



**TESTIMONY OF
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I. Background: How Public Misperceptions and Fear-Mongering Have Historically Driven Bad Policy for Those with Mental Health Challenges.

My name is Jeffrey Berman. I am an attorney with the Legal Aid Society’s Criminal Defense Practice in New York County, and member of the Treatment Not Jail Coalition. I am here in both of these capacities to discuss why we need to legislate mental health courts in New York. Thank you for giving me the opportunity to speak today.

I have served as a public defender with the Legal Aid Society for almost 25 years and as the MICA (“Mentally Ill and Chemically Addicted”) Project Attorney since 2014. In my position, I serve as the primary resource to attorneys in my office who are advocating for treatment as opposed to incarceration for clients who live with a mental health diagnosis and struggle with substance dependence. In my two and a half decades of practice I have seen countless members of our community, good people who have crises of mental health or substance use or both, sent to jail or prison when what they needed and what was warranted was treatment. As public defenders in NYC, we have tragically witnessed the deaths of countless human beings who might be alive today had they been offered appropriate treatment. I have witnessed too many clients who were denied the opportunity to engage in a treatment court only to go to prison and emerge worse off and re-arrested for more serious charges. This revolving door harms not only these individuals, but also other members of the community.

Too often, people buy into the false narrative that incarcerating members of our community who are involved in the criminal legal system make others in our community safer. These narratives

prey on our community's fears by repeating this fallacy over and over. However, a robust body of research analyzing the impact of incarceration - in New York and nationwide - indicates that being in jail and prison actually makes someone *more likely* to re-offend.¹ The reasons for this are not hard to identify. Incarceration is incredibly traumatizing and destabilizing. The people we send to jails and prisons are too often left to languish during their time inside with inadequate mental health treatment and medical care. Moreover, once their period of incarceration ends, these individuals are released without stable housing, medical care, mental health services or rehabilitation systems in place. These individuals are then expected to gain employment, housing and benefits while navigating the adverse collateral consequences that accompany a criminal conviction.² This increases risks for substance use, exacerbated and untreated mental health conditions, and inevitably, further involvement with the criminal legal system - all at the expense of public safety.

Meanwhile, the data show that people who successfully complete mental health or drug diversion courts, should they be lucky enough to be eligible for them or accepted into one, have a significantly lower rate of recidivism.³ Moreover, diversion is proven to be significantly more cost-efficient than incarceration. While New York City spends \$556,539 per year to incarcerate just

¹ Cullen, F. T., Jonson, C. L., & Nagin, D. S. (2011). Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science. *The Prison Journal*, 91(3_suppl), 48S-65S. <https://doi.org/10.1177/0032885511415224>; Stemon, D. (2017, July). "The Prison Paradox: More Incarceration Will Not Make Us Safer." Vera Institute. Retrieved January 2022, from https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf; Emily Leslie & Nolan Pope, The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments 60 *J. OF L. AND ECON.* 3, 529-557 (2017), www.econweb.umd.edu/~pope/pretrial_paper.pdf; Will Dobbie et al., The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges (*Nat'l. Bureau of Econ. Research, Working Paper No. N22511*, 2018), www.nber.org/papers/w22511.pdf.

² Christopher Lowenkamp et al., The Hidden Costs of Pretrial Detention, THE LAURA AND JOHN ARNOLD FOUND., https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf; Baer et al. Understanding the Challenges of Prisoner Reentry: Research Findings from the Urban Institute's Prisoner Reentry Portfolio, Urban Institute Justice Policy Center (January 2006), <https://www.urban.org/sites/default/files/publication/42981/411289-Understanding-the-Challenges-of-Prisoner-Reentry.PDF>;

³ Michael Mueller-Smith & Kevin T. Schnepel, Diversion in the Criminal Justice System, 8 *THE REV. OF ECON. STUD.* 2, 883-936 (2021), <https://doi.org/10.1093/restud/rdaa030> (finding that diversion cuts reoffending rates in half and grows quarterly employment rates by nearly 50% over 10 years); Amanda Agan, Jennifer Doleac & Anna Harvey, Misdemeanor Prosecution (*Nat'l Bureau of Econ. Res., Working Paper No. 28600*, 2021), https://www.nber.org/system/files/working_papers/w28600/w28600.pdf (finding non-prosecution of a nonviolent misdemeanor offense leads to large reductions in the likelihood of a new criminal complaint over the next two years); David Huizinga & Kimberly L. Henry, The Effect of Arrest and Justice System Sanctions on Subsequent Behavior: Findings from Longitudinal and Other Studies, in, *THE LONG VIEW ON CRIME: A SYNTHESIS OF LONGITUDINAL RESEARCH* 244 (Akiva M. Liberman, ed., 2008); John Laub & Robert Sampson, Life-Course and Developmental Criminology: Looking Back, Moving Forward, *J. OF DEV. AND LIFE-COURSE CRIMINOLOGY* (2020); Shelli B. Rossman, Janeen Buck Willison, Kamala Mallik-Kane, KiDeuk Kim, Sara Debus Sherrill, P. Mitchell Downey, Criminal Justice Interventions for Offenders with Mental Illness: Evaluation of Mental Health Courts in Bronx and Brooklyn, New York, *Nat'l Inst. of Justice* (April 2012), <https://www.ojp.gov/pdffiles1/nij/grants/238264.pdf>.

one person in its jail system, the New York State Office of Court Administration reports that every \$1 invested in treatment courts yields \$2.21 in savings.⁴ In short, investing in mental health courts, community treatment and housing is a far more cost-effective use of state resources than incarceration.⁵

Why do so many people embrace the false narrative that incarceration protects our communities? Many wrongly believe that people with a mental illness are more likely to commit violent acts. The truth is that these individuals are no more likely than the general public to engage in acts of violence, and in fact, are far more likely to be the victims, rather than the perpetrators of violence.⁶ Unfortunately for the thousands of justice-involved New Yorkers seeking admission into a mental health court, this misperception often precludes them from accessing needed treatment, which continues the vicious cycle of further destabilization and trauma, an increase in recidivism, and a decrease in protecting our communities.

Many also wrongly assume that individuals facing “violent” charges or who have prior “violent” convictions are less likely to succeed with diversion. Yet studies consistently prove that people charged with violent crimes are just as likely to succeed and rehabilitate in a problem-solving court as those charged with non-violent crimes.⁷ Tragically, the result of treatment courts relying on this false information is that many do not accept the motivated, willing and ready would-be participants who are otherwise eligible but for a prior violent conviction.

II. The Limited Current Treatment Court Options for People Charged With Crimes Who Suffer From Underlying Mental Health Issues.

Public safety is something we all care about, no matter our race, ethnicity, socioeconomic status, geographic location or political persuasion. But if we are going to improve public safety, then we must amend the existing Judicial Diversion statute and extend treatment court opportunities to those who have underlying mental health challenges.

The Treatment Not Jail Act does just that by building on and significantly expanding an existing Judicial Diversion statute, which was originally passed in 2009 by Senate Republicans through the budget process.⁸ This landmark legislation created drug courts in New York State via Criminal

⁴ New York State Unified Court System, *The Future of Drug Courts in New York State: A Strategic Plan* (2017), https://www.nycourts.gov/legacyPDFS/courts/problem_solving/drugcourts/The-Future-of-Drug-Courts-in-NY-State-A-Strategic-Plan.pdf.

⁵ [What Caused the Crime Decline? | Brennan Center for Justice](#) (2015)

⁶ Mental Health Facts and Myths, MentalHealth.gov, <https://www.mentalhealth.gov/basics/mental-health-myths-facts>; Canadian Mental Health Association, Durham, *The Myth of Violence and Mental Illness*, <https://cmhadurham.ca/finding-help/the-myth-of-violence-and-mental-illness/>.

⁷ Naples, Michelle and Steadman, Henry, “Can Persons with Co-occurring Disorders and Violent Charges Be Successfully Diverted?” *Intl J. on Forensic Mental Health*, 2(2):137-143 (October 2003), https://www.researchgate.net/publication/232426982_Can_Persons_with_Co-occurring_Disorders_and_Violent_Charges_Be_Successfully_Diverted.

⁸ [Rockefeller Drug Laws Committee Final 0.pdf \(nysenate.gov\)](#)

Procedure Law Article 216. Judicial Diversion is currently the only law that permits judges to offer court-mandated treatment to people with substance use disorders as an alternative to incarceration independent of the prosecutor. Thirteen years later, it is clear that the current law is woefully deficient in several respects. First, currently this statute limits eligibility to only a very narrow and arbitrary list of offenses – all of which are low-level non-violent drug and theft-related charges. Second, the statute is primarily concerned with addressing underlying substance use or alcoholism disorders. Thus, even when a person is otherwise eligible, drug courts often reject people with serious mental health conditions or intellectual or developmental disabilities because “substance use” is not the primary diagnosis. Consequently, those with underlying mental health issues are often excluded from any treatment court opportunities, and instead are sent to jail or prison, where upon their release, they are without supports, without health care, and without a home – again, all of which can lead to drug use, psychiatric decompensation and ultimately, re-offending.

To be clear, CPL Article 216 was designed and currently operates to address substance use and alcoholism issues exclusively. There is no analogous diversion court statute for mental health issues, despite the fact that mental health issues are as prominent in the criminal legal system and are indeed widely prevalent in our society. One in five New Yorkers have a mental health diagnosis⁹ and roughly half of the New York City jail population is recommended to mental health treatment¹⁰ (though few actually receive it).

In the absence of statutory authority permitting treatment courts for those with underlying mental health issues, some District Attorney offices and courts throughout the state have collaborated to create *ad hoc* mental health courts. However, because prosecutors have the gatekeeping power to exclude whomever they wish, access to these courts remains unevenly and minimally applied. In addition to rejecting mental health court applicants due to the person’s history or underlying charges, prosecutors often refuse to accept people diagnosed only with intellectual disabilities, developmental disabilities, traumatic brain injuries, neurological disorders and personality disorders - even when the criminal charges are directly related to their disability or impairment.

To be clear, because there is no legislation authorizing mental health courts, politically appointed or lawfully elected judges have no power or discretion in deciding whether to admit a deserving person into these courts. Rather, line prosecutors without clinical experience are so empowered. As a result, the participation rates in such makeshift courts are abysmal. Statewide, there are only 30 mental health courts in existence serving only 140 participants.¹¹

⁹ New York State Dept. of Health, Priority Area: Mental Health/Substance Abuse - Mental Health, https://www.health.ny.gov/prevention/prevention_agenda/mental_health_and_substance_abuse/mental_health.htm.

¹⁰ Greater Justice NY, People in Jail in New York City: Daily Snapshot, Vera Institute, <https://greaterjusticenyc.vera.org/nycjail/> (last accessed Jan. 21, 2022).

¹¹ New York State Unified Court System, 2020 Annual Report (2020) <https://www.nycourts.gov/legacypdfs/20-UCS-Annual-Report.pdf>.

Meanwhile, despite efforts to shrink New York’s prison population, its infrastructure remains one of the largest in the country. As of 2021, more than 40,000 New Yorkers are behind bars and another 337,000 have spent time in prison at some point in their lives; three-quarters of them are people of color. This is a shameful statistic.¹²

The result is that many of our fellow New Yorkers who have been failed by health care, education, housing, and child welfare systems throughout their lives are disposed of in jail or prison, released back into their communities without a home, without supports and without health care. This creates a diabolical catch-22 where the fear-mongers who push for re-incarceration are creating the very conditions that bring about recidivism. *This* is not protecting public safety.

III. The Treatment Not Jail Act (S.2881B-Ramos / A.8524A-Forrest) – Legislation That Would Expand Access to Treatment Courts for Those with Underlying Mental Health Challenges

We demand an end to this cruel, ineffective, and financially irrational system and call for “The Treatment Not Jail Act” (S.2881B-Ramos / A.8524A-Forrest). This legislation creates meaningful off-ramps from the carceral system, while increasing opportunities for robust community-based substance use and mental health care services for those who need it and the protection of society as a whole.

The Treatment Not Jail Act would expand existing Criminal Procedure Law 216 to permit treatment courts to accept people with mental health diagnoses, intellectual disabilities and other disorders that impair their functioning in society and leads to criminal legal system involvement. The bill grants judges the discretion to order diversion for any criminal charge and subsequently dismiss or reduce them without the requirement of an up-front plea, thus protecting people from the collateral consequences of a conviction that would have otherwise been vacated. Such consequences include barriers to employment, licensing, housing, education and immigration—all of which foster instability and ultimately recidivism. The bill guarantees due process protections for participants so they cannot be remanded summarily to jail without evidentiary findings. Finally, the bill pivots away from the overly restrictive and arbitrary charge exclusions that currently limit the pool of applicants for diversion court.

The Treatment Not Jail Act understands that most people who enter the criminal legal system are often victims of lifelong racial and economic injustice, including a lack of access to health care, stable housing, and education. Under the legislation proposed in the Treatment Not Jail Act, a prosecutor cannot summarily decide that someone’s life is not worth saving and categorically deny their attempts to enter treatment court. Moreover, in the treatment court model proposed here, a participant’s humanity is at all times recognized and participants are treated with dignity and respect. They are given the chance to get well and thrive in the community – ours and *their*

¹² [Poverty and Mass Incarceration in New York: An Agenda for Change | Brennan Center for Justice](#) (February 23, 2021)

communities – and thus maintain connections to family and friends. Finally, those who complete the court-mandated treatment program will emerge without a criminal conviction and without a sentence of incarceration, thus being spared from the inevitable stigma and trauma that would otherwise have thwarted their ability to procure stable housing, employment, and proper mental health and medical care. As a result, our communities benefit and flourish because the individual in need received treatment, not jail.

If there are any questions about this testimony, I can be reached at JBerman@legal-aid.org.