

**Testimony of
The Legal Aid Society**

at a public hearing on

The Rockefeller Drug Laws – 35 Years Later

Presented to:

**Assembly Standing Committee on Codes
Assembly Standing Committee on the Judiciary
Assembly Standing Committee on Correction
Assembly Standing Committee on Health
Assembly Standing Committee on Alcoholism and Drug Abuse
Assembly Standing Committee on Social Services**

Presented by:

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May 8, 2008

Good morning. My name is William Gibney. I am the Director of the Legal Aid Society Criminal Defense Practice Special Litigation Unit. I recently served as a member of the Sentencing Policy Subcommittee of the New York State Commission on Sentencing Reform.

The Legal Aid Society is the nation's oldest and largest provider of free legal services to the poor, and since 1876 has provided free legal services to New York City residents who are unable to afford private counsel. The Legal Aid Society also serves as the City's primary public defender for individuals accused of criminal conduct, as well as for individuals accused of parole violations in New York City. Over the past year, our staff provided legal assistance to New York residents in some 295,000 individual cases that addressed a full range of clients' civil, juvenile rights, and criminal needs in all five boroughs of the City.

Given our dual role as both the primary public defender and the largest provider of civil legal services for poor people throughout New York City, work related to sentencing, diversion, and reentry makes up a large and growing part of Legal Aid's practice. From a client's first contact with the criminal justice system through successful community reintegration, the Society's legal and social work staff jointly offer a broad array of services that include (for example) consultation and advising on collateral consequences; exploration of diversion options and alternatives to incarceration; advice and representation to ensure appropriate services during incarceration and to mitigate the effects of prison conditions on reentry; advice and representation to preserve and restore housing, public benefits, and other services during and after release; and a variety of other projects that bring to bear more than a century's worth of multifaceted expertise.

The Need for Further Drug Law Reform

When the Legislature enacted the Drug Law Reform Act, L. 2004, C. 738, the Assembly commented that the long-standing "Rockefeller Drug Laws" served to "warehouse offenders in state prison who could more productively be placed into effective drug treatment programs" and to waste valuable tax dollars "which could be used more effectively to provide drug treatment to addicts and harsh punishment to violent criminals." Noting that "drug treatment is more effective and cost effective than incarceration in eliminating substance abuse and its associated criminality," the Assembly said the Act would expand access to prison-based drug treatment, but emphasized that further action was needed to expand opportunities for community-based treatment for many drug-dependent offenders.

Two and a half years later we still await the next step in drug law reform. With the 2004 and 2005 reforms we have somewhat reduced sentence lengths and allowed some of those serving the harshest sentences to be released. As of May 1, 2008, 364 of the people serving A-I felony offenses under the old law have been re-sentenced and 238 of them have been released from prison. In addition, 350 of those serving A-II felony sentences have been re-sentenced and 193 of them have been released.

We have yet, however, to come to terms with the growing body of evidence which indicates that community-based drug treatment works better than incarceration and even better than correctional-based drug treatment when it comes to preventing future crime and keeping our communities safe. The implications of the research for our criminal justice system are enormous. By moving toward a treatment model, we can move away from the policies which

have a profoundly disparate impact based on race that have characterized the war on drugs,¹ better protect our communities, and spend less money than we currently do to incarcerate thousands of people whose crimes were motivated by the need for drugs.

A review of the various studies supporting the fact that community-based treatment works better than correctional based treatment in terms of preventing recidivism was reported to the Sentencing Commission.² In one such study conducted several years ago, the State of Washington decided that it wanted objective information about what programs worked as a way to provide a cost benefit analysis of their effectiveness. The study it commissioned found community-based drug treatment to be more effective in terms of preventing future crime than either prison or jail based drug treatment.³ In New York State the cost effectiveness of community based treatment has also been verified for quite a number of years by District Attorney Hynes in his reports on the Brooklyn DTAP programs.⁴ There is additional evidence that, for some offenders, the very fact of incarceration, with its severance of community ties and isolating nature, actually tends to create additional crime.⁵

Research produced for the Sentencing Commission also shows that there is a nationwide trend toward greater use of diversion away from prison and into community-based treatment,

¹ "Report Finds Persistent Racial Gap in Drug Arrests," *The New York Times*, Tuesday May 6, 2008

² "Draft Working Paper: 'What Works' in Correctional Programming," New York State Commission on Sentencing Reform, August 2007.

³ "Evidence Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates" by Steve Aos, Marna Miller and Elizabeth Drake,

⁴ "DTAP Drug Treatment Alternative to Prison, Sixteenth Annual Report, Anne J. Swern, April 2007

⁵ Lynne Vieraitis, et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data*," *Criminology and Public Policy*, vol. 6, Issue, at 589, 614 (August 2007).

greater use of community corrections for nonviolent drug offenders, even repeat offenders, and a trend toward procedures that allow judges to depart from mandatory minimum sentences.⁶

New York's Experience with Drug Law Reform

There has been considerable institutional reluctance in New York to follow the trend toward a treatment model. Most District Attorney offices still measure success and failure in terms of the number of criminal convictions obtained and years of incarceration imposed. Collectively they have opposed each step of drug law reform and sought to interpret what has passed in the narrowest terms possible.

In 2006, the Office of the Special Narcotics Prosecutor issued a one sided report that criticized the re-sentencing process and blasted the judges who had objectively reviewed all of the evidence presented about the cases, not just the one-sided description presented by the prosecutor, and agreed to a re-sentence. The Special Prosecutor's report ignored such information as the number of years that had passed since the initial sentence was imposed, the number of years actually served, the rehabilitative efforts made during incarceration, and the prospects for a successful release often many years after the commission of the crime. The Manhattan District Attorney's office recently convinced the First Department to adopt eligibility requirements for the A-II drug law resentencing that were not in conformance with the original legislative intent.⁷ The prosecutors demonstrate their bias by taking these steps to undercut reform while at the same time they assert that they are in the best position to play the role of

⁶ "Draft Working Paper #1: Overview of Sentencing Structures and Trends Nationwide" New York State Commission on Sentencing Reform, August 2007

⁷ See People v. Barber, 46 A.D.3d 359 (1st Dept. 2007) and People v. Ortiz, 854 N.Y.S.2d 309 (1st Dept. April 10, 2008) in which the Appellate Division ruled that the defendants were not eligible for resentencing because they were less than three years away from their merit release date. Had this standard been implemented statewide, we estimate that only about 100 people would have been eligible for A-II sentencing relief.

judge in individual cases and objectively decide which defendants should be eligible for alternatives to incarceration.

The State Department of Correctional Services (DOCS) reports that 72% of its inmate population are self identified substance abusers.⁸ Yet, in spite of the obvious need, DOCS has been slow in implementing drug law reform. For example, it took litigation on the part of The Legal Aid Society and others to force DOCS to honor the quite specific provision of the Drug Law Reform Act of 2004 that permitted sentencing judges to order drug law offenders into the in prison CASAT substance abuse treatment program.⁹ Just this year further litigation forced DOCS to account for the possibility of early release when calculating CASAT eligibility .¹⁰

In contrast to the reaction of many of the government agencies, a number of the reform advocates and service providers recognized that the Drug Law Reform Acts were an opportunity to prove that an approach that emphasized support and treatment could work. The Legal Aid Society realized that it was important to identify and address the substance abuse re-entry needs of drug offenders who were being re-sentenced. In spite of the fact that no resources were legislatively allocated, we created a re-sentencing project, headed by Shreya Mandal, a Licensed Clinical Social Worker, that was centered on developing sentence mitigation and clinical assessments to identify critical substance abuse and mental health re-entry services for A-I and A-II drug offenders.

During the course of this three-year effort in advocating for approximately 100 drug offenders, we assisted almost 20% of the entire population most affected by the Rockefeller

⁸ Department of Correctional Services, *Identified Substance Abusers*, December 2006

⁹ E.g., Matter of Grant v. Goord, N.Y.Co. Index 06-400022

¹⁰ Matter of Phillip St. Louis v. Commissioner, Albany Co. Index 7845-07

Drug Laws. Approximately 70% of our Rockefeller clients successfully gained placement in both outpatient and in-patient drug programs, allowing them to rebuild their lives outside of prison.

Our experience shows that prison-based A.S.A.T and C.A.S.A.T programs are often arbitrarily given to prisoners who have been misdiagnosed in some fashion. More often than not these programs inadequately address critical treatment issues that drug offenders have. Prison based treatment programs fail to consider drug offending populations in a comprehensive manner, preventing drug offenders from achieving recovery. They are also sorely lacking in providing effective treatment models for former prisoners with ongoing addictions. This allows offenders to fail in treatment despite their wishes to change addictive behaviors.

We also found that re-entry providers such as parole and probation officers and substance abuse treatment programs often lacked proper re-entry planning and coordination. There is such a great need for these providers to work in tandem so that drug addicted ex-prisoners have higher chances of success and recovery. Ex-prisoners needed not only individual and group drug treatment, but they also needed mental health services, housing, employment, job training, and other types of emergency assistance. Without the proper coordination of all these other critical re-entry needs, we saw that drug offending clients often relapsed under the stress of having to think about where they were going to live and how they would legitimately pay for the costs of living. In addition, we found that disorganized re-entry planning and coordination, primarily on the part of parole officers who failed to realize the comprehensive needs of a client, often duplicated re-entry services that were no longer needed.

The re-sentencing project provides us with a re-entry model that has been effective when it comes to substance abuse issues. Approximately 70% of our clients that had ongoing

substance abuse problems succeeded in their drug treatment because we provided them with pre-release reentry planning, diagnostic assessments, short-term counseling, and clinical coordination with relevant treatment providers. Based on our experience, it is in everyone's interest that we develop new ways to adequately help drug offenders. If it is done correctly, our State will be spared high rates of recidivism among substance abusers.

One stated explanation for the reluctance of the District Attorneys to expand alternatives to incarceration is that they are not aware of what programs work. As we go forward we should make every effort to provide reliable data to the criminal justice system regarding program effectiveness. In light of the objective information now available, the obvious reluctance of the District Attorneys to recognize the need to change their sentencing practices, and based on our own experience, we should immediately take steps to move toward the more effective treatment model.

Greater Discretion for Judges is Indispensable

If New York is to join the trend adopted by other states, we need to create additional ways to place offenders into diversionary programs. While judges have discretion to sentence certain first-time first felony drug offenders into a treatment program (see PL 70.70(2)(b)), they have no authority to order treatment for most first-time "B" level offenders. Nor can they do so for addicts who commit a second offense, even when it is clear that drug addiction is the cause of the crime.

This near total District Attorney control over the use of alternatives to incarceration is a product of the discredited Rockefeller Drug Laws. While some District Attorneys created alternative to prison DTAP programs to alleviate the harshness of those laws, many did not.

Where programs were created eligibility varies widely from county to county. This has to change. We should have more uniform policies statewide and judges, as the sole neutral party in the case, should have the authority to place offenders into treatment.

With popular approval, we have adopted two stages of drug law reform, and in both cases the reform passed in spite of the initial opposition of the District Attorneys. In fact, there is now a split among the District Attorneys themselves on the issue of alternatives to prison and judicial discretion and it has been prominent in several recent elections for District Attorney.

In light of the compelling public safety, fiscal, and humanitarian reasons to expand the use of treatment alternatives, it would be a great mistake to allow opposition on the part of a few to prevent a more just and efficient use of correctional system and community resources. It will take legislative and executive leadership, but by acting together, with all of our collective expertise, we can and should make it happen.