

## Memorandum of Support

The Treatment Not Jail Act  
S.2881-B (Ramos)/A.8524 (Forrest)

January 2022

Brooklyn Defender Services strongly urges the legislature to pass the Treatment Not Jail Act (S.2881-B/A.8524), which will create a fair and equally accessible system of judicial diversion for all New Yorkers.

Brooklyn Defender Services (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.

We represent approximately 25,000 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 also provides a wide range of additional services for our clients, 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.

### **THE CURRENT LAW**

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 court parts 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 reoffending and the decreased costs per capita of treatment versus incarceration.

Unfortunately, CPL 216 diversion is limited to people with substance use disorders charged with a short list of crimes related to substance use. The current law leaves behind people who do not live with substance use disorders, but experience other mental illnesses, developmental disabilities, or cognitive impairments that contributed

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to their involvement in the criminal legal system. Like people with substance use disorders, New Yorkers with mental health issues, developmental disabilities, or cognitive impairments face personal challenges that could be effectively addressed through treatment - making our communities safer and stronger. While some counties in our state have developed mental health courts to support people with these kinds of challenges, the adequacy of treatment provided by these courts varies widely by county and participation is extremely limited because of eligibility restrictions. There are myriad reasons why people become involved in the criminal legal system, but the current statutory off ramp is so limited that most people who would benefit from treatment are left behind.

## **BACKGROUND**

Until the 1960s, a large percentage of people with mental health issues were treated within publicly funded hospitals. Gross negligence and the mistreatment of vulnerable patients contributed to the push toward deinstitutionalization.<sup>1</sup> Many people were left without alternative options for treatment. In the following decades, jails and prisons widely replaced psychiatric care units, warehousing people living with mental health issues, substance use disorders, or cognitive delays.

Today, New York relies largely on policing and jails to address issues related to mental health and substance use. People experiencing a mental health crisis are more likely to be engaged by police than medical providers.<sup>2</sup> Across the country, jails and prisons have become the largest provider of mental health care and New York is no exception.

People living with mental health issues have become a scapegoat for concerns about public safety. Increased visibility of people with mental illness combined with the faulty assumption that this population is dangerous can lead to aggressive police intervention.<sup>3</sup> Many societal factors also contribute to the targeting and arrest of people with mental health issues. People with mental health issues are more likely to face challenges in navigating complicated social and health services and are often deemed ineligible for services.<sup>4</sup> With little to no affordable options for treatment or safe housing, many people

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<sup>1</sup> New York State Nurses Association, *A Crisis in Inpatient Psychiatric Services in New York State Hospitals*, 2020, Available online at

<https://www.nysna.org/sites/default/files/attach/ajax/2020/08/Psych%20Whitepaper%20NYSNA.pdf>

<sup>2</sup> National Alliance on Mental Illness, *Jailing people with mental illness*, 2019, Available online at <https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Jailing-People-with-Mental-Illness>.

<sup>3</sup> Heather Steward, *Violence and Mental Illness: an Overview*, *World Psychiatry*, 2003, Available online at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1525086/>.

<sup>4</sup> David Roe and Larry Davidson, *Noncompliance, Nonadherence, and Dropout: Outmoded Terms for Modern Recovery-Oriented Mental Health*, *Psychiatric Services*, 2017, Available online at <https://ps.psychiatryonline.org/doi/pdf/10.1176/appi.ps.201600522>.

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with mental health issues experience homelessness which increases the likelihood that they will encounter police and be arrested for charges such public order offenses. <sup>5</sup>

People living with mental health issues deserve treatment, not jail. Mental health intervention through courts can decrease the jail population and provide people with access to treatment they would not otherwise receive if incarcerated. This has been shown to increase mental health program enrollment and completion of these programs reduces homelessness, psychiatric hospitalizations, and rates of recidivism.<sup>6</sup> New York can become a leader in diverting people with mental health issues out of the criminal legal system and into treatment by passing the Treatment Not Jails Act.

## PROPOSED SOLUTION

The Treatment Not Jail Act will substantially expand access to judicial diversion and create tangible steps toward ending the criminalization of mental health and cognitive impairments in New York. Treatment Not Jail (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

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<sup>5</sup> National Coalition for the Homeless, Mental Illness and Homelessness, 2009, Available online at [https://www.nationalhomeless.org/factsheets/Mental\\_Illness.pdf](https://www.nationalhomeless.org/factsheets/Mental_Illness.pdf).

<sup>6</sup> Nazisha Dholakia and Daniela Gilbert, What Happens When We Send Mental Health Providers Instead of Police, Vera Institute of Justice: Think Justice Blog, 2021, Available online at <https://www.vera.org/blog/what-happens-when-we-send-mental-health-providers-instead-of-police>.

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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 identifying as 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.

Brooklyn Defender Services supports the swift passage of the Treatment Not Jail Act to provide a pathway to treatment for people with mental health issues or cognitive impairments, which will, in turn strengthen our communities and create a safer New York for all.

If you have further questions, please contact Molly Gallivan Senior Policy Counsel & Supervising Attorney, at [mgallivan@bds.org](mailto:mgallivan@bds.org).