



Mental
Health
Project



Testimony of

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My name is Marco Barrios. I am a criminal justice advocate in the Mental Health Project of the Urban Justice Center. My primary responsibilities entail monitoring New York City's compliance with the terms of the *Brad H.* settlement, which requires the City to provide discharge planning services to people receiving mental health treatment in City jails.

I am also a member of the Treatment Not Jail Coalition, a collective of statewide mental health care professionals, attorneys, community organizers, treatment providers, law enforcement, faith-based leaders, and, importantly, people with lived experience who advocate for human rights and systemic reform at the intersection of mental health, substance use, and criminal justice.

I am a veteran of the United States Armed Forces and served in the Gulf War. I am also a survivor of the criminal legal system myself. In 2017, I was released from New York State prison after serving 24 years and six months.

I am here to share my personal and professional experiences observing first-hand the abhorrent care those with mental health and substance use concerns receive in our jails and prisons. Ultimately, I am here to urge the legislature to endorse the Governor's pledge to expand mental health courts by including in this year's budget the Treatment Not Jail Act

([S.1976B-Ramos/A.1263B-Forrest](#)), which will provide legislative authority to establish these diversion opportunities statewide, and make sure they are modeled according to best practices.

Thank you for the opportunity to testify here today.

I. New York’s Shameful History of Criminalizing and Incarcerating Those with Mental Health and Substance Use Challenges

As a result of decades of racist, abusive, and policies and systemic neglect, people with mental health conditions are drastically overrepresented in New York State’s carceral system. Nearly 55% of the people in New York City’s Department of Correction custody are in need of mental health services,¹ and the proportion of those diagnosed with a debilitating “serious mental illness,” such as schizophrenia, schizoaffective disorder and bipolar disorder, has skyrocketed in recent years.² Currently, roughly 1,200 people who are incarcerated in NYC jails are diagnosed with a serious mental illness, about 20% of the entire incarcerated population.³ In some facilities, the number of people with mental health diagnoses exceed those without.⁴ New York State’s jails and prisons have become larger mental health providers than psychiatric hospitals.⁵ In fact, Rikers Island in New York City houses more people with mental illness than any psychiatric hospital in the entire state.⁶

Importantly, as I have seen with my own eyes, New York’s carceral system subjects those with mental health and substance use issues to horrific conditions, leading to an unprecedented rise of avoidable deaths among these vulnerable populations.⁷ The unprecedented number of deaths at Rikers Island in recent years is an ugly reminder of this.⁸ Those who do survive the horrors of incarceration return to our communities traumatized and unmoored: disconnected from housing, public assistance, treatment, and services while struggling to establish livelihoods under the stigma of a criminal conviction. This is why even short periods of incarceration are proven to increase recidivism.

¹ https://vera-institute.shinyapps.io/nyc_jail_population/

² New York City Comptroller. (August 2023). The State of New York City Jails: One Year of Measuring Jail Operations and Management on the Comptroller’s DOC Dashboard. <https://comptroller.nyc.gov/reports/the-state-of-new-york-city-jails/>

³ *Id.*

⁴ Source: [Vera Institute of Justice](#).

⁵ <https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness>.

⁶ Jan Ransom, The New York Times, *How Rikers Island Became New York’s Largest Mental Institution* (Dec. 29, 2023)

<https://www.nytimes.com/2023/12/29/nyregion/nyc-rikers-homeless-mental-illness.html#:~:text=As%20the%20proportion%20of%20mentally,pandemic%20swept%20across%20New%20York>.

⁷ *Id.*

⁸ Jonah E. Bromwich, The New York Times, *Medical Care at Rikers is Delayed for Thousands, Records Show* (February 1, 2022), <https://nytimes.com/2022/02/01/nyregion/rikers-island-medical-care.html>.

Jail and prison are especially deadly for those struggling with substance use issues. Overdose is the leading cause of death among people recently released from jail and prison.⁹ With respect to heroin overdoses in particular, the likelihood of overdose death in the two weeks following a release from incarceration is a staggering 74 times that of the average population.¹⁰ Even a year after release, the likelihood of overdose is 10-18 times higher among formerly incarcerated individuals than for people who have not been incarcerated.¹¹

Unfortunately, as discussed below in Section III, thousands of justice-involved New Yorkers who become entangled in the criminal legal system due to their mental health or substance dependence health condition have few opportunities to exit the revolving door of incarceration and criminalization. Our criminal legal system's failure to provide treatment continues the vicious cycle of destabilization and trauma, increases the chance of recidivism, and ultimately fails to protect our communities.

II. The Effectiveness and Underutilization of Treatment Courts in New York State

To mitigate the harm caused by the criminalization of substance use and mental health, New York must expand access to and modernize its diversion opportunities. Diversion programs, also known as treatment courts or problem-solving courts, are specialized court parts that seek to address and treat the root causes that drive individuals' involvement in the criminal legal system, like substance use disorder and/or mental health issues. Rather than processing a case through the traditional criminal court system, which might entail a conviction and a jail or prison sentence, diversion allows individuals to resolve their cases by successfully completing a course of treatment that places them on a path towards long-term recovery.

Generally speaking, diversion programs are incredibly effective at making individuals experiencing substance use and mental health challenges healthier and making communities safer. Diversion opportunities have proven to cut rearrest rates by half and grow employment rates by 50% over 10 years.¹² They also significantly reduce drug relapse rates and promote better psychosocial outcomes in the long term.¹³ This is true in New York's diversion courts as well. According to a comprehensive study of New York City drug diversion courts published in 2015, "when controlling for a range of background factors, enrollment in treatment leads to

⁹ Joudrey, P.J., Khan, M.R., Wang, E.A. *et al.* A conceptual model for understanding post-release opioid-related overdose risk. *Addict Sci Clin Pract* 14, 17 (2019), available at <https://doi.org/10.1186/s13722-019-0145-5>.

¹⁰ Shabbar Ranapurwala PhD MPH, Meghan Shanahan PhD, *et al.*, "Opioid Overdose Mortality Among Former North Carolina Inmates," *American Journal of Public Health*; (April 27, 2018) <https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304514>.

¹¹ *Id.*

¹² 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>

¹³ Paul S. Appelbaum, M.D., Ordering Abstinence: How Far Can Courts Go in Requiring Offenders to Remain Substance Free?, *J. of Law & Psychiatry* (Oct. 2018) <https://ps.psychiatryonline.org/doi/10.1176/appi.ps.201800357>.

statistically significant reductions in time to re-arrest,” and the “average number of felony violent rearrest was 50 percent lower for the diverted sample compared to the sentenced sample.”¹⁴

Thanks to the legislature’s leadership in 2009 in passing Drug Law Reform, New York State established drug diversion in every county in the state for individuals experiencing substance use disorder. The statute created in this effort - Criminal Procedure Law Article 216 - is currently the only law on the books that permits judges to offer court-mandated treatment to people as an alternative to incarceration.

But the current law does not go far enough. Article 216 only accepts a narrow subset of the population in need of treatment because under the statute, only a small percentage of non-violent drug and theft-related penal law charges are eligible for drug court. The results of these exclusionary policies can be deadly. In Philadelphia, for example, a 2016 study revealed that of over half of the 907 individuals who died from overdoses in Philadelphia in 2016 had prior contact with the criminal legal system in the last two years, and only nine were deemed eligible to participate in drug court.¹⁵

Moreover, even when a person is otherwise eligible, drug courts often reject people with mental health conditions or intellectual or developmental disabilities because “substance use” is not the primary diagnosis. So even these otherwise eligible candidates for drug court are rejected because of their impairment. Many of those who are rejected by drug courts are given a felony record and sent to state prison, where upon their release, they are without supports, without health care, and without a home – all of which can lead to drug use, psychiatric decompensation and ultimately, continued contact with the criminal legal system.

There is no analogous diversion court option for those with mental health challenges, despite the fact that mental health issues are prominent in the criminal legal system, and our society in general. Despite the undeniable need for mental health treatment in our legal system, New York law provides no legislation that authorizes mental health courts.

In the absence of any statutory authority permitting these courts, some District Attorney offices throughout the state have collaborated with courts and the defense bar to create *ad hoc* mental health courts. However, because eligibility is determined by prosecutors, very few people have access to these courts. In addition to rejecting mental health court applicants due to the person’s history or underlying charges, prosecutors gatekeeping these courts often refuse to accept people

¹⁴ Jim Parsons, Qing Wei, Joshua Rinaldi, Christian Henrichson, Talia Sandwick, Travis Wendel, Ernest Drucker, Michael Ostermann, Samuel DeWitt, Todd Clear, A Natural Experiment in Reform: Analyzing Drug Policy Change In New York City, Final Report, National Institute of Justice, <https://www.ojp.gov/pdffiles1/nij/grants/248524.pdf>.

¹⁵ Ruth T Shefner, Jason S Sloan, Kayla R Sandler, Evan D Anderson, *Missed opportunities: Arrest and court touchpoints for individuals who fatally overdosed in Philadelphia in 2016* Int J Drug Policy, 2020 Apr;78:102724 <https://pubmed.ncbi.nlm.nih.gov/32279054/>.

with intellectual disabilities, developmental disabilities, traumatic brain injuries, neurological disorders and personality disorders - even when their criminal legal charges are directly related to their disability or impairment.

To be clear, because there is no legislation authorizing mental health courts, judges have no discretion in deciding whether to admit a deserving person into these courts. As a result, the mental health courts that do exist are wildly underutilized. In 2021, for example, there were 39 mental health courts in existence across the state, but of the nearly 275,000 individuals arrested that year, only 570 were granted admission to these courts.¹⁶

The result is that many deserving, vulnerable, justice-involved New Yorkers who have been failed by health care, educational, and child welfare systems during their lives end up in jail or prison, only to be released back into their communities without a home, without supports and without health care.

III. New York's Treatment Courts Are In Need of Modernization To Reflect Current Best Practices and Regain The Trust of Potential Participants.

In the nearly fifteen years since CPL Article 216 was enacted, society's understanding around addiction and mental health has evolved significantly, and the research regarding treatment practices has revealed new insights on best intervention and treatment strategies. Unfortunately, the governing statute does not reflect these current best practices and drug courts across the state have failed to adapt on their own.

For example, most drug courts in New York faithfully subscribe to the bedrock theory of coerced treatment, a treatment court model in vogue in the years preceding the enactment of CPL Art. 216. As a consequence of this treatment paradigm, courts across the state maintain a heavy reliance on jail sanctions and gross overuse of restrictive treatment settings, even when residential treatment is not medically appropriate.¹⁷ However, many recent studies have disputed

¹⁶ Data provided from the Office of Court Administration in 2022, on file with authors and available upon request; *see also* New York State Unified Court System, 2020 Annual Report (2020) <https://www.nycourts.gov/legacypdfs/20-UCS-Annual-Report.pdf> (reporting only 140 people admitted into mental health courts in 2020).

¹⁷ Diego García-Sayán, Dainius Pūras, Information Note: Drug courts pose dangers of punitive approaches encroaching on medical and health care matters, UN Experts say, UNCHR Special Procedures (March 2019) https://www.unodc.org/documents/commissions/CND/2019/Contributions/UN_Entities/InfoNote20March2019.pdf; Riggs, R., Parsons, J., Wei, Q. *et al.* From punishment to treatment: a providers' perspective on the implementation of 2009 Rockefeller Drug Law reforms in New York. *Health Justice* 2, 10 (2014). <https://doi.org/10.1186/2194-7899-2-10> (“[M]any providers interviewed expressed concern that the assessments conducted by the various screening and referring agencies in the courts are often not clinically oriented and that decisions about treatment modalities and length often seemed to be determined by criminal justice rather than clinical concerns.”).

the basic premise of this treatment philosophy,¹⁸ and in fact, have revealed a grave risk of overdose for individuals receiving such coercive treatment.¹⁹ The overuse of jail sanctions is particularly alarming for individuals suffering from substance use disorder, because, as detailed above, any periods of incarceration raise the specter of overdose. Moreover, the abuse of jail sanctions is shown to lead to worse outcomes overall, including more criminal involvement and more drug use by the participant.²⁰

Moreover, because CPL Art. 216 is unclear as to how medical decisions should be made, judges often assume the role of final arbiter, often overruling the judgment of medical professionals in making treatment planning or prescription drug decisions.²¹ For many reasons, this convention has drawn widespread unease from partnering treatment providers and healthcare professionals,²² raised human rights concerns,²³ and ultimately, has not benefited participants.²⁴

Finally, CPL Art. 216 contains little statutory authority ensuring uniform (or even any) due process in the event of alleged noncompliance, leaving far too much opportunity for abusive practices to flourish.²⁵ As reported by practitioners and current and former participants, the sanctions and judicial responses to alleged noncompliance can be unpredictable, and on too many occasions, overly punitive.

¹⁸ See, e.g., D. Werb, A. Kamarulzaman, M.C. Meacham, C. Rafful, B. Fischer, S.A. Strathdee, E. Wood, *The effectiveness of compulsory drug treatment: A systematic review*, Intl. J. of Drug Policy (Feb. 2016) <https://www.sciencedirect.com/science/article/abs/pii/S0955395921003066>.

¹⁹ Anh T. Vo, Christopher Magana, Matthew Hickman, Annick Borquez, Leo Beletsky, Natasha K. Martin, Javier A. Cepeda, *Assessing HIV and overdose risks for people who use drugs exposed to compulsory drug abstinence programs (CDAP): A systematic review and meta-analysis*, Intl. J. of Drug Policy (Oct. 2021).

²⁰ Shelli B. Rossman, Michael Rempel, John K. Roman, Janine M. Zweig, Christine H. Lindquist, Mia Green, P. Mitchell Downey, Jennifer Yahner, Avinash S. Bhati, Donald J. Farole, Jr., *The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts, Volume 4* (Dec. 2011) <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/237112.pdf>.

²¹ Riggs, R., Parsons, J., Wei, Q. *et al.* From punishment to treatment: a providers' perspective on the implementation of 2009 Rockefeller Drug Law reforms in New York. *Health Justice* 2, 10 (2014). <https://doi.org/10.1186/2194-7899-2-10>; *Neither Justice Nor Treatment: Drug Courts in the United States*, Physicians for Human Rights (June 2017), https://phr.org/wp-content/uploads/2017/06/phr_drugcourts_report_singlepages.pdf.

²² *Id.* (“[M]any providers interviewed expressed concern that the assessments conducted by the various screening and referring agencies in the courts are often not clinically oriented and that decisions about treatment modalities and length often seemed to be determined by criminal justice rather than clinical concerns.”).

²³ *Neither Justice Nor Treatment* Drug Courts in the United States, Physicians for Human Rights (June 2017), https://phr.org/wp-content/uploads/2017/06/phr_drugcourts_report_singlepages.pdf.

²⁴ Driessen, M., Schulz, P., Jander, S. *et al.* Effectiveness of inpatient versus outpatient complex treatment programs in depressive disorders: a quasi-experimental study under naturalistic conditions. *BMC Psychiatry* 19, 380 (2019). <https://doi.org/10.1186/s12888-019-2371-5>.

²⁵ Honorable William Meyer (Ret.), Chapter 8: Constitutional and Legal Issues in Drug Courts, National Drug Court Institute, Judicial Benchbook <https://nyatcp.org/assets/pdfs/powerpoints2020/NDCI%20Judicial%20Benchbook%20Chapter%208.pdf>; Center for Justice Innovation, A Practitioner’s Guide to Constitutional and Legal Issues in Adult Drug Courts (May 2023) <https://www.innovatingjustice.org/sites/default/files/media/document/2023/Constitutional-and-Legal-Issues.pdf>

IV. The Treatment Not Jail Act (S.1976B/A.1263B) is the Legislation New York Needs To Modernize and Expand Access to Diversion

The Treatment Not Jail Act ([S.1976B-Ramos/A.1263B-Forrest](#)) addresses the untapped potential of New York's treatment courts by dramatically expanding access to and improving upon the treatment model outlined in CPL Art. 216.

First, the Treatment Not Jail Act would allow admission for people with mental health diagnoses, intellectual disabilities and other mental health challenges which have interfered with their functioning in society and led to their involvement in the criminal legal system. Under the model envisioned by Treatment Not Jail, judges would be empowered to order diversion regardless of the underlying charge or the person's criminal history, as long as the court determines that the person's underlying mental health or substance use issue has contributed to their criminal legal system involvement, that such underlying issue can be effectively treated, and that it is in the best interest of the public to offer the individual community-based treatment. Such a decision would be based upon the scientific assessment of mental health clinicians and evidence and arguments submitted by the prosecution and the applicant. This admissions criteria will vastly expand the pool of eligible and deserving diversion candidates.

Moreover, under the Treatment Not Jail model, diversion participants will not be required to plead guilty in order to access treatment. This is an approach already used in Opioid Intervention Courts, Manhattan Misdemeanor Mental Health Court, and in all mental health treatment courts currently operating in California. In these courts, the pre-plea model has been proven to be incredibly effective. Not only has it expanded the pool of participants and shown better outcomes, it has also fast-tracked and streamlined what has historically been an inordinately cumbersome admissions process. Passage of this important law would thus ensure the widespread application of what already is proven to work throughout New York state and in other parts of the country.

In addition to expanding access to these courts, the Treatment Not Jail Act improves upon the treatment court model by requiring judges to implement evidence-based best practices. The legislation incorporates the tenets of harm reduction and clarifies that relapse or positive toxicology results should not be used punitively, in accordance with OASAS guidelines.

Moreover, the bill requires diversion judges and personnel to undergo annual training in specialized areas such as the latest research on substance use disorder treatment, the effectiveness of certified peers, harm reduction principles, and the tenets of procedural justice in treatment court settings. Continuous training will reduce gaps in skills and resources, while keeping court staff apprised of new treatment, evidence-based practices, and rapidly evolving areas such as brain science and its impact on behavior and cognitive functions. This language is

modeled on language in the Raise the Age statute, which instituted similar training for youth part judges and court staff statewide.

The Treatment Not Jail Act also removes a judge's ability to override health professionals and mandate specific forms of treatment (residential, detox, etc) and clarifies that healthcare professionals will develop a treatment plan in accordance with peer-reviewed best practices and the regulations and guidance promulgated by the OMH, OASAS, and OPWDD. The language in the statute is largely borrowed from Insurance Law § 3216. TNJ also establishes standards for modifications of the agreed-upon treatment plan, clarifying that those decisions, too, should be made by a mental healthcare professional or treatment provider.

Finally, the Treatment Not Jail Act will afford treatment court participants with rightful due process protections, including the prohibition of summary jail sanctions and other punishments without process. The bill primarily achieves this by mandating a hearing and response-setting protocol in the event of alleged noncompliance, the process and particulars of which are carefully detailed. This will protect the rights of those enrolled in these programs, provide clarity and transparency for participants and all other court actors, and engender trust in the relationship between the court and participant.

V. Conclusion

In order to effectively address the mental health and overdose crises in New York, our state must recognize the significant harms caused by the criminalization of mental health and addiction, and make every effort to provide off-ramps for individuals caught in the criminal legal system who suffer from these issues. New York has already developed a robust infrastructure of drug courts and other *ad hoc* treatment courts over the past fifteen years. Now it is time to modernize and expand access to these important vehicles for diversion. The Treatment Not Jail Coalition therefore urges the Senate and Assembly to recognize the urgency of passing statewide legislation like the Treatment Not Jail Act to allow these courts to reach their full potential and save as many lives as we can.