

# STATE OF NEW YORK

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2172--A

2019-2020 Regular Sessions

## IN SENATE

January 23, 2019

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Introduced by Sens. BAILEY, MYRIE -- read twice and ordered printed, and when printed to be committed to the Committee on Alcoholism and Substance Abuse -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the criminal procedure law, in relation to a judicial diversion program for certain felony offenders

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The opening paragraph of subdivision 1 and subdivision 2 of  
2 section 216.00 of the criminal procedure law, the opening paragraph of  
3 subdivision 1 as amended by chapter 90 of the laws of 2014 and subdivi-  
4 sion 2 as added by section 4 of part AAA of chapter 56 of the laws of  
5 2009, are amended to read as follows:

6 "Eligible defendant" means any person who stands charged in an indict-  
7 ment or a superior court information with a class B, C, D or E felony  
8 offense defined in article one hundred seventy-nine, two hundred twenty  
9 or two hundred twenty-one of the penal law, an offense defined in  
10 sections 105.10 and 105.13 of the penal law provided that the underlying  
11 crime for the conspiracy charge is a class B, C, D or E felony offense  
12 defined in article one hundred seventy-nine, two hundred twenty or two  
13 hundred twenty-one of the penal law, auto stripping in the second degree  
14 as defined in section 165.10 of the penal law, auto stripping in the  
15 first degree as defined in section 165.11 of the penal law, identity  
16 theft in the second degree as defined in section 190.79 of the penal  
17 law, identity theft in the first degree as defined in section 190.80 of  
18 the penal law, or any other specified offense as defined in subdivision  
19 [~~four~~ five of section 410.91 of this chapter, provided, however, a  
20 defendant is not an "eligible defendant" if he or she:

21 2. "Alcohol and substance [~~abuse~~ use evaluation" means a written  
22 assessment and report by a court-approved entity or licensed health care  
23 professional experienced in the treatment of alcohol and substance

EXPLANATION--Matter in italics (underscoring) is new; matter in brackets  
[~~-~~] is old law to be omitted.

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1 [~~abuse~~] use disorder, or by an addiction and substance abuse counselor  
2 credentialed by the office of alcoholism and substance abuse services  
3 pursuant to section 19.07 of the mental hygiene law, which shall  
4 include:

5 (a) an evaluation as to whether the defendant has a history of alcohol  
6 or substance [~~abuse or alcohol or substance dependence~~] use disorder, as  
7 such terms are defined in the diagnostic and statistical manual of  
8 mental disorders, [~~fourth~~] fifth edition, and a co-occurring mental  
9 disorder or mental illness and the relationship between such [~~abuse or~~  
10 ~~dependence~~] use and mental disorder or mental illness, if any;

11 (b) a recommendation as to whether the defendant's alcohol or  
12 substance [~~abuse or dependence~~] use, if any, could be effectively  
13 addressed by judicial diversion in accordance with this article;

14 (c) a recommendation as to the treatment modality, level of care and  
15 length of any proposed treatment to effectively address the defendant's  
16 alcohol or substance [~~abuse or dependence~~] use and any co-occurring  
17 mental disorder or illness; and

18 (d) any other information, factor, circumstance, or recommendation  
19 deemed relevant by the assessing entity or specifically requested by the  
20 court.

21 § 2. The opening paragraph of subdivision 1 of section 216.00 of the  
22 criminal procedure law, as added by section 4 of part AAA of chapter 56  
23 of the laws of 2009, is amended to read as follows:

24 "Eligible defendant" means any person who stands charged in an indict-  
25 ment or a superior court information with a class B, C, D or E felony  
26 offense defined in article two hundred twenty or two hundred twenty-one  
27 of the penal law, an offense defined in sections 105.10 and 105.13 of  
28 the penal law provided that the underlying crime for the conspiracy  
29 charge is a class B, C, D or E felony offense defined in article two  
30 hundred twenty or two hundred twenty-one of the penal law, auto strip-  
31 ping in the second degree as defined in section 165.10 of the penal law,  
32 auto stripping in the first degree as defined in section 165.11 of the  
33 penal law, identity theft in the second degree as defined in section  
34 190.79 of the penal law, identity theft in the first degree as defined  
35 in section 190.80 of the penal law, or any other specified offense as  
36 defined in subdivision [~~four~~] five of section 410.91 of this chapter,  
37 provided, however, a defendant is not an "eligible defendant" if he or  
38 she:

39 § 3. Section 216.05 of the criminal procedure law, as added by section  
40 4 of part AAA of chapter 56 of the laws of 2009, subdivision 5 as  
41 amended by chapter 67 of the laws of 2016, subdivision 8 as amended by  
42 chapter 315 of the laws of 2016, and paragraph (a) of subdivision 9 as  
43 amended by chapter 258 of the laws of 2015, is amended to read as  
44 follows:

45 § 216.05 Judicial diversion program; court procedures.

46 1. At any time after the arraignment of an eligible defendant, but  
47 prior to the entry of a plea of guilty or the commencement of trial, the  
48 court at the request of the eligible defendant, may order an alcohol and  
49 substance [~~abuse~~] use evaluation. An eligible defendant may decline to  
50 participate in such an evaluation at any time. The defendant shall  
51 provide a written authorization, in compliance with the requirements of  
52 any applicable state or federal laws, rules or regulations authorizing  
53 disclosure of the results of the assessment to the defendant's attorney,  
54 the prosecutor, the local probation department, the court, authorized  
55 court personnel and other individuals specified in such authorization  
56 for the sole purpose of determining whether the defendant should be

1 offered judicial diversion for treatment for substance [~~abuse or depend-~~  
2 ~~ence~~] use, alcohol [~~abuse or dependence~~] use and any co-occurring mental  
3 disorder or mental illness.

4 2. Upon receipt of the completed alcohol and substance [~~abuse~~] use  
5 evaluation report, the court shall provide a copy of the report to the  
6 eligible defendant and the prosecutor.

7 3. (a) Upon receipt of the evaluation report either party may request  
8 a hearing on the issue of whether the eligible defendant should be  
9 offered alcohol or substance [~~abuse~~] use treatment pursuant to this  
10 article. At such a proceeding, which shall be held as soon as practica-  
11 ble so as to facilitate early intervention in the event that the defend-  
12 ant is found to need alcohol or substance [~~abuse~~] use treatment, the  
13 court may consider oral and written arguments, may take testimony from  
14 witnesses offered by either party, and may consider any relevant  
15 evidence including, but not limited to, evidence that:

16 (i) the defendant had within the preceding ten years (excluding any  
17 time during which the offender was incarcerated for any reason between  
18 the time of the acts that led to the youthful offender adjudication and  
19 the time of commission of the present offense) been adjudicated a youth-  
20 ful offender for: (A) a violent felony offense as defined in section  
21 70.02 of the penal law; or (B) any offense for which a merit time allow-  
22 ance is not available pursuant to subparagraph (ii) of paragraph (d) of  
23 subdivision one of section eight hundred three of the correction law;  
24 and

25 (ii) in the case of a felony offense defined in subdivision [~~four~~]  
26 five of section 410.91 of this chapter, or section 165.10, 165.11,  
27 190.79 or 190.80 of the penal law, any statement of or submitted by the  
28 victim, as defined in paragraph (a) of subdivision two of section 380.50  
29 of this chapter.

30 (b) Upon completion of such a proceeding, the court shall consider and  
31 make findings of fact with respect to whether:

32 (i) the defendant is an eligible defendant as defined in subdivision  
33 one of section 216.00 of this article;

34 (ii) the defendant has a history of alcohol or substance [~~abuse or~~  
35 ~~dependence~~] use;

36 (iii) such alcohol or substance [~~abuse or dependence~~] use is a  
37 contributing factor to the defendant's criminal behavior;

38 (iv) the defendant's participation in judicial diversion could effec-  
39 tively address such [~~abuse or dependence~~] use; and

40 (v) institutional confinement of the defendant is or may not be neces-  
41 sary for the protection of the public.

42 4. When an authorized court determines, pursuant to paragraph (b) of  
43 subdivision three of this section, that an eligible defendant should be  
44 offered alcohol or substance [~~abuse~~] use treatment, or when the parties  
45 and the court agree to an eligible defendant's participation in alcohol  
46 or substance [~~abuse~~] use treatment, an eligible defendant may be allowed  
47 to participate in the judicial diversion program offered by this arti-  
48 cle. Prior to the court's issuing an order granting judicial diversion,  
49 the eligible defendant shall be required to enter a plea of guilty to  
50 the charge or charges; provided, however, that no such guilty plea shall  
51 be required when:

52 (a) the people and the court consent to the entry of such an order  
53 without a plea of guilty; or

54 (b) based on a finding of exceptional circumstances, the court deter-  
55 mines that a plea of guilty shall not be required. For purposes of this  
56 subdivision, exceptional circumstances exist when, regardless of the

1 ultimate disposition of the case, the entry of a plea of guilty is like-  
2 ly to result in severe collateral consequences.

3 5. The defendant shall agree on the record or in writing to abide by  
4 the release conditions set by the court, which, shall include: partic-  
5 ipation in a specified period of alcohol or substance [~~abuse~~] use treat-  
6 ment at a specified program or programs identified by the court, which  
7 may include periods of detoxification, residential or outpatient treat-  
8 ment, or both, as determined after taking into account the views of the  
9 health care professional who conducted the alcohol and substance [~~abuse~~]  
10 use evaluation and any health care professionals responsible for provid-  
11 ing such treatment or monitoring the defendant's progress in such treat-  
12 ment; and may include: (i) periodic court appearances, which may include  
13 periodic urinalysis; (ii) a requirement that the defendant refrain from  
14 engaging in criminal behaviors; (iii) if the defendant needs treatment  
15 for opioid [~~abuse or dependence~~] use, that he or she may participate in  
16 and receive medically prescribed drug treatments under the care of a  
17 health care professional licensed or certified under title eight of the  
18 education law, acting within his or her lawful scope of practice,  
19 provided that no court shall require the use of any specified type or  
20 brand of drug during the course of medically prescribed drug treatments.

21 6. Upon an eligible defendant's agreement to abide by the conditions  
22 set by the court, the court shall issue a securing order providing for  
23 bail or release on the defendant's own recognizance and conditioning any  
24 release upon the agreed upon conditions. The period of alcohol or  
25 substance [~~abuse~~] use treatment shall begin as specified by the court  
26 and as soon as practicable after the defendant's release, taking into  
27 account the availability of treatment, so as to facilitate early inter-  
28 vention with respect to the defendant's abuse or condition and the  
29 effectiveness of the treatment program. In the event that a treatment  
30 program is not immediately available or becomes unavailable during the  
31 course of the defendant's participation in the judicial diversion  
32 program, the court may release the defendant pursuant to the securing  
33 order.

34 7. When participating in judicial diversion treatment pursuant to this  
35 article, any resident of this state who is covered under a private  
36 health insurance policy or contract issued for delivery in this state  
37 pursuant to article thirty-two, forty-three or forty-seven of the insur-  
38 ance law or article forty-four of the public health law, or who is  
39 covered by a self-funded plan which provides coverage for the diagnosis  
40 and treatment of chemical abuse and chemical dependence however defined  
41 in such policy; shall first seek reimbursement for such treatment in  
42 accordance with the provisions of such policy or contract.

43 8. During the period of a defendant's participation in the judicial  
44 diversion program, the court shall retain jurisdiction of the defendant,  
45 provided, however, that the court may allow such defendant to (i) reside  
46 in another jurisdiction, or (ii) participate in alcohol and substance  
47 [~~abuse~~] use treatment and other programs in the jurisdiction where the  
48 defendant resides or in any other jurisdiction, while participating in a  
49 judicial diversion program under conditions set by the court and agreed  
50 to by the defendant pursuant to subdivisions five and six of this  
51 section. The court may require the defendant to appear in court at any  
52 time to enable the court to monitor the defendant's progress in alcohol  
53 or substance [~~abuse~~] use treatment. The court shall provide notice,  
54 reasonable under the circumstances, to the people, the treatment provid-  
55 er, the defendant and the defendant's counsel whenever it orders or  
56 otherwise requires the appearance of the defendant in court. Failure to

1 appear as required without reasonable cause therefor shall constitute a  
2 violation of the conditions of the court's agreement with the defendant.

3 9. (a) If at any time during the defendant's participation in the  
4 judicial diversion program, the court has reasonable grounds to believe  
5 that the defendant has violated a release condition or has failed to  
6 appear before the court as requested, the court shall direct the defend-  
7 ant to appear or issue a bench warrant to a police officer or an appro-  
8 priate peace officer directing him or her to take the defendant into  
9 custody and bring the defendant before the court without unnecessary  
10 delay; provided, however, that under no circumstances shall a defendant  
11 who requires treatment for opioid [~~abuse or dependence~~] use be deemed to  
12 have violated a release condition on the basis of his or her partic-  
13 ipation in medically prescribed drug treatments under the care of a  
14 health care professional licensed or certified under title eight of the  
15 education law, acting within his or her lawful scope of practice. The  
16 provisions of subdivision one of section 530.60 of this chapter relating  
17 to revocation of recognizance or bail shall apply to such proceedings  
18 under this subdivision.

19 (b) In determining whether a defendant violated a condition of his or  
20 her release under the judicial diversion program, the court may conduct  
21 a summary hearing consistent with due process and sufficient to satisfy  
22 the court that the defendant has, in fact, violated the condition.

23 (c) If the court determines that the defendant has violated a condi-  
24 tion of his or her release under the judicial diversion program, the  
25 court may modify the conditions thereof, reconsider the order of recog-  
26 nizance or bail pursuant to subdivision two of section 510.30 of this  
27 chapter, or terminate the defendant's participation in the judicial  
28 diversion program; and when applicable proceed with the defendant's  
29 sentencing in accordance with the agreement. Notwithstanding any  
30 provision of law to the contrary, the court may impose any sentence  
31 authorized for the crime of conviction in accordance with the plea  
32 agreement, or any lesser sentence authorized to be imposed on a felony  
33 drug offender pursuant to paragraph (b) or (c) of subdivision two of  
34 section 70.70 of the penal law taking into account the length of time  
35 the defendant spent in residential treatment and how best to continue  
36 treatment while the defendant is serving that sentence. In determining  
37 what action to take for a violation of a release condition, the court  
38 shall consider all relevant circumstances, including the views of the  
39 prosecutor, the defense and the alcohol or substance [~~abuse~~] use treat-  
40 ment provider, and the extent to which persons who ultimately success-  
41 fully complete a drug treatment regimen sometimes relapse by not  
42 abstaining from alcohol or substance [~~abuse~~] use or by failing to comply  
43 fully with all requirements imposed by a treatment program. The court  
44 shall also consider using a system of graduated and appropriate  
45 responses or sanctions designed to address such inappropriate behaviors,  
46 protect public safety and facilitate, where possible, successful  
47 completion of the alcohol or substance [~~abuse~~] use treatment program.

48 (d) Nothing in this subdivision shall be construed as preventing a  
49 court from terminating a defendant's participation in the judicial  
50 diversion program for violating a release condition when such a termi-  
51 nation is necessary to preserve public safety. Nor shall anything in  
52 this subdivision be construed as precluding the prosecution of a defend-  
53 ant for the commission of a different offense while participating in the  
54 judicial diversion program.

55 (e) A defendant may at any time advise the court that he or she wishes  
56 to terminate participation in the judicial diversion program, at which

1 time the court shall proceed with the case and, where applicable, shall  
2 impose sentence in accordance with the plea agreement. Notwithstanding  
3 any provision of law to the contrary, the court may impose any sentence  
4 authorized for the crime of conviction in accordance with the plea  
5 agreement, or any lesser sentence authorized to be imposed on a felony  
6 drug offender pursuant to paragraph (b) or (c) of subdivision two of  
7 section 70.70 of the penal law taking into account the length of time  
8 the defendant spent in residential treatment and how best to continue  
9 treatment while the defendant is serving that sentence.

10 10. Upon the court's determination that the defendant has successfully  
11 completed the required period of alcohol or substance [abuse] use treat-  
12 ment and has otherwise satisfied the conditions required for successful  
13 completion of the judicial diversion program, the court shall comply  
14 with the terms and conditions it set for final disposition when it  
15 accepted the defendant's agreement to participate in the judicial diver-  
16 sion program. Such disposition may include, but is not limited to: (a)  
17 requiring the defendant to undergo a period of interim probation super-  
18 vision and, upon the defendant's successful completion of the interim  
19 probation supervision term, notwithstanding the provision of any other  
20 law, permitting the defendant to withdraw his or her guilty plea and  
21 dismissing the indictment; or (b) requiring the defendant to undergo a  
22 period of interim probation supervision and, upon successful completion  
23 of the interim probation supervision term, notwithstanding the provision  
24 of any other law, permitting the defendant to withdraw his or her guilty  
25 plea, enter a guilty plea to a misdemeanor offense and sentencing the  
26 defendant as promised in the plea agreement, which may include a period  
27 of probation supervision pursuant to section 65.00 of the penal law; or  
28 (c) allowing the defendant to withdraw his or her guilty plea and  
29 dismissing the indictment.

30 11. Nothing in this article shall be construed as restricting or  
31 prohibiting courts or district attorneys from using other lawful proce-  
32 dures or models for placing appropriate persons into alcohol or  
33 substance [abuse] use treatment.

34 § 4. This act shall take effect immediately; provided, that the amend-  
35 ments to the opening paragraph of subdivision 1 of section 216.00 of the  
36 criminal procedure law made by section one of this act shall be subject  
37 to the expiration and reversion of such paragraph pursuant to section 12  
38 of chapter 90 of the laws of 2014, as amended, when upon such date the  
39 provisions of section two of this act shall take effect.