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## JUDICIAL DIVERSION PROGRAM FOR CERTAIN FELONY OFFENDERS

(effective 10/7/09 to all cases pending on or committed after 4/7/09)

The Criminal Procedure Law has been amended to add Article 216 entitled “**Judicial Diversion Program for Certain Felony Offenders**” (Judicial Diversion). This new law allows the Court, in its discretion, to divert certain eligible defendants into drug treatment as a condition of a deferred sentence. Upon a defendant’s successful completion of the conditions of the program, the Court can dismiss the case in its entirety, order a period of interim probation, or reduce the conviction to a misdemeanor and impose a non-jail sentence.

### Assignment of Cases (effective immediately)

Paragraph (r) has been added to Judiciary Law § 212(2), which states that the Chief Administrator must “ensure that cases eligible for judicial diversion . . . shall be assigned to court parts . . . and that, to the extent practicable, such cases are presided over by judges who, by virtue of the structure, caseload and resources of the parts and the judges’ training, are in the best position to provide effective supervision over such cases, such as the drug treatment courts . . .”

### Eligible Defendants

Anyone charged with a felony under Article 220 or 221 (except Class A felonies) or any of the following “specified offenses” is eligible (NOTE: The new law mistakenly refers to the “specified offenses” in CPL 410.91[4]: it should be subsection 5):

Burglary in the Third Degree

Criminal Mischief in the Second or Third Degrees

Grand Larceny in the Fourth Degree (subdivisions 1-6 and 8-10)

Grand Larceny in the Third Degree (except when property stolen is a firearm, rifle, or shotgun)

Unauthorized Use of a Vehicle in the Second Degree

Criminal Possession of Stolen Property in the Fourth Degree (subdivisions 1-3, 5, and 6)

Criminal Possession of Stolen Property in the Third Degree (except when property possessed is a firearm, rifle, or shotgun)

Forgery in the Second Degree  
Criminal Possession of a Forged Instrument in the Second Degree  
Unlawfully Using Slugs in the First Degree  
An attempt to commit any of the above offenses if such attempt constitutes a felony

### Ineligible Defendants

Notwithstanding the foregoing, a defendant is ineligible if:

(a) within the preceding ten years (excluding time incarcerated), he/she was convicted of any:

Violent Felony as defined in Penal Law §70.02

Any Class A felony offense

All Article 130 felonies

All Article 263 felonies

Manslaughter in the Second Degree

Vehicular Manslaughter in the First and Second Degrees

Criminally Negligent Homicide

Incest in the Second and Third Degrees

Aggravated Harassment of an Employee by an Inmate

(b) has previously been adjudicated a second or persistent violent felony offender

(c) is currently charged with one of the offenses specified in paragraph (a)

**\*ALL INELIGIBLE DEFENDANTS BECOME ELIGIBLE UPON THE PEOPLE'S CONSENT**

### The Evaluation

Any time after the criminal court arraignment, but prior to the entry of a guilty plea or the commencement of trial, an eligible defendant may request that the Court order an alcohol and substance abuse evaluation, which is a written assessment and report by:

(a) a court-approved entity or licensed health care professional experienced in the treatment of alcohol and substance abuse; or

(b) an addiction and substance abuse counselor credentialed by the Office of Alcoholism and Substance Abuse Services pursuant to Mental Hygiene Law § 19.07.

The evaluation shall include:

(a) whether the defendant has a history of **alcohol or substance abuse or dependence** (as such terms are defined in the DSM-IV) (hereinafter referred to as **AOSA/D**) and a co-occurring mental disorder or illness and the relationship between such abuse or dependence and the disorder or illness, if any;

(b) a recommendation as to whether the defendant's AOSA/D could be effectively addressed by judicial diversion;

(c) a recommendation as to the treatment modality, level of care, and length of any proposed treatment to effectively address the defendant's AOSA/D and any co-occurring mental disorder or illness; and

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

The sole purpose of the evaluation is to determine whether the defendant should be offered **judicial diversion for treatment of any AOSA/D and any co-occurring mental disorder or illness**. Defendants may decline to participate in the evaluation at any time. However, if they wish to participate, they must provide a written authorization consenting to disclosure of the results to his/her attorney, the prosecutor, the local probation department, the Court, authorized court personnel, and other individuals specified in such authorization.

Upon receipt of the evaluation, the Court must provide a copy to the defendant and the prosecutor, whereupon either party may request a hearing on the issue of whether the defendant should be offered **Judicial Diversion**.

### The Hearing on Granting Judicial Diversion

The hearing shall be held as soon as practicable to facilitate early intervention in the event that the defendant is found to be in need of treatment. At the hearing, the Court may consider:

- (a) oral and written arguments,
- (b) testimony from witnesses offered by either party; and
- (c) any relevant evidence, including, but not limited to:
  - (i) evidence that the defendant received YO treatment within the preceding ten years (excluding time incarcerated) for any offenses that would otherwise cause him to be ineligible; and
  - (ii) oral or written statement by the victim of any “specified offense” with which the defendant is being charged.

### Findings of Fact

Upon completion of the hearing, the Court shall make findings of fact as to whether:

- (a) the defendant is an eligible defendant;
- (b) the defendant has a history of AOSA/D;
- (c) such abuse or dependence is a contributing factor to the defendant’s criminal behavior;
- (d) the defendant’s participation in judicial diversion could effectively address such abuse or dependence; and
- (e) institutional confinement of the defendant is or may not be necessary for the protection of the public.

## Plea

An eligible defendant may participate in **Judicial Diversion** upon the Court's determination, or upon agreement of the parties and the Court, that he/she should be offered alcohol or substance abuse treatment. However, prior to an order granting judicial diversion, the defendant must enter a guilty plea to the charge or charges, except if:

- (a) the People and the Court consent to treatment without a guilty plea, or
- (b) the Court determines that exceptional circumstances call for treatment without a guilty plea because severe collateral consequences could result from the entry of a plea of guilty regardless of the ultimate disposition.

The defendant must also agree on the record or in writing to abide by the "release conditions" set by the Court, which shall include participation for a specified period in an alcohol or substance abuse treatment program(s) identified by the Court, which may include periods of detoxification, residential or outpatient treatment or both, as determined after taking into account the views of the health care professional who conducted the evaluation and any health care professionals responsible for providing or monitoring the defendant's progress in treatment; and may include:

- (a) periodic Court appearances, which may include periodic urinalysis; and
- (b) a requirement that the defendant refrain from engaging in criminal behaviors.

The Court accepting the plea retains jurisdiction for the duration of treatment. If at any time during the defendant's participation, the Court has "reasonable grounds" to believe that the defendant has violated a release condition or has failed to appear before the Court as requested, the Court shall direct the defendant to appear or order a bench warrant.

## The Hearing on Violation of Release Conditions

In determining whether a defendant has violated a release condition, the Court may conduct a summary hearing consistent with due process and sufficient to satisfy the Court that the defendant has, if fact, violated the condition. If the Court determines that the defendant has violated a release condition, the Court may:

- (a) modify the conditions;
- (b) reconsider the order of recognizance or bail; or
- (c) terminate participation and, when applicable, proceed with the defendant's sentencing.

In determining what action to take, the Court shall consider all relevant circumstances, including:

- (a) the views of the prosecutor, the defense, and the treatment provider;
- (b) the extent to which people sometimes relapse prior to successfully completing a drug treatment regimen; and
- (c) the use of a system of graduated and appropriate responses or sanctions.

The Court may terminate a defendant's participation for violating a release condition when such termination is necessary to preserve public safety. A defendant may at any time advise the Court that he/she wishes to terminate participation, at which time the Court shall proceed with the case and, where applicable, impose sentence. If the Court imposes sentence, the Court may sentence the defendant in accordance with the plea agreement or to any lesser sentence, "taking into account the length of time the defendant spent in residential treatment and how best to continue treatment while the defendant is serving that sentence."

If the defendant successfully completes treatment, the Court may:

- (a) order a period of interim probation supervision and then dismiss the indictment;
- (b) order a period of interim probation supervision, have the defendant plead to a misdemeanor, and then sentence the defendant as promised (which may include a period of probation); or
- (c) vacate the plea and dismiss the indictment.

#### Conditional Sealing (effective 6/8/09)

Provided the defendant has no other pending cases, upon the successful completion of Judicial Diversion, the sentencing Court may, on its own or on the defendant's motion, conditionally seal all records relating to the arrest, prosecution, and resulting conviction for the drug crime or specified offense charged.

The Court may also conditionally seal up to three prior eligible drug misdemeanors if:

- (a) the Court and the People review the defendant's criminal history, including sealed cases;
- (b) the cases identified by the Court for sealing have been completed; and
- (c) the DA(s) in the county(ies) in which the case(s) had been pending have been notified and given a reasonable opportunity (at least 30 days) to comment.

In deciding whether to seal cases, the Court may conduct a hearing to determine:

- (a) the circumstances and seriousness of the offenses;
- (b) the defendant's character, including the completion of Judicial Diversion;
- (c) the defendant's criminal history;
- (d) the impact of sealing on the defendant's rehabilitation and successful re-entry into society; and
- (e) the impact on public safety.

A sealing order would prevent the disclosure of the record to any person or private agency, except:

- (a) the defendant or designated agent;
- (b) qualified agencies;

- (c) in connection with an application for a gun license; or
- (d) in connection with an application to be a police officer or peace officer.

No person shall be required to divulge information about an arrest or accusation that was terminated:

- (a) in favor of the accused;
- (b) by YO adjudication;
- (c) by conviction for a violation sealed pursuant to CPL § 160.55; or
- (d) by conviction sealed under this provision.

If there is a subsequent arrest, the records would be automatically unsealed and remain unsealed unless the new charge is resolved in favor of the accused, at which time they will again become conditionally sealed.

### **Other Changes**

Interim Probation (applies to all cases committed after 4/7/09 and to any cases committed prior to 4/7/09 where sentence was not imposed as of that date)

Only drug courts may adjourn sentencing for more than one year, upon defendant's consent.

Re-sentencing (effective 10/7/09, except for appointment of counsel provision, which is effective immediately)

Anyone convicted of a Class B drug offense committed prior to January 13, 2005, and sentenced to an indeterminate sentence with a maximum of more than three years, may apply to be re-sentenced. Counsel is to be appointed for these motions. Defendants may not apply for Re-sentencing if they are a second or persistent violent felony offender, or if they are serving a sentence or have a predicate conviction within the preceding ten years (excluding time incarcerated) for:

- Any Violent Felony as defined in Penal Law §70.02
- Any Class A felony offense
- All Article 130 felonies
- All Article 263 felonies
- Manslaughter in the Second Degree
- Vehicular Manslaughter in the First and Second Degrees
- Criminally Negligent Homicide
- Incest in the Second and Third Degrees
- Aggravated Harassment of an Employee by an Inmate

## SENTENCING OPTIONS

### Court-Ordered Comprehensive Alcohol and Substance Abuse Treatment (CASAT) (effective immediately)

Upon a motion by any felony drug offender, the sentencing court may exercise its discretion to direct the Department of Correctional Services to enroll the defendant in a "comprehensive alcohol and substance abuse treatment program" operated at a medium-security residential dormitory. A defendant convicted of a drug felony may begin participating in such a program when he or she is within 21½ years of eligibility for release on parole or conditional release. Regardless of the proximity to such release dates, however, a second felony drug offender convicted of a class B drug felony may not enter such program before serving a total of nine months on the underlying term of imprisonment.

(Now, the time served requirement for second felony offenders is nine months.)

### Shock Incarceration (effective immediately)

An "eligible inmate" means a person who:

- (a) is eligible for release on parole or for conditional release within three years;
- (b) has not reached the age of 50 years;
- (c) has not previously been convicted of a felony upon which an indeterminate or determinate term of imprisonment was imposed;
- (d) was between the ages of 16 and 50 at the time of the commission of the crime upon which his or her present sentence was based; and
- (e) is not a second felony Class B drug offender.

Notwithstanding the foregoing, no person who is convicted of any of the following crimes will be deemed eligible to participate in this program:

- (1) a violent felony offense as defined in Article 70 of the Penal Law;
- (2) an A-1 felony offense;
- (3) any homicide as defined in Article 125 of the Penal Law;
- (4) any felony sex offense as defined in Article 130 of the Penal Law; and
- (5) any escape or absconding offense as defined in Article 205 of the Penal Law.

DOCS is directed to place judicially sentenced SHOCK prisoners directly into the program upon admission to DOCS or as soon as they are within three years of eligibility for parole or conditional release. If an eligible defendant's medical or mental health precludes participation, Corrections will propose an alternative. If defendant refuses the alternative, he shall be produced before the sentencing court for an opportunity to modify the sentencing order.

(Now, the Judge not DOCS controls entry into SHOCK, and those defendant's whose medical or mental health precludes participation must be offered an alternative.)

Parole Supervision a/k/a Willard (applies to all cases pending on or committed after 4/7/09)

A defendant is eligible when he/she:

(a) has not previously been convicted of a violent felony or a Class A or B felony, other than a Class B drug felony;

(b) is not subject to an undischarged term of imprisonment; and

(c) only stands convicted of the following offense(s):

Burglary in the Third Degree

Criminal Mischief in the Second or Third Degrees

Grand Larceny in the Fourth Degree (subdivisions 1-6 and 8-10)

Grand Larceny in the Third Degree (except when property stolen is a firearm, rifle, or shotgun)

Unauthorized Use of a Vehicle in the Second Degree

Criminal Possession of Stolen Property in the Fourth Degree (subdivisions 1-3, 5, and 6)

Criminal Possession of Stolen Property in the Third Degree (except when property possessed is a firearm, rifle, or shotgun)

Forgery in the Second Degree

Criminal Possession of a Forged Instrument in the Second Degree

Unlawfully Using Slugs in the First Degree

An attempt to commit any of the above offenses if such attempt constitutes a felony

A Class B, C, D, or E drug felony

A Class C, D, or E marijuana felony

(Now, those convicted of for the first time of Class B drug offenses are eligible. No longer needs to be a second felony offender.)

# JUDICIAL DIVERSION PROGRAM

(effective 10/7/09 to all cases pending on or committed after 4/7/09)

Article 216 has been added to the Criminal Procedure Law.

Entitled “**Judicial Diversion Program for Certain Felony Offenders,**” the new law allows judges to divert eligible defendants into drug treatment.

Preference for cases to be assigned to Drug Treatment Courts.

Chief Administrative Judge to promulgate rules regarding the assignment of cases.

**Eligible** defendants are those charged with Class B or lower drug felonies or specified non-violent felonies, including defendants with prior convictions for most non-violent felony offenses.

**If the people consent, any defendant may be eligible to participate.**

At the request of an eligible defendant, the **Court can order an evaluation** to determine whether the defendant has a history of alcohol or substance abuse or dependence that can be effectively addressed by participation in a court mandated judicially supervised treatment program.

If the Court decides to allow a defendant to participate in Judicial Diversion over the People’s objection, the People may request a hearing to contest the ruling.

If the Court decides not to allow a defendant to participate in Judicial Diversion, the defendant may request a hearing to contest the ruling.

In order to participate in Judicial Diversion, **the defendant must enter a guilty plea, except** if the Court and the People consent to treatment without a guilty plea, or if the Court determines that exceptional circumstances call for treatment without a guilty plea.

Sentence is deferred and the Court accepting the plea retains jurisdiction for the duration of treatment.

The Court shall set “**Release Conditions**” including: participation for a specified period in treatment, periodic court appearances, periodic urinalysis, and refraining from criminal behavior.

If the **defendant successfully completes treatment**, the Court may: order a period of interim probation supervision; reduce the conviction to a misdemeanor and then impose a non-jail sentence; or vacate the plea and dismiss the indictment.

If, after a summary hearing, the Court finds that the **defendant violated a release condition**, the Court can: modify the conditions, remand the defendant, or terminate participation. Use of a system of graduated sanctions is encouraged.

If the Court imposes sentence, the sentence can be the one agreed to at the time of the plea or any lesser sentence, “taking into account the length of time the defendant spent in residential treatment and how best to continue treatment while the defendant is serving that sentence.”

Provided the defendant has no other pending cases, upon the successful completion of Judicial Diversion, the sentencing court may **conditionally seal** all records relating to the arrest, prosecution, and resulting conviction for the drug or specified felony charged, as well as up to three prior eligible drug misdemeanors.