CENTER FOR COMMUNITY ALTERNATIVES
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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, such as a conviction for a violent felony offense within the preceding ten years or a prior adjudication as a second or

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 with non-violent, merit time eligible offenses.

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persistent violent felony offender.

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. 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

[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.

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) ... 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.

[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.

(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.