

TESTIMONY OF:

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BROOKLYN DEFENDER SERVICES

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Oversight Hearing on Community Problem-Solving Courts

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My name is Yung-Mi Lee and I am the Legal Director of the Criminal Defense Practice at Brooklyn Defender Services (BDS). BDS is a public defense office whose mission is to provide outstanding representation and advocacy free of cost to people facing loss of freedom, family separation and other serious legal harms by the government. For over 25 years, BDS has worked, in and out of court, to protect and uphold the rights of individuals and to change laws and systems that perpetuate injustice and inequality. Thank you to the Committee on Public Safety and Chair Hanks for the opportunity to testify today about Brooklyn's problem solving and community courts.

BDS represents approximately 21,000 people each year who are accused of a crime, facing loss of liberty, their home, their children, or deportation. Our staff consists of specialized attorneys, social workers, investigators, paralegals, and administrative staff who are experts in their individual fields. BDS is fortunate to have the support of the City Council to supplement the services we provide as a public defender office in Brooklyn. Through specialized units of the office, we provide extensive wrap-around services that meet the needs of people with legal system involvement, including civil legal advocacy, assistance with educational needs of our clients or their children, housing and benefits advocacy, as well as immigration advice and representation.

Problem Solving Courts

In 2009, as part of the Rockefeller Drug Law Reforms, New York State passed the Judicial Diversion Program legislation. Under Criminal Procedure Law Article 216 (CPL 216), this legislation created a pathway for a small subset of people with substance use disorders to avoid

prison and potentially have their charges reduced or dismissed after engaging in a course of treatment. This treatment is monitored by specialized courts in every county in New York. Judicial diversion has successfully enabled thousands of individuals to minimize or avoid a criminal record while receiving the benefit of potentially lifesaving substance use treatment. Judicial diversion has also realized the saving of tax dollars, from both reductions in recidivism and the decreased costs per capita of treatment versus incarceration.

Many of the people we serve become eligible for support services only because of their interaction with the NYPD and the criminal legal system. With the support of the City Council, we are able to provide robust support services to people who may have avoided court involvement if they had access to services sooner, such as assistance navigating public assistance and affordable housing applications as well as access to quality long-term mental health care, substance use treatment, educational support, respite centers, or immigration assistance.

We are committed to continuing to provide these services to the people who come through our doors but urge the City to consider why it takes an arrest or investigation for a New Yorker to access meaningful assistance and humane support. We urge the City Council to work with the Mayor to begin to move funding away from surveillance and criminalization and toward community investment and community-based responses. This must include ongoing support for existing community-based providers, who can provide increased interim services to allow the City to reduce reliance on the criminal legal system and move toward evidence-based alternatives. We are committed to providing a bridge in services for people who continue to be impacted by the criminal legal, family regulation, and immigration systems as we work to shrink the scope of these systems and their impact on Black, Latine, and other New Yorkers of color.

Mental Health Court

BDS is proud to have played an important role in the creation of the Brooklyn Mental Health Court (MD-1) in 2002. The Brooklyn Mental Health Court works with people accused of crimes who have serious and persistent mental illnesses, linking them to long-term treatment as an alternative to incarceration. BDS continues to collaborate with this court to advocate for its expansion to meet the needs of more people, including people with intellectual disabilities and people who have prior criminal legal system involvement. Our Mental Health Representation Team is made up of specially trained attorneys and social workers who are experts in working with and for people who have been accused of a crime and who are living with serious mental illness or a developmental disability.

Drug Courts

Pressed by formerly incarcerated people, grassroots activism and legal experts to reverse skyrocketing incarceration rates for drug offenses, New York City became a pioneer in the creation of drug treatment courts in the early 1990's and remains one of the jurisdictions with the most developed post-arraignment diversion system. While these courts are part of the problematic drug prohibition model, they have helped reduce jail and prison admissions and sentences within that structure. A landmark report, *Better by Half: The New York City Story of Winning Large-Scale Decarceration While Increasing Public Safety*,¹ details and attempts to quantify the impact of these courts, including the Drug Treatment Alternative-to-Prison (DTAP) program, originally operated by the Brooklyn District Attorney's office and later replicated throughout the state. For example, "the proportion of felony drug cases that resulted in a prison sentence fell from 21 percent in 1997 to an all-time low of 11 percent in 2007."² Largely as a result of decreased drug arrests and an increase in diversion, the City jail population began to fall from its peak in 1991. State prisons followed suit in 1999 (72,899 in 1999 to 49,424 as of June 1, 2018), with the majority of the decline in admissions coming from New York City. It is important to remember that this decline was relative to the surging incarceration rates under the Rockefeller Drug Laws, during which the state prison population increased by a factor of seven. The decline has only been by about one-third since then.³

In Brooklyn, there are three specialized courts for people charged with drug offenses or who live with a substance use disorder: Screening Treatment & Enhancement Part (STEP), Brooklyn Treatment Court (BTC), and Misdemeanor Brooklyn Treatment Court (MBTC).

I. Screening Treatment & Enhancement Part (STEP)

STEP primarily handles non-drug, non-violent felony cases (such as grand larceny, unauthorized use of a credit card, burglary in the 3rd degree) for people who have substance use disorders. This court also accepts felony drug cases for so-called non-violent predicate felony offenders, or people who have one or more prior non-violent felony convictions in the last ten years. Based upon a clinical evaluation, a participant may receive intensive outpatient or residential treatment. Successful completion of the program results in a dismissal of the court case. Unsuccessful participants receive a jail sentence of up to one year if the person does not have a prior felony.

¹ Judith A. Greene & Vincent Schiraldi, *Better by Half: the New York City Story of Winning Large-Scale Decarceration while Increasing Public Safety*, 29 Fed. Sentencing Reporter 22, 27 (2016), available at https://sites.hks.harvard.edu/ocpa/cms/files/criminal-justice/research-publications/fsr2901_04_greeneschiraldi.pdf.

² *Id.*

³ New York State Corrections and Community Supervision, DOCCS Fact Sheet, June 1, 2018, available at <http://www.doccs.ny.gov/FactSheets/PDF/currentfactsheet.pdf>.

STEP also handles Drug Treatment Alternative to Prison (DTAP) cases. DTAP was the first prosecution-led residential drug treatment diversion program in the country. The program diverts nonviolent felony drug offenders with a prior felony conviction to community-based residential treatment.⁴ DTAP requires an upfront guilty plea to a felony charge that will ultimately be changed to a misdemeanor or an outright dismissal if the participant successfully completes the program. DTAP requires a longer residential treatment mandate – usually up to two years, but can be longer if the person doesn't have a place to live upon release. The mandate also requires six months of outpatient treatment with full-time employment and a stable residence. DTAP can be difficult for our clients to successfully complete because the mandates, i.e. long term residential treatment which often requires giving up stable housing and separation from family, and then obtaining both stable housing and full time employment after a long term residential stay, are difficult to accomplish. Oftentimes, participants hesitate to enter treatment in the first place knowing that relapses will result in jail sanctions, sometimes up to a week, which, again, leads to a disruption in treatment. Notably, DTAP mandates, which are set by the court, are not based on a clinical determination but are based solely on the participant's criminal record. If participants cannot complete the program, they are sentenced to prison time that varies based on their court case.

II. Brooklyn Treatment Court

Brooklyn Treatment Court (BTC) handles felony drug cases for defendants who do not have previous felony convictions (non-predicates). Eligibility for BTC is decided on a case-by-case basis by the prosecutor. However, if the prosecutor does not consent, the court has the capability of offering treatment through judicial diversion for some people, but not all, under the Drug Law Reform Act of 2009.

III. Misdemeanor Brooklyn Treatment Court

Misdemeanor Brooklyn Treatment Court (MBTC) is designed for people who repeatedly face criminal legal system involvement for low-level charges due to their substance use disorder. The court has recently evolved to be less punitive toward our clients. Participants now receive shorter treatment mandates and shorter jail sentences for those who are unable to successfully complete the program due to ambivalence about treatment or an unwillingness or inability to adhere to treatment mandates. Prior to these shortened mandates and jail alternatives, court administrators, the judiciary, treatment staff, prosecutors and defense attorneys found that defendants were

⁴ Prosecutors may also, at their discretion, allow people to participate in DTAP who are charged with or have previous convictions for technically violent felonies, if the underlying conduct of the violent felony was not actually violent and no one was injured. A common example of this is burglary in the 2nd Degree when somebody steals a package from an empty foyer in a residential building.

avoiding this option, preferring to take a plea to the underlying misdemeanor with a sentence of time served (or even short jail sentences). Those who complete the treatment program get a full dismissal of their case.

Veterans Treatment Court

Brooklyn's Veterans Treatment Court opened in 2009 and has been expanding its services and incorporating more and more veterans into its eligible pool of participants ever since. The two specialized court parts that work with veterans or people with military experience who have been accused of a crime. The Felony Veterans Treatment Court accepts people charged with a felony who have a substance use disorder and whose alleged offense is connected to their status as a veteran. The Misdemeanor Veterans Treatment Court accepts people with any level of military experience who have a substance use disorder and have been charged with a misdemeanor offense. The current paradigm requires that someone have both military experience and a substance use disorder. We are hopeful that the Brooklyn courts will follow the example of other veterans courts in the state and expand to include all people with military experience.

Veterans are arrested at a higher rate than the those without military experience⁵ and many of the veterans we represent live with mental illness and/or substance use disorders as a result of their military career. The most prevalent diagnoses involve post-traumatic stress disorder (PTSD) and traumatic brain injuries (TBI). It is our strong belief that special consideration of veterans' experiences must be integrated into any court proceedings, in order to offer tailored solutions that meet the unique needs of this population and minimize the chances that veterans will be incarcerated. In our experience, Veterans Treatment Court provides critical avenues for healing and recovery to individuals who require evidence-based treatment interventions in the community. This specialized focus is extremely helpful in reducing the long-term collateral consequences of a conviction, such as limited employment and educational options, loss of housing, deportation and loss of familial relationships. The targeted intervention of the Veterans Court also increases the likelihood of successful reintegration of veterans into community life, improves our clients' long-term treatment options, increases treatment compliance once the case is completed and reduces the chances of re-arrest.

Red Hook Community Justice Center

The Red Hook Community Justice Center handles cases for misdemeanor and low level offenses in the Red Hook neighborhood. This Court is primarily a diversion court, where people who are arrested for offenses like shoplifting or drug possession are automatically arraigned in the Red

⁵ Council on Criminal Justice, From Service through Reentry: A Preliminary Assessment of Veterans in the Criminal Justice System, August 2022, Available online at <https://counciloncj.org/vjc-preliminary-assessment/>

Hook court, as opposed to being brought to central booking in downtown Brooklyn. This is beneficial because the court focuses on the treatment needs of the same community it serves and provides opportunities for its participants to be released back into that community with easily accessible services in an effort to stem the cycle of rearrest.

Recommendations

Problem solving courts are a critical resource for diverting people out of the criminal legal system, decreasing the city's reliance on mass incarceration and ensuring access to needed treatment services. We respectfully offer the following suggestions to strengthen problem solving courts and improve outcomes for New Yorkers involved in the criminal legal system.

1. Reduce barriers to treatment

All of the Brooklyn treatment courts refer participants to “outside” or “contract” substance use or mental health treatment programs. Most of these programs also serve people who have no court mandate and who do not have criminal justice involvement. However, the overall quality of these programs varies and there are many barriers to acceptance and entry. For example, some programs cannot take participants who have a diagnosed mental illness while some are better equipped to treat people with dual diagnoses. Almost all programs require that participants have medical insurance, usually through Medicaid, making participation nearly impossible for undocumented participants who do not qualify for public health insurance and must pay out of pocket. Additionally, while there are many treatment providers in New York City, existing treatment courts often use the same small number of providers and are unwilling to accept new or different providers.

Many substance use and mental health treatment programs require partial hospitalization, inpatient, or full day programming, which means that participants are at risk of losing their job, source of income, and housing. Moreover, New York City has limited residential treatment bed capacity, which can result in wait times of a few weeks or more. Sometimes, if the person is incarcerated, the longer waiting periods discourage them from choosing the treatment program option because it could mean longer time in jail. There is an extreme shortage of treatment beds in most treatment facilities our clients need to go to from jail. This results in longer stays in dangerous and overcrowded jail facilities that are unable to meet their clinical needs than our other clients face.⁶ Many clients give up on treatment solely because they have to wait in jail for a treatment bed. Also, for these clients, the delays often result in their mental health conditions

⁶ Jake Offenhartz, City Ordered to Pay Rikers Detainees who were Denied Medical Appointments, *Gothamist*, August 10, 2022, Available at <https://gothamist.com/news/city-ordered-to-pay-rikers-detainees-who-were-denied-medical-appointments?betaRedirect=true>

deteriorating. On a number of occasions, BDS clients have lost opportunities for placement in a program because they became too symptomatic due to their extended stay in jail while waiting for the program bed.

More funding for such programs could increase capacity and reduce waiting periods and increase participation. Rather than relying solely on residential programs which are oftentimes not clinically necessary and do not necessarily prepare individuals for independent living, courts should, instead, rely on clinically based recommendations. As such, for those with mental health needs, funding for more supportive housing is critical. An increase in overall funding and expansion of programs must come with program oversight to ensure that programs are actually addressing the need, including mental health needs, providing culturally competent services, serving unique populations or otherwise expanding options for people who need treatment.

2. Employ harm reduction models

All of the drug treatment courts have contributed to positive case outcomes for individual BDS clients, but in general many BDS attorneys are skeptical of STEP and BTC, and in some cases even MBTC. All of the treatment courts allow for relapses and recurring relapses, but our clients face increasingly harsher sanctions with each additional relapse. Additionally, our clients often face harsh punishments, including harsh jail sanctions for low level drug arrests while in these programs. This is particularly problematic because of the disparate treatment between arrests for drug possession and sanctions for drug use. Treatment courts and ATI (Alternative to incarceration) programs are tolerant of drug use relapse, yet almost universally incarcerate or expel participants when they are arrested for possessing the same drugs they tested positive for using. Obviously, for a person to use drugs, that person had to at some point possess the drugs. This model multiplies the punitive nature of our current criminal legal system model for addressing drug use. Additionally, programs almost universally disallow the use of medicated assisted treatment, which is a widely-accepted harm reduction method. Finally, we are concerned about privacy for program participants because providers routinely skirt HIPAA privacy protections when disclosing information to the court when providers should only make disclosures related to program enrollment and compliance.

Our clients often find these coercive treatment regimens and inconsistent punishment schemes to be less effective than voluntary alternatives that do not involve such sanctions. In order to serve more people in need of treatment, ensure greater engagement and successful completion, we recommend non-jail alternatives that address relapse prevention, including the use of medicated assisted treatment, and greater privacy for program participants.

3. Increase access to permanent, affordable housing

People with criminal legal system involvement face additional barriers to accessing housing. For people who are living with serious mental illness, substance use disorder, or court mandated to receive services, homeless or housing insecure creates additional barriers to access treatment. People experiencing homelessness may have difficulties connecting to providers, affording treatment or medication, or accessing transportation to appointments. The Mayor has instructed NYPD to remove people experiencing homelessness from the subway, while simultaneously divesting from the Department of Homeless Services.⁷

In the midst of the COVID-19 pandemic, as the city worked to decarcerate and we fought to get clients out of jail, MOCJ opened several hotels to provide emergency transitional housing to people leaving jail.⁸ This safe, stable housing addressed an unmet need that began far before the pandemic began. Jail populations have risen to pre-pandemic levels. They are overcrowded and deadly. This setting has proven to be life-changing for many of the people we serve. . In lieu of loud, chaotic and often violent congregate shelters, people have private rooms in clean, comfortable buildings where they are treated with dignity and respect. Recently, it has been reported that the MOCJ reentry hotels will close by the end of the year, with the first hotel closing tomorrow, October 1, 2022. We urge the city and this Council to baseline funding in the city budget for permanent emergency reentry housing. This critical resource must be maintained as a part of a continuum of housing options for New Yorkers. We urge the City to concurrently work to expand access to supportive housing for people with SMI or substance use disorders, as well as ensure access to affordable housing for all.⁹

4. Pass a resolution in support of the Treatment Not Jail Act (S2881B/A8524A)

Over the past few years, the New York State Legislature has championed and won historic legislative change in the criminal legal system—including bail and discovery reform. We call on the City Council to follow their lead and pass a resolution calling on the legislature to pass and the governor to sign the Treatment Not Jail Act (S2881B - Ramos/A8524A - Forrest).

The Treatment Not Jail Act (TNJ) will substantially expand access to judicial diversion and create tangible steps toward ending the criminalization of mental health and cognitive

⁷ David Brand, Mayor's Budget Plan Cuts \$615M from Homeless Services, as Subway Crackdowns Intensified, *City Limits*, (February 18, 2022), <https://citylimits.org/2022/02/18/mayors-budget-plan-cuts-615m-from-homeless-services-as-subway-crackdown-intensifies/>

⁸ Ilyssa Daly, 'I Feel Human Again' – At Three Hotels, Formerly Incarcerated New Yorkers get the Support They Need, *Queens Daily Eagle*, (October 12, 2022), <https://queenseagle.com/all/i-feel-human-again-at-three-nyc-hotels-formerly-incarcerated-get-help-with-reentry>.

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impairments in New York. TNJ will create parity in the court system for vulnerable populations who need support and opportunity, and promote public safety by opening avenues of appropriate, individualized treatment where currently the default is incarceration. TNJ will:

- Create equitable access to judicial diversion by making the current judicial diversion law inclusive of people with mental health challenges and neurological, intellectual, and other disabilities.
- Allow New Yorkers to access treatment regardless of where they live. Currently, some counties will not allow people to participate in treatment court unless they are a county resident. TNJ will enable people to engage in treatment court within their county of residence, regardless of where the offense with which they are charged took place.
- Provide due process protection by ensuring that judicial diversion participants are not jailed without due process by requiring there be some substantiation of violations of judicial diversion conditions.
- End automatic exclusions based on level of charge. Currently, some people are excluded from participating in judicial diversion because of the section of the Penal Law with which they are charged regardless of their personal circumstances and background. TNJ will expand access to judicial diversion to people accused of any criminal offense. Research shows that diversion programs promote public safety, and that the nature of the charge does not impact treatment outcomes. TNJ will provide judges with the discretion to give people appearing before them individual consideration.
- Increase likelihood of success by embracing a clinical rather than punitive approach. TNJ will allow individuals to participate in treatment court without requiring them to plead guilty to access treatment. Judges will be trained in the best practices for mental health treatment within the judicial system. These practices will be grounded in providing support for participants and guided by treatment providers' individualized recommendations rather than over relying on punitive sanctions. TNJ will promote collaboration between participants and treatment providers, offering participants the best chance of achieving their treatment goals.

The number of people living with or having experienced mental health issues is at an all-time high, and jails and prisons have become the de facto mental health facilities across New York State. Treatment Not Jail seeks to put an end to this untenable condition and to redirect people out of jails and the criminal legal system and into evidence-based treatment programs that can offer the medical care and support they need.

Conclusion

Brooklyn has some of the best problem solving courts in the state and New York is a leader in the creation and use of drug, mental health, and other treatment courts. Our experience has shown that these courts can provide non-jail alternatives for those wrapped up in the criminal justice system because of substance use disorders and serious mental illness. However, more access is needed for these courts, and the city can help by increasing funding for more programs, more providers, and more beds. But these programs must be flexible, utilize harm reduction models, and increase privacy protections for its participants. New York City must also urge the state to take action by passing the Treatment not Jail bill and ensure equitable access to judicial diversion for all New Yorkers, regardless of where they live and despite the unique challenges that accompany their disabilities. Lastly, while problem solving courts can be a successful method to provide services for our community members *after* they have been arrested, we ask the Council to continue to address the problems in our communities that create the risk of criminal justice involvement in the first place, such as lack of stable housing, access to gainful employment and access to substance use and mental health care.

BDS is grateful to the Committee on Public Safety for holding this important hearing. Thank you for your time and consideration of our comments. If you have any additional questions, please contact me at ylee@bds.org.