



**REPORT ON PROPOSED LEGISLATION BY THE
CRIMINAL JUSTICE OPERATIONS COMMITTEE, CRIMINAL COURTS
COMMITTEE, AND MASS INCARCERATION TASK FORCE

CREATING A FIRST-TIME FELONY DIVERSION COURT**

I. INTRODUCTION

The New York City Bar Association calls on the legislature to create a diversion court for individuals facing their first felony conviction, through which they would receive individualized programming, and, upon successful completion, would have their case dismissed.¹ A copy of proposed legislation is appended to this report.

The long-term effects and collateral consequences of an individual's first felony conviction are well known.² From substantially decreased job opportunities to an inability to secure housing to disenfranchisement, those convicted of a felony for the first time face a difficult road to a stable life. Indeed, a felony conviction can effectively propel an individual to further criminal systems contact, as the aggravating factors that led an individual to commit a felony often continue to exist after the conviction, alongside a whole new set of barriers a felony conviction creates. Communities as well as individuals participating in this program would receive substantial benefits if the criminal justice system addressed the root causes of recidivism, while simultaneously preventing the sharp decline in opportunities that follows a felony conviction.

¹ The Criminal Justice Operations Committee has expansive jurisdiction involving issues relevant to New York State penal law and procedure and the functioning of the courts with regard to criminal cases. The Criminal Courts Committee consists of prosecutors, and criminal defense attorneys who analyze laws and policies that affect the criminal courts in New York. The Task Force on Mass Incarceration is comprised of leaders committed to criminal justice reform—prosecutors, defense attorneys, judges, and other experts on criminal law. The Task Force is committed to reducing the mass incarceration rate with a focus on the state of New York. For more information on the committees and their work, visit <https://www.nycbar.org/issue-policy/issue/criminal-justice>.

² Not only are the collateral consequences of a felony conviction severe, but they are also racially disparate, with Black and Latino individuals suffering more collateral consequences than white individuals from felony convictions. See e.g. Decker, S. et. al. *Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment*. Nat'l Institute of Justice, available at http://thecrimereport.s3.amazonaws.com/2/fb/e/2362/criminal_stigma_race_crime_and_unemployment.pdf; Darren Wheelock, *Collateral Consequences and Racial Inequality: Felon Status Restrictions as a System of Disadvantage*. 21 J. of Contemporary Criminal Justice 82 (2005)(all websites last visited Dec. 9, 2020).

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

In contrast, by diverting individuals facing first-time felony charges to a specialty court created to address the circumstances that led to their interaction with the criminal system, prosecutors and legislators could re-imagine a first felony offense as a moment for intervention rather than punishment. Such a court could involve wrap-around services, including education, job training and placement, mental health services, housing assistance and peer mentorship. Upon successful completion of a program crafted to fit the needs of the individual, they would have their case dismissed, thereby avoiding the permanent collateral consequences accompanying a felony conviction.

This report makes the case for such programs, gives some examples of similar programs in other states, suggests best practices, and offers sample legislation that could create a first-time felony diversion court in New York.

II. THE NEED FOR FIRST-TIME FELONY DIVERSION

Judges, prosecutors, and defense counsel recognize the need for first-time felony diversion. As a result, informal versions of such programs based exclusively on prosecutorial consent have been crafted across the state.³ Prosecutors sometimes allow for “repleaders” in which an individual pleads guilty to a felony, completes a program, and is then allowed to withdraw his plea and instead plead to a misdemeanor. Such dispositions are generally driven by individual defense attorneys who take on the burden of finding an appropriate program and convincing a prosecutor their client deserves such a chance. Prosecutors maintain complete discretion over who qualifies for such a disposition and whether the individuals have met their obligations (though judges may intervene if they believe prosecutors are miscarrying justice).

Across the country, alternative programs have been shown to be effective; they reduce convictions and incarceration, re-arrests and costs.⁴ In New York City, non-custodial intervention programs have succeeded in lowering recidivism rates and costs associated with the criminal justice system.⁵ However, only a few individuals benefit as existing programs are piecemeal and generally based upon prosecutorial consent.

III. SIMILAR PROGRAMS IN OTHER STATES

If approved, the New York statute would be a first-of-its-kind means of allowing individuals charged with a broad range of felonies, who complete pre-trial programming, to have

³ In the absence of an act by the legislature, great strides could still be made in this arena if District Attorney’s Offices and court systems instituted a first-time felony diversion program based on prosecutorial consent similar to the creation of drug diversion courts by individual District Attorneys prior to the establishment of the program statewide by the legislature.

⁴ See Rempel, M. et. Al. *NIJ’s Multisite Evaluation for Prosecutor-Led Diversion Programs*, Center for Court Innovation, April 2018, available at https://www.courtinnovation.org/sites/default/files/media/document/2017/Pretrial_Diversion_Overview_ProvRel.pdf.

⁵ For example, CASES offers individualized services to 16-24 year-olds facing a felony conviction in New York City. Their program lowers rates of incarceration, recidivism and costs. *Court Employment Project*, CASES, <https://www.cases.org/programs/court-employment-project/>.

the charges against them dismissed and avoid the stigma of a criminal record. A number of states, including Ohio and Rhode Island, have established pre-trial programming for non-violent offenses; in fact this is a developing trend.⁶ In other states, individuals charged with a first felony who are not sentenced to prison upon conviction may have their cases dismissed after attending programming (Connecticut) or apply to have their records expunged (Michigan, New Jersey).⁷

In 2013, Illinois began the Offender Initiative Program (OIP)⁸ for individuals charged for the first time with certain non-violent felony categories (theft/forgery/burglary/drugs), with the prosecutor's agreement. Individuals participating in OIP engage in a special pre-conviction probation program. If the individual completes the program, the case records are expunged. Illinois is now also experimenting with a weapon offender program under which an individual pleads guilty to an unlawful use of weapons or aggravated unlawful use of weapons offense and enters an 18-24 month First Time Weapon Offender Program. Upon successful completion, the charges are dismissed and the record sealed. This pilot initiative is scheduled to run through 2023. New Jersey has a similar program, Pretrial Intervention Program (PTI), with judicial discretion to order six-month to three-year programming followed by a dismissal, but there is a presumption against admitting individuals charged with violent felonies and domestic violence-related crimes into the program.⁹ Seventeen statutory factors are laid out for the court to take into consideration in deciding whether to permit an individual to participate, including "due consideration" of the victim's position.

IV. PROPOSED MODEL FOR NEW YORK

a. Overview

Rather than rely solely on prosecutorial discretion, a first-time felony diversion program in New York would follow the same procedures as the drug diversion courts. Individuals facing their first felony conviction could request evaluation by a diversion court, as is currently done for drug diversion.

Prior to any plea, an initial evaluation would be done to determine whether the individual would be a good candidate for diversion and what services they would most benefit from if admitted. After the evaluation, the People, the defense, and any victim would have a chance to weigh in before a judge would determine whether to offer diversion and what programming and supervision would be required.

Ideally, each court system would have a dedicated judge who would handle the diversion court, and other judges in the system would send individuals to the diversion judge for evaluation.¹⁰

⁶ Ohio Rev. Code § 2935.36; R.I. Gen. Laws 1956 § 8-2-39.3

⁷ CT Gen Stat § 54-56e; Michigan Court Rule 8.119(I); N.J.S.A. 2C:52-6(c)

⁸ 730 ILC 5/5-6-3.3.

⁹ NJSA 2C:43-12

¹⁰ One study of drug courts found that different judges had different rates of impact on the recidivism of individuals, and that judges who did more than one rotation on the drug court had a greater impact on lowering recidivism the second time around, suggesting judges became more successful over time when working in diversion courts.

Pleading guilty to the felony charge would not always be a prerequisite for participation in the program.¹¹ Instead, the diversion judge could determine whether an individual should be required to plead guilty prior to entering the program. A judge could determine that due to, for example, immigration consequences or the high likelihood of an individual prevailing at a suppression hearing or trial, they should be allowed to enter the program without pleading guilty.¹²

If admitted into the diversion program and required to plead guilty, the individual would do so pursuant to a contract that would outline the terms of the program and provide an alternative sentence should the individual fail the program. Such a contract should allow for partial completion of the program, with a commensurate reduction in sentence and/or level of crime to be entered.

If admitted and not required to plead guilty, the individual would likewise enter into a contract which would outline steps required in order to have the case dismissed.

After accepting an individual into the program, court parts could work closely with established non-profit organizations where available, or, for smaller counties, have on-staff social workers who would not only conduct the evaluations and provide updates to the court, but also help individuals access needed services. Regular check-ins would occur before the judge, with the prosecutor and defense present, along with a staff member from the program, to update the judge on the individual's progress.

After meeting pre-determined goals, an individual would graduate from diversion court, their guilty plea would be vacated, and their case dismissed and the case sealed for civil purposes, though remain visible to courts, prosecutors and the defense.

b. Who Would Qualify?

Most programs like the proposed model are designed only for individuals charged with non-violent crimes, and in New York would typically also exclude those accused of A1 and A2 drug felonies. However, the ideal first-time felony diversion program would allow for the admission of those facing violent offenses or A1 or A2 drug crimes, where appropriate. Not every individual facing violent or high-level drug crimes would be granted diversion, but those who the diversion court believes would benefit should not be precluded from participating in this programming. Allowing their participation would ultimately lead to a decrease in recidivism and an increase in community safety.

Finigan, M.W; Carey, S.M.; Cox, A. *Impact of a Mature Drug Court Over 10 Years of Operation: Recidivism and Costs*, Dep't Justice Report, July 2007, <https://www.ncjrs.gov/pdffiles1/nij/grants/219225.pdf>.

¹¹ Other states, including Maryland, have been able to establish procedures for delaying a case without a plea. In Maryland, this is known as "disposition by stet" in which a prosecutor can move to have trial indefinitely delayed and after three years the individual can have the case expunged. Conditions can be set on the individual during this period of time. Md. Rule 4-248.

¹² In the current drug diversion law, pre-plea diversion is allowed in "exceptional circumstances" involving "severe collateral consequences." C.P.L.R. 216.05(4). As discussed further below, we recommend authorizing such pre-plea diversion in a wider range of circumstances.

In addition, these categories include a broad range of crimes that all fall under the same umbrella, but may be radically different both in the seriousness of the offense and the circumstances that led to the commission of such an offense. A wide range of actions may result in an A1 or A2 felony drug charge. For example, a person selling less than 50 pills of some brands of Percocet (oxycodone mixed with acetaminophen) is guilty of an A2 felony because the weight of the pills is increased by the high quantity of acetaminophen contained within them. Certain life circumstances also come into play. Some individuals guilty of more serious A1 drug offenses, such as possessing, for example, a kilogram of fentanyl, may simply be impoverished and may have been paid a very small amount of money to transport a large amount of drugs from one location to another.

Similarly, there is a wide range of behavior that can be charged as a “violent felony” offense, and judges should be able to weigh whether or not a person accused of such a crime, as well as their community, could benefit from the individual’s inclusion in a diversion program. Most prosecutors and defense attorneys would agree that some individuals charged with crimes such as Robbery in the First Degree would benefit from a rehabilitative model that seeks to address the root causes of their behavior. Similarly, simple gun possession outside of one’s home is a violent felony in New York. Kings County has a “gun court” dedicated solely to illegal possession of firearm cases. In a review of two hundred cases in the Kings County gun court, it was determined that 70% of participants had no prior felony conviction and two-thirds were in their teens or twenties.¹³ Recognizing that these young individuals may benefit from alternatives to incarceration, even though their underlying offense involves possession of a gun, the Brooklyn District Attorney’s Office allows for diversion in some circumstances. Expanding this program would benefit communities across the state.

Furthermore, as has been the case since 2017, 64% of those currently imprisoned in New York State are incarcerated for offenses categorized as violent.¹⁴ Thus, criminal justice reform efforts cannot systematically exclude all individuals accused of violent felony offenses.

The goal of the proposed model diversion court is to allow judges to consider any individual who could benefit from the program such that participation would reduce the likelihood that they would commit future crimes as compared to the likely outcome of incarceration and a felony conviction. After all, not all individuals charged with non-violent felonies would be appropriate candidates for such a program, and judges can be trusted to make that determination. By the same token, some individuals charged with violent offenses would certainly be less likely to commit crimes in the future if given the opportunities the model program presents. The Legislature should trust judges to make informed decisions based on individual cases rather than prevent individuals from receiving needed programming and the chance to move on with their lives based upon inexact categories.

¹³ EMILY BAZELON. CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATIONS 70 (2019).

¹⁴ *Issue Brief: People Incarcerated in New York: Population Profile and Recent Trends*. Correctional Association of New York, 2019, <https://static1.squarespace.com/static/5b2c07e2a9e02851fb387477/t/5c5ae47a971a184de7158ad9/1549460603410/CANY+Issue+Brief+-+Population+Profile.pdf>.

c. Allowing for Failures & Partial Completion

A model program must be cognizant of the pressures that may have led the individual to the court house in the first place.¹⁵ A proportionate, flexible approach to program “failure” and partial completion should be among the program’s guiding principles. Response to an individual’s failure to abide by the program terms should be proportionate; an all-or-nothing approach that requires perfection from all participants will result in unnecessary failures and subvert the goals of the program.

Models for such flexibility exist, including those encompassed by the highly successful HOPE (Hawaii Opportunity Probation with Enforcement) program in Hawaii. Any violation of probation for those in HOPE results in the individual being briefly jailed within 72 hours of the violation, but individuals are allowed to stay in the program and on probation. In order to gauge results of the program, HOPE conducted a study. Individuals were randomly placed in HOPE or in traditional probation. The study found that, as compared to those in traditional probation, “HOPE participants were 79% less likely to fail a drug test and 55% less likely to be rearrested for a new crime.”¹⁶ A range of responses, which are known to the individual, that are swift and not unnecessarily punitive are more effective than other forms of punishment.

In addition, if, ultimately, a participant is unable to complete the program, the individual should receive partial credit for participation. A reduction in sentence or a lower level plea should be allowed for those individuals who do not complete the program but meaningfully participated in it.

d. Pre-Plea Diversion

As discussed above, there should be flexibility to allow for pre-plea diversion in appropriate cases. The judge should weigh multiple factors to determine whether or not an individual should be allowed to enter the program without pleading guilty or should be required to plead guilty in the case. Some factors a judge could consider in such a determination, include:

- Collateral consequences of a guilty plea, including immigration, employment, housing, education, licensing, familial, and financial consequences;
- Effect of time on the People's ability to prove their case;

¹⁵ A good example comes from a member of the Criminal Justice Operations Committee. One prosecutor on the Committee had agreed to a repleader from a misdemeanor to a violation for an individual who was accused of a felony drug sale. The individual had recently aged out of foster care and was homeless. The repleader agreement included the standard rule that the individual could not be arrested for a new crime for the year following the misdemeanor plea. Over the course of the year, the individual was arrested twice, once for Trespass for sleeping on a cold day in the stairwell of a NYCHA building, and once for Theft of Services when he jumped a turnstile at a subway station. The individual was still allowed to replead to a violation (and neither of his other arrests resulted in convictions). That the individual had agreed to this repleader did not change the fact of his poverty, and arrests so clearly resulting from his poverty did not and should not have netted him a criminal record.

¹⁶ BAZELON at 211-2.

- Weaknesses in the People's case, including the possibility of suppression of evidence;¹⁷
- Effect of extending the potential duration of the case on any alleged victims of the crime with which the individual has been charged;
- History and characteristics of the individual.

Through this process the Court could determine whether the interests of justice support an individual taking a guilty plea prior to entering the program or allowing that person to enter the program without admission of guilt. If a Court determines that it is appropriate to require the individual to plead guilty, the Court should also issue a Certificate of Relief from Disabilities at that time, which would provide protection when seeking jobs and housing, thus furthering the rehabilitative goals of the program.

V. CONCLUSION

The creation and funding of a diversion court such as the one proposed has the potential to change individual lives, while simultaneously lowering crime rates. By addressing the pressures that lead individuals to commit crimes and helping them avoid the stigma and narrowing of opportunities that comes with a felony conviction, the criminal justice system can lower recidivism rates and make communities safer. This could lead to a reduction in incarceration rates in both the short and long term. Not only would successful participants be diverted from incarceration in the immediate term, but if the program succeeds in lowering recidivism rates, it would lower future rates of incarceration even for those who otherwise might have been sentenced to traditional probation. This proposal is in keeping with the growing body of research and statistics underscoring the failures of incarceration and punishment as a means of effective social reform and supports a more humane and rehabilitation-oriented criminal justice system.

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¹⁷ It is important too that judges and prosecutors be thoughtful about who would have been given a misdemeanor offer in the absence of this program when making this determination. It would pervert the goals of this program for an individual to be convicted of a felony because of entering the program and failing if, otherwise, the individual would have received a misdemeanor.