in judicial diversion could effectively address such functional impairment; and, “the defendant’s access to treatment through this

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<sup>23</sup> <https://comptroller.nyc.gov/newsroom/comptroller-stringer-cost-of-incarceration-per-person-in-new-york-city-skyrockets-to-all-time-high-2/>

<sup>24</sup> [The Hidden Cost of Incarceration | The Marshall Project](#). See also [Prison And Jail Reentry And Health | Health Affairs](#)

<sup>25</sup> <https://www.mentalhealth.gov/basics/mental-health-myths-facts>

<sup>26</sup> [Can Persons with Co-occurring Disorders and Violent Charges Be Successfully Diverted? \(researchgate.net\)](#)

article would benefit the public and the defendant.”

The bill allows for participation in treatment without requiring a guilty plea to avoid dire collateral consequences of a such a conviction. Criminal convictions may compromise a person’s lawful immigration status and otherwise prevent educational, housing and employment opportunities. People who sustain criminal convictions can lose access to public benefits, parenting rights, licensure, freedom of movement, and suffer financial instability. These consequences affect a person’s family relationships, self-worth, stability, motivation to succeed and can have the adverse effect of bringing about more criminal legal involvement, and by extension, jeopardize public safety.<sup>27</sup>

The impact of collateral consequences to communities of color was also previously noted by this committee when debating automatic sealing and expungement of criminal convictions. Pre- and post-plea outcomes also disproportionately fail to protect majority BIPOC communities. For example, Syracuse County Treatment Court, a court that serves a majority white population, allows some individuals to participate pre-plea. Since participants must live in Onondaga County, the population of which is 80% white (as compared to the population of NYC, which is 42.7% white) we see a more open and accepting model benefitting the majority white residents in Onondaga County, whereas a similar model has been rejected in other courts serving Black and Brown populations.<sup>28</sup>

A pre-plea model also reduces the coercive aspects of our legal system and addresses the reality that poor people, particularly those who are Black and Brown, too often plead guilty to crimes they did not commit every single day in order to get out of jail, access treatment, protect their jobs, keep their housing, maintain their schooling, return to their loved ones, and avoid the hassle of having to return to court over and over again. A pre-plea resolution acknowledges criminal legal involvement as a public health issue, making inroads towards viewing behavioral health as a health and not criminal issue. The majority of people who enter into the criminal legal system struggle with a diagnosable condition under the DSM-5: a mental health condition, a substance use disorder, a neurocognitive disability, or other disorders and disabilities. If a person’s mental illness or addiction played a role in their criminal legal system involvement, the resulting legal experience and treatment must also be treated as a matter of public health equity. The TNJ amendment to CPL 216 would also presume treatment rather than incarceration, which would in effect mitigate racial and gendered disparities in carceral policies’ impact.<sup>29</sup> It would also ensure that mental health and substance use practitioners collaborate with participants in treatment based on scientific and clinical models of treatment rather than outdated punitive models which are proven to have disparate impacts on<sup>30</sup> and exacerbate harm to people with mental health and substance use issues.

Treatment courts have an ethical obligation - and a practical imperative - to evolve their practices in the face of a changing public health and legal landscape.<sup>31</sup> To that end, the bill would base treatment on evidence-based practices, including “harm reduction,” which is now recognized around the world as a safe, smart, effective and humane to way to view “treatment,” deferring to the expertise and clinical opinions of

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<sup>27</sup> See [National Inventory of Collateral Consequences](#); for example, a conviction can affect employment requiring licensure in New York. As [outlined here](#), the Department of State reviews criminal convictions and open cases when an individual applies for licensure.

<sup>28</sup> [Syracuse Community Treatment Court Policy](#); [Census Facts Onondaga County](#) ; [Census Facts New York City](#)

<sup>29</sup> [Prison Policy Review, New York State](#). In New York, per 100,000 people incarcerated: 1,655 are Black, 709 are American Indian/Alaska Native, 607 are Hispanic, 219 are white. [Prison Policy Review, LGBTQ](#). In both prisons and jails, lesbian or bisexual women are sentenced to longer periods of incarceration than straight women. Gay and bisexual men are more likely than straight men to have sentences longer than 10 years in prison.

<sup>30</sup> Once incarcerated, people with mental illness often spend longer in prison than their counterparts without mental illness. Paula M. Ditton, [Special Report: Mental Health and Treatment of Inmates and Probationers](#), Bureau of Justice Statistics 8 (1999), (people with mental illness are incarcerated on average 15 months longer than those without disabilities with similar convictions); [Prevalence And Severity Of Mental Illness Among California Prisoners On The Rise](#), Stanford Justice Advocacy Project 1, 2 (2017), (on average, California incarcerated people with mental illness receive sentences 12% longer than those without diagnosis for same crimes).

<sup>31</sup> Alezandra Garcia and David Lucas, [Bridging the Gap A Practitioner’s Guide to Harm Reduction in Drug Courts](#) (2021).

mental health and substance use practitioners and ensuring the focus remains on the individual's success in treatment.<sup>32</sup> The bill thus encourages judges to use incarceration as a last option for positive drug screenings and mental health crises. TNJ will, further, reduce dangerous overdose and death related to substance use, adopting a much needed and widely recommended "harm reduction" model which recognizes that "cold turkey" approaches to treating substance use is dangerous and counterproductive to meaningful, autonomous, and safe recovery.

Over the last decade, there has been even greater acknowledgement of the harm inflicted upon BIPOC<sup>33</sup> communities marginalized by barriers to accessing wealth and services.<sup>34</sup> TNJ Bill, which will ensure that problem-solving court models reduce rather than reproduce disparities along race, income, gender/gender identity and ethnic lines in the health and criminal legal systems. TNJ will effectively "legislate" mental health courts in recognition of the nexus between a person's mental health condition or other disability with criminal legal involvement and the shared goal of protecting public safety and reducing recidivism.

Based on the foregoing, the State Bar Association **SUPPORTS** the enactment of this legislation.

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<sup>32</sup> Bourgon G., Guterrez L. (2013) The Importance of Building Good Relationships in Community Corrections: Evidence, Theory and Practice of the Therapeutic Alliance. In: Ugwudike P., Raynor P. (eds) [What Works in Offender Compliance](#). Palgrave Macmillan, London.; Horvath, A. (2015). [Therapeutic/Working Alliance](#), Blasko, B, Serran, G., Abracen, J. (2018), [The Role of the Therapeutic Alliance in Offender Therapy](#): The Translation of Evidence-Based Practices to Correctional Settings. In *New Frontiers in Offender Treatment.*; Courmoyer, L., Brochu, S., Bergeron, J. (2007). [Therapeutic alliance, patient behaviour and dropout in a drug rehabilitation program: the moderating effect of clinical subpopulations](#).

<sup>33</sup> "BIPOC" stands for Black, Indigenous, and People of Color.

<sup>34</sup> See, e.g., the resources cited under "Racism and Health (Physical & Mental)" at <https://www.nysda.org/page/RacialJusticeandEquity>