

**TESTIMONY BY THE CENTER FOR COMMUNITY ALTERNATIVES
BEFORE THE
ASSEMBLY STANDING COMMITTEE ON CODES
ASSEMBLY STANDING COMMITTEE ON CORRECTION
ASSEMBLY STANDING COMMITTEE ON ALCOHOLISM
AND DRUG ABUSE**

**IMPLEMENTATION AND FUNDING OF THE
ROCKEFELLER DRUG LAW REFORM LEGISLATION**

Thank you for the opportunity to address the New York State Assembly Standing Committees on Codes, Correction, and Alcoholism and Drug Abuse.

The Justice Strategies division of the Center for Community Alternatives (CCA) is the research, training, and policy arm of CCA. Justice Strategies appreciates the opportunity to offer our perspective on the first year of the implementation of Drug Law Reform in New York State based upon CCA's long-standing work to reduce the use of incarceration and promote public safety. CCA applauds the Assembly's leadership that has led the way to the long-overdue reform of the Rockefeller Drug Laws in 2004, 2005 and most recently in 2009. The 2009 legislation has given us a path to follow that is less punitive and more humane, less based upon retribution and more based upon a medical model, moving away from incarceration and towards treatment. It is a pathway that is based upon the very sound premise that public safety is advanced when we promote successful reentry and reintegration, thereby reducing crime and recidivism.

Implementing these reforms has proven to be a real challenge. Taking the high hopes and aspirations of this legislation, designed to provide the opportunity for treatment and ultimately successful and productive reentry and reintegration, to a wide spectrum of individuals caught up in the criminal justice system, and translating that into a judicial process that reaches the full

scope and potential of the legislation has been difficult. CCA is uniquely situated to identify the difficulties in full, meaningful implementation of the 2009 Drug Law Reform Act (DLRA). In addition to its alternative-to-incarceration (ATI) programs, CCA operates reentry programs, recovery community programs, treatment programs, and through its Justice Strategies division, it provides training, research and policy analysis to lawyers, judges, legislators and community organizations. CCA has been instrumental in the establishment of the drug court for one upstate jurisdiction and has undertaken the evaluation of drug courts over the span of several years. With the advent of the 2009 reforms, attorneys from CCA have traveled around the state working in collaboration with defense attorneys and sentencing advocates, providing technical assistance and resources to help fully implement the new legislation.

In general, we believe that the implementation has been flawed due to the largely successful efforts of opponents of the reform to place restrictions on access and eligibility for treatment, therapeutic prison-based programs, and resentencing and reentry support. The most vocal detractors of the reform have been prosecutors, who have strenuously opposed the reform because it restores discretion to judges and eliminates those aspects of the Rockefeller Drug Laws that gave complete control to district attorneys. Unfortunately, however, not all judges have embraced the new discretion given to them, and continue to rely on district attorney consent to make sentencing and program eligibility decisions. This written testimony addresses the following key areas of concern:

1. The shortcomings of Court-directed implementation.
2. How the broad scope of eligibility the legislation offers to many individuals to benefit from treatment and other aspects of the reform has been severely narrowed in the process of

implementation. I will focus primarily on:

- Resentencing
- Judicial Diversion
- Conditional Sealing

3. Why collaboration is necessary to accomplish full and effective implementation.

4. Strengthening implementation by increasing the role of ATI programs.

1. The Shortcomings of Court-Directed Implementation.

In reforming the harsh and draconian Rockefeller Drug Laws and restoring discretion to judges, it probably seemed like a good idea to cede over to the judiciary much of the responsibility for implementation of the 2009 reforms, particularly Judicial Diversion. After all, there has been so much positive said and written about drug courts over the past decade. It appeared to make sense to capitalize on the experience of the drug courts since Judicial Diversion was based upon a similar concept and to pave the way for the judiciary to take control of the implementation of Article 216 by adding new subsection (r) to Judiciary Law § 212(2). Pursuant to this amendment to the Judiciary Law, the Chief Administrative Judge amended Part 143 of the Rules of the Chief Administrative Judge, thereby setting the stage for the judiciary to gain much control over implementing Judicial Diversion. This means that traditional Drug Court judges have been largely responsible for implementation of Judicial Diversion, and unfortunately, in many jurisdictions, this means that the “bad habits” that developed over the years as drug courts moved away from the collaborative model of the early Drug Courts have persisted in implementation of Judicial Diversion.

The early Drug Courts were developed around ten key components (Defining Drug Courts: The Key Components, BJA, 1997). The model claimed remarkable results and inspired replication all over the country. One of the earmarks of the model was key component Number 10: “Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.” This fundamental principle of collaboration held out great hope. The essential idea for the drug courts was that representatives from the court, community organizations, law enforcement, corrections, prosecution, defense counsel, supervisory agencies, treatment and rehabilitation providers, educators, health and social service agencies, and the faith community would meet to regularly provide guidance and direction to the drug court program. Steering committees, advisory boards and management teams would insure the collaborative effort. It made sense for the legislature to assume that the judiciary was well situated to engage in a collaborative implementation process. Unfortunately, over the years, most drug courts abandoned Key Component Number 10; the drug courts implemented in later years never even adopted it. It should be noted that this has not been the experience in every jurisdiction. There are several notable exceptions where collaboration was still part of the culture from drug court or prosecution initiated treatment alternatives (DTAP). Not surprisingly, in these jurisdictions implementation has been more successful, and more people are benefitting from the 2009 DLRA. Indeed, the successes in these jurisdictions is further proof that collaboration is a critical component of successful implementation of the 2009 DLRA. However, despite benefits of the institutionalization of Drug Courts, unfortunately, broad-based community collaboration was not uniformly sustained.

The traditional Drug Court judges who had long ago abandoned the key component of

collaboration did not re-embrace it when given the responsibility of implementing Judicial Diversion and did not elicit critical input from key stakeholders, including treatment providers and defense attorneys. In large part it is this lack of collaborative effort to implement the drug law reform that has led to many of difficulties that have severely limited the opportunity for a more broad-based participation in the treatment, programs and reentry supports offered by this legislation.

2. How the 2009 DLRA’s Promise That a Broad Scope of Defendants Would be Able to Benefit from Treatment and Other Aspects of the Reform Has Been Severely Narrowed in the Process of Implementation.

The legislature worked hard and long with the goal to create a wide funnel of eligibility in order accommodate the wide flow of people who could benefit from the drug law reform and its treatment model. For the detractors of this reform, who maintain a passion for punishment and eschew a public health model, the goal is to obstruct implementation of the reforms, and ultimately to declare it a failure. Their goal throughout the implementation process has been to invert the funnel created by the legislation and limit its benefit to a trickle.

This struggle to obstruct the implementation of the reforms - a struggle to choke off eligibility- can be seen in the three most significant features of the 2009 legislation: resentencing, Judicial Diversion, and Conditional Sealing.

Limiting the Scope of Resentencing:

Critics of this reform have advanced three arguments in an attempt to limit eligibility for resentencing and condemn many individuals to their current draconian sentences without relief.

First, they have argued for a strained and unduly restrictive interpretation of the “ten year lookback” to determine if a violent felony conviction that was remote in time renders a defendant

ineligible for resentencing [(CPL § 440.46(5)]. Instead of “looking back” ten years from the time of the filing of the resentencing motion, as the statute so clearly requires, prosecutors around the state have put forth the unreasonable interpretation that the “lookback” should be commenced from the time date the individual committed the drug offense for which they are currently incarcerated.

Second, they have argued that a parole violator, who is back in the Department of Correctional Services’ (DOCS) custody after having been released on parole and who has been returned on a parole violation, should not be considered in DOCS custody, and should not be considered eligible for resentencing.

Finally, they have argued that even though people convicted of drug sales are clearly eligible for resentencing, such people should not be resentenced. This, of course, ignores the reality that many people who have a dependence or history of drug abuse, sell to support their habit. It also flies in the face of fundamental fairness. Under our new determinate sentencing scheme enacted in 2004 a person convicted of the sale of drugs is eligible for a determinate sentence.

Limiting the Reach of Judicial Diversion:

Limitations on eligibility for Judicial Diversion, and discouragement from participation have occurred in a number of different ways.

- In some jurisdictions the District Attorney routinely objects to participation in Judicial Diversion for most or all defendants even where the defendants are clearly eligible and where it is evident that their criminal conduct is driven by a substance abuse problem. Since district attorney consent is not required this

would not appear to be a significant factor. Unfortunately, in many jurisdictions the judges still defer to the district attorneys. According to the Division of Criminal Justice Services (DCJS), between October 2009- June 2010, the most common reason for non-admission to Judicial Diversion was “district attorney determination.” The DCJS data suggests that more than 1000 people were turned away from a treatment alternative as a result of district attorney opposition, though our statewide anecdotal experience with Judicial Diversion suggests that this number is an under-estimation of the true number of people denied the opportunity for treatment.

- In some jurisdictions an individual is barred from participation in Judicial Diversion if the district attorney has included in the indictment, in addition to an eligible drug or Willard eligible specified offense, an “eligibility-neutral” offense. An “eligibility-neutral” offense is one that is not listed as a qualifying offense, but it also not listed as a disqualifying offense. Since there are no misdemeanors, attempts, or conspiracy charges listed as qualifying offenses, barring people who are also indicted for an “eligibility-neutral offense” is tantamount to giving district attorneys – though their charging decisions – complete control over who participates in Judicial Diversion.
- Most jurisdictions have refused to negotiate caps on the sentence people would receive if unsuccessful in their treatment efforts through Judicial Diversion, despite the fact that the new legislation recognized the efficacy of such caps and made specific provision for them. Failure to cap means that people face the

maximum possible sentence for trying treatment, and failing. This has discouraged many from participating.

- District attorneys have objected strenuously and courts have been reluctant to utilize the “exceptional circumstances” provision of Article 216 to allow admission into Judicial Diversion without a plea for individuals facing immigration consequences. This means that many lawful permanent residents who have a substance abuse problem have not been able to benefit from the therapeutic opportunities in the 2009 DLRA.
- Many judges have established their own “per se” bars to admission in Judicial Diversion, despite clear legislative intent otherwise. For example, the statute itself permits people charged with drug sales to participate in Judicial Diversion; many judges, however, regularly exclude such individuals.
- Courts have made limited or perfunctory use of the hearing required by Article 216 to determine both eligibility and suitability for Judicial Diversion. This has been encouraged by a July 7, 2009 memo issued by the Office of Court Administration (OCA) to all New York State Superior Court Judges exercising criminal jurisdiction which suggests that “although a court could elect to take testimony from witnesses,” (a normal and usual way to conduct a hearing), “it can simply rely on the oral or written arguments of the parties.” This has resulted in many, less than well-informed, judicial determinations not to offer Judicial Diversion.
- Despite the fact that Article 216 very specifically provides for a defendant to

request participation in Judicial Diversion at any time up until plea or trial, some judges have been refusing to offer Judicial Diversion if the request is not made immediately.

- Probation has refused to provide for inter-county interim probation supervision for individuals arrested for drug possession in one county but who reside in another. This has resulted in individuals who qualify for Judicial Diversion and who would benefit from treatment in that forum, being denied participation in diversion. (See memo from Judge Richards attached hereto).

The Limited Use of Conditional Sealing:

The expectation was that conditional sealing would be a great help to individuals in their attempts at reentry. Indeed, in enacting the conditional sealing statute (Criminal Procedure Law §160.58), the Legislature recognized the completion of treatment is but the first step in a person's recovery, and that finding a fulfilling job, completing educational goals, and obtaining stable housing are critical to a person's life-long recovery. Sadly, the anticipated avalanche of applications for conditional sealing has not materialized and only a handful of people across the State are benefitting from this incredibly critical tool for life-long recovery. There are several reasons for the paucity of conditional sealing applications:

- In some jurisdictions district attorneys have advanced the preposterous argument that the conditional sealing provided for in CPL § 160.58 is not retroactive, and that people who completed a traditional drug court treatment program are not eligible for conditional sealing.
- Some judges have openly expressed their disdain for this legislation thereby

discouraging people from even applying for conditional sealing.

- It has been difficult for many institutional defenders to take on these motions without additional funding, and the lack of authorization for payment of assigned counsel to represent individuals on such motions has led many to a dead end.
- Despite the statute's clear and welcoming authorization for courts, on their own motion, to conditionally seal records, there does not seem to be a single court that has taken the Legislature up on its invitation. In light of the fact that this reform enables many Drug Courts to confer the benefit of conditional sealing on the thousands of individuals who had successfully completed DTAP and graduates of Drug Court, the courts' reluctance to utilize this reform is somewhat mystifying.

Two observations about conditional sealing might be helpful. First, had courts in the various jurisdictions around the state engaged in collaboration, they might have learned from treatment providers and stakeholders involved in reentry work how desperately needed conditional sealing is, and what an important aid to successful reintegration it would be. This would have undoubtedly led to a greater willingness on the part of the courts to figure out how to best implement the conditional sealing process and open it up to the large number of people who qualify. Second, in this day and age we have a new awareness of the challenges to reentry and the effects of collateral consequences. Since the conditional sealing motion is so intimately related to both the criminal process and successful reintegration, the Legislature should consider providing for the right to counsel on these motions. Even if it were only for two years, with a sunset provision, it would help prime the pump to make conditional sealing a common occurrence rather than a rarity.

3. Why Collaboration is Necessary to Accomplish Full and Effective Implementation.

In the very few jurisdictions where collaboration was part of the pre-existing drug court culture we have seen a much more complete implementation of the new features of the 2009 reform. The benefit of collaboration can be clearly seen. The stakeholder have helped the courts determine how best to welcome people into Judicial Diversion and provide access to other opportunities that the new reforms have to offer. Information provided by the defense, prosecution, treatment providers, and other advocates representing reentry and community perspectives has given the court insights it would not otherwise have, the result of which is that a more informed court is better positioned to understand how and why the new reforms should be implemented for that particular jurisdiction. In turn, because their contribution was elicited by the court, community stakeholders are more engaged and committed to the success of the treatment-based alternative to incarceration.

Through collaboration stakeholders can provide to the court perspectives that it is not particularly well situated to fully appreciate. It is these perspectives that will help wean courts away from the old retributive model and make them more receptive to the therapeutic model of the 2009 reform, with its new vision of public safety more closely linked to the 2006 amendment to the Penal Law that established the additional goal for the criminal justice system to promote the successful and productive reentry and reintegration into society [Penal Law § 1.05(6)].

Stakeholders, particularly treatment providers, can bring to a collaboration with the courts a better understanding of the medical model. This is essential. Without this knowledge, insight and perspective the implementation of Judicial Diversion is destined to be flawed.

Community stakeholders, advocates, treatment providers, ATIs, and reentry programs,

bring a body of knowledge to the collaboration that is otherwise missing. They provide a recognition of the damage that is caused by the criminal justice system. They can help make the court keenly aware of what happens when a system over-relies on incarceration, including the following deleterious effects:

- The harmful and criminogenic effects that long periods of incarceration can have on individuals, families and communities also know as “prisonization.”
- Collateral consequences of a criminal record and their effect on employment, education, housing, immigration, civic participation and equality.
- Racial and social inequality driven by mass incarceration.

4. Strengthening Implementation by Increasing the Role of Alternative-to-Incarceration Programs.

New York State’s Alternative-to-Incarceration (ATI) programs have played a key role over many decades both advocating for the reform of Rockefeller Drug Laws, and, even when those laws were in place, convincing judges and prosecutors to allow individuals a chance at drug treatment or other appropriate alternatives. It is ironic then to find that once drug law reform was enacted, ATI programs were largely ignored in the implementation.

ATIs bring certain skills to the criminal justice system that are especially important to ensuring the effective implementation of the law. First, we understand the culture of the courts and criminal justice system. We understand that simply allowing for judicial discretion alone will not automatically ensure that the spirit of the law, i.e., a greater use of alternatives and a reduced use of incarceration, will come to pass. Judges and prosecutors need to be convinced - by solid, thoughtful, and verifiable advocacy and information - that a defendant deserves a

chance at rehabilitation rather than incarceration, and needs solid, sensible and verifiable information about what ATI programming will provide. This sort of information needs to be more than “cookie cutter.” Referencing a CCA model, it needs to be “client-specific,” that is, information that is more than a clinical assessment, but that also provides the context for both behaviors and solutions.

To this end, there is a particularly important role to be played through what is often referred to as client- specific sentencing advocacy. This service, which is often initiated by a referral from the defense attorney, incorporates a comprehensive assessment that goes far beyond clinical issues such as addiction or mental health problems, and includes a review of the defendant’s social history, education, employment and criminal history to identify both needs and strengths. Based on the results of the assessment, the sentencing specialist would then make concrete, and specific referrals to service providers and treatment agencies that agree to serve the defendant as part of the ATI sentence. These referrals may include, but are not limited to treatment. The sentencing specialist then prepares a report for submission to the court that would summarize the findings of the assessment and identify specific program options that would form the basis of an alternative sentencing plan. The program options are developed to address defendant needs within the context of what interventions will best promote public safety, i.e., reduction in recidivism. By intervening through the defense at the pre-plea/pre-trial stage, there is the opportunity for early intervention, giving a chance for a person who is released pre-trial to develop a track record of compliance (or lack thereof) that can then be evaluated by the prosecutor and judge at time of plea negotiations and sentence.

In addition, ATI programs provide a variety of services and support beyond treatment that

help people move on to law abiding and productive lives. Examples of services include: employment readiness and job placement; family reunification; life skills training; educational remediation and placement; and help in addressing the collateral consequences of a criminal conviction. What makes ATI programs distinct from other otherwise valuable services is our focus on the criminal justice system-involved population. What this specialization means is that we know the critical importance of communicating to judges and other criminal justice stakeholders and can help our clients understand how to most effectively comply with mandates. In a sense, ATI programs serve as translators between two very different communities. Finally, and often distinct from service providers, we understand that a criminal record itself is a barrier to moving ahead in life. Job training and job readiness alone are not enough to help people with criminal records get jobs. This population needs help in understanding what is on their rap sheet, help in correcting errors on their record, knowing their rights and responsibilities in disclosing one's criminal record, and assistance in obtaining certificates of rehabilitation and conditional sealing that can mitigate the presence of a record.

The foregoing comprehensive and critical services cannot be achieved without adequate funding for ATI programs. The Assembly's support of ATI programs has created an unparalleled array of services and supports that does not exist anywhere else in the country. We believe it is one reason that New York State has been able to simultaneously reduce its prison population and its crime rate. Despite the Assembly's longstanding support, ATIs remain underfunded and over the last several years, our funding has been cut to the point that agencies have closed, programs have been eliminated and many of us are hanging on by a thread. To point to one of our own programs- Crossroads worked with the very people who are now eligible for Rockefeller Drug

Law reform sentences. However, the program's Byrne funding was inadvertently omitted from 2009-2010 State budget and was not restored this year. As a result, the numbers of women we can serve have been drastically reduced. We know this year will again be a difficult budget year, but we are asking that ATIs become the Assembly's priority so that we can continue our efforts to make the intent of the drug law reform a reality.

Conclusion

In closing, we fear that the absence of advocacy and planning resources will impede the full implementation of Rockefeller drug law reform and will make it difficult for eligible and worthy defendants to benefit from the changes in the new law. As we now know, the over-reliance on incarceration to address drug crime has been driven by agendas other than simply the misguided notion that punishment is an effective response to addiction. Effective implementation of the law reforms is not just a matter of making sure that clinical services such as assessment, treatment and case management are available. Over the three decades before reform of the drug laws, New York State, like the rest of the country, became addicted to punishment and incarceration. The change in the law alone will not automatically change how judges, district attorneys and even treatment providers have come to rely on the hammer of the criminal justice system to address addiction. Effective advocacy can help to change the habituated behavior that has sent so many people to prison instead of treatment.

Thank you for the opportunity to provide this testimony today and again thank you for your leadership in enacting Rockefeller Drug Law reform.

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