

# STATE OF NEW YORK

8687

## IN SENATE

July 8, 2020

Introduced by Sen. RAMOS -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the criminal procedure law, in relation to judicial diversion programs; and to repeal certain provisions of such law relating thereto

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

1 Section 1. The article heading of article 216 of the criminal procedure law, as added by section 4 of part AAA of chapter 56 of the laws of 2009, is amended to read as follows:

4 JUDICIAL DIVERSION [~~PROGRAM FOR CERTAIN FELONY OFFENDERS~~]  
5 PROGRAMS

6 § 2. The opening paragraph of subdivision 1 of section 216.00 of the criminal procedure law, as amended by chapter 90 of the laws of 2014, is amended to read as follows:

9 "Eligible defendant" means any person who stands charged in an indictment [~~or a~~], superior court information [~~with a class B, C, D or E felony offense defined in article one hundred seventy-nine, 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, provided, however, a defendant is not an "eligible defendant" if he or she~~], misdemeanor complaint or felony complaint with any offense and has a functional impairment.

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

20 "Eligible defendant" means any person who stands charged in an indictment [~~or a~~], superior court information [~~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, provided, however, a defendant is not an "eligible defendant" if he or she~~], misdemeanor complaint or felony complaint with any offense and has a functional impairment.

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

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1 § 4. Paragraphs (a) and (b) and the closing paragraph of subdivision 1  
2 of section 216.00 of the criminal procedure law are REPEALED.

3 § 5. Subdivision 2 of section 216.00 of the criminal procedure law, as  
4 added by section 4 of part AAA of chapter 56 of the laws of 2009, is  
5 amended to read as follows:

6 2. [~~"Alcohol and substance abuse~~] "Functional impairment" means a  
7 condition determined by a licensed health care professional to impair  
8 the defendant's functioning. A functional impairment may include, but is  
9 not limited to, substance abuse or alcohol dependence, mental illness,  
10 developmental disability, intellectual disability, traumatic brain inju-  
11 ry or other neurological disease, personality disorder, cognitive  
12 dysfunction, dementia or emotional disturbance. The court shall defer to  
13 licensed health care professionals and the broader medical community  
14 consensus in determining what a functional impairment is in recognition  
15 that such standards may change quickly within the medical field based on  
16 new research. A person may have more than one functional impairment.

17 3. "Clinical evaluation" means a written assessment and report by a  
18 court-approved entity or licensed health care professional experienced  
19 in the treatment of [~~alcohol and substance abuse, or~~] functional impair-  
20 ments as defined in subdivision two of this section or an evaluation  
21 conducted by an addiction and substance abuse counselor credentialed by  
22 the office of [~~alcoholism and substance abuse services~~] addiction  
23 services and supports pursuant to section 19.07 of the mental hygiene  
24 law, which shall include:

25 (a) an evaluation as to whether the defendant currently has a [~~history~~  
26 ~~of alcohol or substance abuse or alcohol or substance dependence~~] func-  
27 tional impairment including but not limited to a mental disorder, as  
28 [~~such terms are~~] defined in the diagnostic and statistical manual of  
29 mental disorders, [~~fourth~~] fifth edition, and a co-occurring [~~mental~~  
30 ~~disorder or mental illness and the relationship between such abuse or~~  
31 ~~dependence and mental disorder or mental illness~~] functional impairment,  
32 if any;

33 (b) a recommendation as to whether the defendant's [~~alcohol or~~  
34 ~~substance abuse or dependence~~] functional impairments, if any, could be  
35 effectively addressed by judicial diversion in accordance with this  
36 article;

37 (c) a recommendation as to the treatment modality, level of care and  
38 length of any proposed treatment to effectively address the defendant's  
39 [~~alcohol or substance abuse or dependence and any co-occurring mental~~  
40 ~~disorder or illness~~] functional impairments; and

41 (d) any other information, factor, circumstance, or recommendation  
42 deemed relevant by the assessing entity or specifically requested by the  
43 court.

44 § 6. Section 216.05 of the criminal procedure law, as added by section  
45 4 of part AAA of chapter 56 of the laws of 2009, subdivision 5 as  
46 amended by chapter 67 of the laws of 2016, subdivision 8 as amended by  
47 chapter 315 of the laws of 2016 and paragraph (a) of subdivision 9 as  
48 amended by section 21 of part JJJ of chapter 59 of the laws of 2019, is  
49 amended to read as follows:

50 § 216.05 Judicial diversion program; court procedures.

51 1. At any time after the arraignment of an eligible defendant, but  
52 prior to the entry of a plea of guilty or the commencement of trial, the  
53 court at the request of the eligible defendant, [~~may~~] shall order [~~an~~  
54 ~~alcohol and substance abuse~~] a clinical evaluation. An eligible defend-  
55 ant may decline to participate in such an evaluation at any time. The  
56 defendant shall provide a written authorization, in compliance with the

1 requirements of any applicable state or federal laws, rules or regu-  
2 lations authorizing disclosure of the results of the assessment to the  
3 defendant's attorney, the prosecutor, the local probation department,  
4 the court, authorized court personnel and other individuals specified in  
5 such authorization for the sole purpose of determining whether the  
6 defendant should be offered judicial diversion for treatment for  
7 [~~substance abuse or dependence, alcohol abuse or dependence and any~~  
8 ~~co-occurring mental disorder or mental illness~~] functional impairment or  
9 mental disorder.

10 2. Upon receipt of the completed [~~alcohol and substance abuse~~] clin-  
11 ical evaluation report, the court shall provide a copy of the report to  
12 the eligible defendant and the [~~prosecutor~~] defendant's counsel. Any  
13 finding in the report or assessment that the defendant has a mental  
14 disorder as defined in the diagnostic and statistical manual of mental  
15 disorders, fifth edition, or a clinical diagnosis of another serious  
16 functional impairment shall be viewed as presumptive evidence that the  
17 case should be diverted and the defendant should receive treatment.

18 3. (a) Upon receipt of the evaluation report [~~either party~~] the  
19 defendant may request a hearing on the issue of whether the eligible  
20 defendant should be offered [~~alcohol or substance abuse~~] treatment  
21 pursuant to this article. At such time, the defendant shall turn over a  
22 complete copy of the evaluation report to the prosecutor and the court.

23 At such a proceeding, which shall be held as soon as practicable so as  
24 to facilitate early intervention in the event that the defendant is  
25 found to need [~~alcohol or substance abuse~~] treatment, the court may  
26 consider oral and written arguments, may take testimony from witnesses  
27 offered by either party, and may consider any relevant evidence includ-  
28 ing, but not limited to, evidence that:

29 (i) the defendant had within the preceding ten years (excluding any  
30 time during which the offender was incarcerated for any reason between  
31 the time of the acts that led to the youthful offender adjudication and  
32 the time of the commission of the present offense) been adjudicated a youth-  
33 ful offender for: (A) a violent felony offense as defined in section  
34 70.02 of the penal law; or (B) any offense for which a merit time allow-  
35 ance is not available pursuant to subparagraph (ii) of paragraph (d) of  
36 subdivision one of section eight hundred three of the correction law;  
37 and

38 (ii) in the case of a felony offense defined in subdivision four of  
39 section 410.91 of this chapter, any statement of or submitted by the  
40 victim, as defined in paragraph (a) of subdivision two of section 380.50  
41 of this chapter; and

42 (iii) the defendant has a functional impairment; and

43 (iv) the defendant's functional impairment contributed to their crimi-  
44 nal legal system involvement.

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

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

49 (ii) the defendant has a [~~history of alcohol or substance abuse or~~  
50 ~~dependence~~] functional impairment as defined in subdivision two of  
51 section 216.00 of this article;

52 (iii) such [~~alcohol or substance abuse or dependence~~] functional  
53 impairment is or may be a contributing factor to the defendant's [~~crimi-~~  
54 ~~nal behavior~~] involvement in the criminal legal system;

55 (iv) the defendant's participation in judicial diversion could effec-  
56 tively address such [~~abuse or dependence~~] functional impairment; and

1 (v) institutional confinement [~~of~~] or outpatient treatment for the  
2 defendant [~~is or may not be necessary for the protection of the public~~]  
3 would benefit the public or the defendant.

4 4. (a) When an authorized court determines, pursuant to paragraph (b)  
5 of subdivision three of this section, that an eligible defendant should  
6 be offered [~~alcohol or substance abuse~~] treatment, or when the parties  
7 and the court agree to an eligible defendant's participation in [~~alcohol~~  
8 ~~or substance abuse~~] treatment, an eligible defendant [~~may~~] shall be  
9 allowed to participate in the judicial diversion program offered by this  
10 article. [~~Prior to the court's issuing an order granting judicial~~  
11 ~~diversion, the eligible defendant shall be required to enter a plea of~~  
12 ~~guilty to the charge or charges; provided, however, that no such guilty~~  
13 ~~plea shall be required when:~~

14 (a) ~~the people and the court consent to the entry of such an order~~  
15 ~~without a plea of guilty; or~~

16 (b) ~~based on a finding of exceptional circumstances, the court deter-~~  
17 ~~mines that a plea of guilty shall not be required. For purposes of this~~  
18 ~~subdivision, exceptional circumstances exist when, regardless of the~~  
19 ~~ultimate disposition of the case, the entry of a plea of guilty is like-~~  
20 ~~ly to result in severe collateral consequences.]~~

21 (b) There shall be a presumption in favor of allowing eligible defend-  
22 ants to participate in the judicial diversion program without a prior  
23 plea of guilt. This presumption recognizes the presumption of innocence  
24 in all cases before the prosecutor obtains a conviction. This presump-  
25 tion also protects defendants from the severe collateral consequences  
26 associated with a criminal conviction, particularly consequences relat-  
27 ing to immigration status, licensing for employment, and housing. Under  
28 no circumstances shall the prosecutor serve as a gatekeeper to diver-  
29 sion.

30 (c) In the rare circumstance that a court determines that a plea of  
31 guilty prior to treatment is necessary, such as when the defendant has  
32 previously failed to complete judicial diversion under this article on  
33 more than two occasions, the defendant shall not be required to waive  
34 their trial rights or submit an affidavit conceding their guilt. Under  
35 no circumstance shall a court require a plea of guilty prior to disclo-  
36 sure of the discovery material in the case pursuant to section 245.25 of  
37 this chapter.

38 5. The defendant shall agree on the record or in writing to abide by  
39 the release conditions set by the court, which, shall include[+] partic-  
40 ipation in a specified period of [~~alcohol or substance abuse~~] treat-  
41 at a specified program or programs identified by the court[~~, which may~~  
42 ~~include~~]. The court shall take into account the views of the health care  
43 professional who conducted the clinical evaluation and any health care  
44 professionals responsible for providing such treatment or monitoring the  
45 defendant's progress in such treatment. Additional release conditions  
46 may include:

47 (a) adhering to a doctor's prescribed medication,

48 (b) periods of detoxification,

49 (c) residential or outpatient treatment, or both, as determined after  
50 taking into account the views of the health care professional who  
51 conducted the mental health assessment or alcohol and substance abuse  
52 evaluation and any health care professionals responsible for providing  
53 such treatment or monitoring the defendant's progress in such treatment;  
54 and may include:

55 [~~(+)~~] (d) periodic court appearances, which may include periodic  
56 urinalysis;

1 [~~(ii)~~] (e) a requirement that the defendant refrain from engaging in  
2 criminal behaviors;

3 [~~(iii)~~] (f) if the defendant needs treatment for opioid abuse or  
4 dependence or has another condition requiring prescription medication,  
5 that he or she may participate in and receive medically prescribed drug  
6 treatments under the care of a health care professional licensed or  
7 certified under title eight of the education law, acting within his or  
8 her lawful scope of practice~~[, provided that no]~~. No court shall require  
9 the use of any specified type or brand of drug during the course of  
10 medically prescribed drug treatments.

11 6. Upon an eligible defendant's agreement to abide by the conditions  
12 set by the court, the court shall issue a securing order providing for  
13 bail or release on the defendant's own recognizance and conditioning any  
14 release upon the agreed upon conditions pursuant to article five hundred  
15 ten of this chapter. The period of alcohol or substance abuse treatment  
16 shall begin as specified by the court and as soon as practicable after  
17 the defendant's release, taking into account the availability of treat-  
18 ment, so as to facilitate early intervention with respect to the defend-  
19 ant's abuse or condition and the effectiveness of the treatment program.  
20 In the event that a treatment program is not immediately available or  
21 becomes unavailable during the course of the defendant's participation  
22 in the judicial diversion program, the court may release the defendant  
23 pursuant to the securing order.

24 7. When participating in judicial diversion treatment pursuant to this  
25 article, any resident of this state who is covered under a private  
26 health insurance policy or contract issued for delivery in this state  
27 pursuant to article thirty-two, forty-three or forty-seven of the insur-  
28 ance law or article forty-four of the public health law, or who is  
29 covered by a self-funded plan which provides coverage for the diagnosis  
30 and treatment of mental illness, chemical abuse and chemical dependence,  
31 or any other functional impairment however defined in such policy; shall  
32 first seek reimbursement for such treatment in accordance with the  
33 provisions of such policy or contract. The court in its discretion may  
34 order the defendant to obtain public insurance such as Medicaid or Medi-  
35 care if they so qualify. However, the defendant shall not be required to  
36 pay for any part of the cost of treatment required by the court that is  
37 not covered by private or public health insurance.

38 8. During the period of a defendant's participation in the judicial  
39 diversion program, the court shall retain jurisdiction of the defendant,  
40 provided, however, that the court may allow such defendant to (i) reside  
41 in another jurisdiction, or (ii) participate in mental health and/or  
42 alcohol and substance abuse treatment and other programs in the juris-  
43 diction where the defendant resides or in any other jurisdiction, while  
44 participating in a judicial diversion program under conditions set by  
45 the court and agreed to by the defendant pursuant to subdivisions five  
46 and six of this section. The court may require the defendant to appear  
47 in court at any time to enable the court to monitor the defendant's  
48 progress in alcohol or substance abuse treatment. The court shall  
49 provide notice, reasonable under the circumstances, to the people, the  
50 treatment provider, the defendant and the defendant's counsel whenever  
51 it orders or otherwise requires the appearance of the defendant in  
52 court. Failure to appear as required without reasonable cause therefor  
53 shall constitute a violation of the conditions of the court's agreement  
54 with the defendant.

55 9. (a) If at any time during the defendant's participation in the  
56 judicial diversion program, the court has reasonable grounds to believe

1 that the defendant has violated a release condition in an important  
2 respect or has willfully failed to appear before the court as requested,  
3 the court except as provided in subdivision two of section 510.50 of  
4 this chapter regarding a failure to appear, shall [~~direct the defendant~~  
5 ~~to appear or issue a bench warrant to a police officer or an appropriate~~  
6 ~~peace officer directing him or her to take the defendant into custody~~  
7 ~~and bring the defendant before the court without unnecessary delay]~~  
8 order a hearing to determine whether it is appropriate to issue a bench  
9 warrant; provided, however, that under no circumstances shall a defend-  
10 ant who requires treatment for mental health issues and/or opioid abuse  
11 or dependence be deemed to have violated a release condition on the  
12 basis of his or her participation in medically prescribed drug treat-  
13 ments under the care of a health care professional licensed or certified  
14 under title eight of the education law, acting within his or her lawful  
15 scope of practice. The relevant provisions of section 530.60 of this  
16 chapter relating to issuance of securing orders shall apply to such  
17 proceedings under this subdivision.

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

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~~]. The court shall take into  
35 account the length of time the defendant spent in residential treatment  
36 and how best to continue treatment while the defendant is serving that  
37 sentence. In determining what action to take for a violation of a  
38 release condition, the court shall consider all relevant circumstances,  
39 including the views of the prosecutor, the defense and the mental health  
40 and/or alcohol or substance abuse treatment provider, and the extent to  
41 which persons who ultimately successfully complete a drug treatment  
42 regimen sometimes relapse by not abstaining from alcohol or substance  
43 abuse or by failing to comply fully with all requirements imposed by a  
44 treatment program. The court shall also consider using a system of grad-  
45 uated and appropriate responses or sanctions designed to address such  
46 inappropriate behaviors, protect public safety and facilitate, where  
47 possible, successful completion of the mental health and/or alcohol or  
48 substance abuse treatment program.

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

1 shall be offered to support that there exists a substantial risk to an  
2 identifiable person. In the absence of such a hearing and such a find-  
3 ing, there can be no termination.

4 (e) A defendant may at any time advise the court that he or she wishes  
5 to terminate participation in the judicial diversion program, at which  
6 time the court shall proceed with the case and, where applicable, shall  
7 impose sentence in accordance with the plea agreement. Notwithstanding  
8 any provision of law to the contrary, the court may impose any sentence  
9 authorized for the crime of conviction in accordance with the plea  
10 agreement, or any lesser sentence authorized to be imposed on a felony  
11 drug offender pursuant to paragraph (b) or (c) of subdivision two of  
12 section 70.70 of the penal law taking into account the length of time  
13 the defendant spent in residential treatment and how best to continue  
14 treatment while the defendant is serving that sentence.

15 10. Upon the court's determination that the defendant has successfully  
16 completed the required period of alcohol or substance abuse treatment  
17 and has otherwise satisfied the conditions required for successful  
18 completion of the judicial diversion program, the court shall comply  
19 with the terms and conditions it set for final disposition when it  
20 accepted the defendant's agreement to participate in the judicial diver-  
21 sion program. Such disposition may include, but is not limited to:

22 (a) requiring the defendant to undergo a period of interim probation  
23 supervision and, upon the defendant's successful completion of the  
24 interim probation supervision term, notwithstanding the provision of any  
25 other law, permitting the defendant to withdraw his or her guilty plea  
26 and dismissing the indictment or information; or

27 (b) requiring the defendant to undergo a period of interim probation  
28 supervision and, upon successful completion of the interim probation  
29 supervision term, notwithstanding the provision of any other law,  
30 permitting the defendant to withdraw his or her guilty plea, enter a  
31 guilty plea to a misdemeanor or violation offense if the original charge  
32 was a felony, or enter a guilty plea to a violation if the original  
33 charge was a misdemeanor, and sentencing the defendant as promised in  
34 the plea agreement, which may include a period of probation supervision  
35 pursuant to section 65.00 of the penal law; or

36 (c) allowing the defendant to withdraw his or her guilty plea and  
37 dismissing the indictment or information; or

38 (d) sentencing the defendant to less than the statutory minimum  
39 required by article seventy of the penal law where the judge finds that  
40 the defendant took steps to substantially comply with the treatment and  
41 such a reduced sentence is in the interests of justice.

42 11. Nothing in this article shall be construed as restricting or  
43 prohibiting courts or district attorneys from using other lawful proce-  
44 dures or models for placing appropriate persons into [~~alcohol or~~  
45 ~~substance abuse~~] treatment.

46 12. No agreement entered into pursuant to this article shall contain a  
47 provision waiving defendant's right to sealing pursuant to section  
48 160.50 of this chapter.

49 § 7. The criminal procedure law is amended by adding a new section  
50 216.10 to read as follows:

51 § 216.10 Diversion part established.

52 1. The chief administrator of the courts is hereby directed to estab-  
53 lish, in each county of the state, a part of the court to be known as  
54 the diversion part for the county in which such court presides. To aid  
55 in their work, such judges shall receive annual training in specialized  
56 areas, including, but not limited to mental health and substance abuse

1 needs, including co-occurring disorders, evidence based-practices, and  
2 trauma-informed care, as well as training in procedural justice and  
3 cultural competency. The chief administrator of the courts shall ensure  
4 that all employees who staff the diversion parts receive specialized  
5 training in procedural justice and working with people with complex  
6 needs.

7 2. Each chief administrator of the courts shall at the end of each  
8 year prepare and file an annual report, which the office shall compile,  
9 publish on its website and make available upon request to members of the  
10 public. Such reports shall not include any personal identifying informa-  
11 tion for any individual defendants. Each such report, in addition to  
12 other relevant information, shall set forth, disaggregated by each coun-  
13 ty served:

14 (a) the number of defendants with cases in the diversion part;

15 (b) the length of time, in months, each case remained in the diversion  
16 part prior to acquittal, dismissal, release on recognizance, revocation  
17 of release on conditions, and sentencing;

18 (c) the race, ethnicity, age and sex of each defendant in the diver-  
19 sion part;

20 (d) the crimes with which each defendant was charged;

21 (e) whether the treatment obtained was for substance use, mental  
22 health, co-occurring or other;

23 (f) the court disposition in each supervised case, including sentenc-  
24 ing information;

25 (g) the costs saved to the county by avoiding pre-trial or post-con-  
26 viction detention in a county jail or state prison; and

27 (h) a list of service providers, including contact information, that  
28 the diversion part in the superior court of the county partners with to  
29 serve defendants.

30 § 8. This act shall take effect immediately; provided, however that  
31 the amendments to the opening paragraph of subdivision 1 of section  
32 216.00 of the criminal procedure law made by section two of this act  
33 shall be subject to the expiration and reversion of such paragraph  
34 pursuant to section 12 of chapter 90 of the laws of 2014, as amended,  
35 when upon such date the provisions of section three of this act shall  
36 take effect.