JUDICIAL DIVERSION

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November 24th 2020

In 2009, in recognition of the all-too-common connection between drug/alcohol abuse and the commission of crimes, and upon the belief that reducing the former can lessen the latter, in 2009, the New York State Legislature expanded the Drug Law Reform Act (DLRA) of 2004 (which provided for shortened sentences for drug offenders and opportunities for re-sentencing), by introducing rehabilitative (and less punitive) alternatives to imprisonment including judicially-imposed SHOCK INCARCERATION (before then, it was entirely a matter of DOCCS discretion), JUDICIAL DIVERSION (JD) and CONDITIONAL SEALING of criminal records.

As noted in People v DeYoung 2012 NY Slip Op.02112 (2d dep't 3/20/12), the Judicial Diversion Program (JDP), embodied in CPL Art. 216, "is part of the legislature's ...(efforts) to encourage courts and prosecutors to consider placing (i.e. "diverting") defendants who commit certain (non-violent [NV] felony drug offenses (FDO), (and other offenses designated in CPL 410.91), to support (or because of) their addictions into a substance abuse program rather than sending them to jail." (citing, inter alia, People v Jordan 28 Misc 3d 208 [Sup Ct NY County 2010).

In Jordan, the defendant who was indicted for Class B felony drug sales ([the second one near a school], and who had four prior felony drug convictions [not consistent with personal use], while eligible for JDP consideration, was rejected by the court as unsuitable where his claimed history of drug and alcohol abuse was contradicted by other evidence, and was more consistent, in the court's view, with recreational use than addictive consumption. The court was, therefore, not satisfied that drug/alcohol abuse was a CONTRIBUTING FACTOR to the defendant's crimes or that JDP, in this defendant's case, could effectively address any such abuse/dependence. (CPL 216.05 [3][b][iii][iv]).

The court in People v Iverson 2011 NY Slip Op. 5171 (Sup Ct, Kings County 2011) sounded a similar theme as expressed in People v DeYoung, supra, noting that the underlying purpose of the statute is to significantly reduce drug (and alcohol) related crime by "addressing the substance abuse that often lies at the core of criminal behaviors, and to accomplish that goal by returning discretion to judges to tailor the Penal Law penalties to the facts and circumstances of each ...offense, and authorizing the court to sentence certain (NVDO'S) to probation and drug treatment (with or without prosecutorial consent), rather than mandatory prison."

Counsel and clients considering JDP as an option must not only be aware of the criteria for JDP eligibility (and disqualification), but also be mindful that the road to successful resolution (preferably by a plea to a misdemeanor with no incarceration, and ideally dismissal of the charges), is long (up to two years or more), demanding (e.g. in-patient and/or outpatient treatment, unannounced drug testing, numerous appearances in JDP court to ensure compliance), and fraught with opportunities for failure (e.g. missed appointments, relapses, new arrests or other avenues for non-compliance).

While the lure of avoiding a jail sentence can be attractive, the defendant may be just putting off the inevitable trip to state prison if he/she is not willing or able to commit to the rigors of rehabilitation in the JDP which, fortunately, does factor in the realistic possibility that a drug addict or alcoholic may falter. (See CPL 216.05([9][c] which requires courts to consider a "system of graduated responses or sanctions" before terminating the defendant from the program).

So, if a court were to offer, for example, a definite sentence of up to one year in jail with no strings attached to resolve a felony case (or the minimum stretch in state prison followed by one year of PRS in lieu of a much longer possible term), that could be an acceptable outcome for a defendant who is unlikely to make it through the JDP.

CPL 216.00 JDP FOR CERTAIN FELONY OFFENDERS/ ELIGIBILITY:

1. An ELIGIBLE DEFENDANT (ED) is any person who is charged in an INDICTMENT or SUPERIOR COURT INFORMATION (SCI) with a CLASS B, C, D, E FELONY OFFENSE defined in: PL Article 179 (Criminal Diversion of Medical Marijuana), PL 220 (Controlled Substance Offenses) PL 221 (Marijuana Offenses) and any other SPECIFIED OFFENSE defined in CPL 410.91(5): which include: BURGLARY 3D DEGREE (PL 140.20), CRIMINAL MISCHIEF 3D DEGREE (PL 145.05) AND 2D DEGREE (PL 145.10), GRAND LARCENY 4TH DEGREE (PL 155.30 [1]-[6],[8]-[10]) AND 3D DEGREE (PL 155.35 [EXCLUDING FIREARMS]), UUV 2D DEGREE (PL 165.06), CPSP 4TH DEGREE (PL 165.45 [1]-[3], [5]-[6]) AND 3D DEGREE (PL 165.50 [EXCLUDING FIREARMS]), FORGERY 2D DEGREE (PL 170.10), CPFI 2D DEGREE (PL170.25), UNLAWFUL USE OF SLUGS (PL 170.60) CRIMINAL DIVERSION OF MEDICAL MARIJUANA 1ST DEGREE (PL 179.10), AN ATTEMPT TO COMMIT ANY OF THE ABOVE OFFENSES; OR a CLASS BFDO [PER PL 220 WHERE SENTENCE IS IMPOSED PER PL 70.70[2][A]; OR ANY CLASS C, D, OR E FDO [PER PL ART 220 0R 221]).

It should be noted that while the JDP is often directed at the "small fry" drug (or alcohol) abuser /addict (see, for example, People v Coco 28 Misc 3d 563 [Sup Ct Brooklyn County 2009]), i.e. "low-level [NVDFO's], or first-time offenders who were misguided in their youth..and addicts driven to possession or selling drugs because of a drug habit" rather than a drug dealer motivated by greed or profit), that does NOT mean that someone who sells or a participates in the sale of controlled substances (even at a high level), is neither eligible nor suitable for JDP.

In People v DeYoung supra, the Second Department held that the County Court erred in denying the defendant (whom the court sentenced to probation upon his guilty plea to Criminal Possession of Marijuana 1st degree, a Class C felony), admittance to the JDP by focusing almost entirely on the defendant's conduct in this case (facilitating a co-defendant's shipments of large amounts of marijuana from California to New York State at a pay-rate of $5,000.00 a pop), without fully considering the defendant's nearly continuous history of marijuana and alcohol abuse since age 12, and the fact that he used at least some of his earnings here to purchase more marijuana and alcohol. (The defendant also testified that he had met this supplier as a result of his involvement in the use of marijuana).

At a hearing held per CPL 216.05(3), the court also considered information from a defense psychologist and testimony from a VA social worker regarding the defendant's dependence on

cannabis for which he was receiving treatment. Even the court evaluator who was adversely swayed by the defendant's level of participation in (and income from) drug dealing, agreed that treatment was absolutely appropriate.

In the appellate court's view, the lower court was wrong to conclude that the defendant's history of substance abuse/dependence was not a contributory factor in his crime (resulting in his first criminal conviction), and the fact that he didn't spend all of his drug earnings on more drugs (it was also used to pay for rent and utilities), should not have been considered a deal breaker for purposes of the JDP. As the court observed, the statute does not require that the defendant's drug/alcohol abuse be the only or primary cause of his criminal behavior, but that it only be a CONTRIBUTING FACTOR.

With respect to the lower court's concern that drug dealers could claim or feign drug addiction in an effort to avoid the punitive consequences of their conduct, the AD noted that trial courts always retain the ultimate discretion to refuse admission of an ED into the JDP, for example, when they conclude that incarceration is necessary for public protection. (CPL 216.05[3][5]).

Such exercise of discretion is usually afforded great deference by the appellate courts (See People v Williams 105 AD3d 1428 [4th dep't 2013]). But in DeYoung, the court apparently felt no need for incarceration because it sentenced the defendant to probation on the Probation Department's recommendation. (The defendant's waiver of appeal upon his guilty plea, it should be noted, expressly did not include the denial of JDP. Hence, the AD deemed the issue to be preserved for appellate review).

In contrast, see People v Iverson supra where the court denied the defendant entry into the JDP because his drug selling activity (13 pre-arranged undercover sales of cocaine and heroin over two months in a public housing project), and the presence of packaging and paraphernalia at the defendant's residence, (with no demonstrable indication of drug abuse), was indicative of a drug dealer conducting business motivated by greed rather than the need to obtain money to buy more drugs to feed an uncontrollable habit. In the court's view, drug abuse/dependence was NOT a contributing factor in the defendant's crime to justify admission into the JDP.

The denial of the defendant's application, it should be noted, was based on the court's discretionary determination that he was ill-suited for the JDP and NOT that he was ineligible in the first place. To the contrary, the court rejected the People's argument that he was ineligible because he was charged with Conspiracy (which is not specifically included among the JDP-eligible offenses nor is it expressly excluded under CPL 216.00[a](b]), in addition to the multiple BF drug sale counts (which were JDP eligible) set forth in the indictment.

In view of the underlying purpose of the statute to reduce drug-related crime by addressing addiction as a causative agent, the court deemed it appropriate to interpret it broadly to include lesser included offenses and, in this case, a charge of Conspiracy which embraces the overt acts (here, leading to the sale of drugs), and, therefore, is integrally related to the commission of the completed crime. Therefore, the inclusion of the Conspiracy counts did not disqualify the defendant from eligibility. Nevertheless, the defendant, as noted above, was ultimately denied admission into the program in the court's exercise of discretion.

BASES FOR INELIGIBILITY FOR JDP:

1(a) A defendant will be deemed INELIGIBLE to enter the JDP if, within the preceding 10 years (excluding periods of incarceration for whatever reason), between the time of the commission of the PREVIOUS FELONY and the time of commission of the PRESENT FELONY, he/she has: previously been (i) convicted of a VF (PL 70.02) or (ii) any other offense for which MERIT TIME ALLOWANCE IS NOT AVAILABLE (per CL 803 [1][d][ii]; or (iii) a CLASS A DFO defined in PL Art. 220; or

(b) has previously been adjudicated a 2VFO (per PL 70.04) or a PERSISTENT VFO (per PL 70.08).

A defendant who (in addition to being charged with other JDP-qualifying offenses), is also charged with a VF or any offense for which merit time allowance is not available, for which the court must sentence the defendant to state prison in the event of conviction, is NOT AN ED WHILE SUCH CHARGES ARE PENDING.

BUT, A DEFENDANT WHO IS EXCLUDED FROM THE JDP PER SUBDIVISIONS (a) and (b) above, MAY BECOME ELIGIBLE UPON THE PROSECUTOR'S CONSENT.

2. ALCOHOL AND SUBSTANCE ABUSE (A/SA) EVALUATION

An ASA EVALUATION means a WRITTEN ASSESSMENT and REPORT by a court-approved entity or licensed health care professional (HCP) experienced in the treatment of alcohol and substance abuse, or by an addiction and substance abuse counsellor credentialed by the Office of Alcoholism and Substance Abuse Services per MHL 19.07 which SHALL INCLUDE:

(a) an EVALUATION as to whether the defendant has a HISTORY of ALCOHOL or SUBSTANCE ABUSE/DEPENDENCE (as defined in the DSM IV) and any co-occurring MENTAL DISORDER (MD) or MENTAL ILLNESS (MI), if any;

(b) a RECOMMENDATION as to whether the defendant's alcohol or substance abuse/ dependence, if any, could be EFFECTIVELY ADDRESSED by the JDP;

(c) a RECOMMENDATION as to the TREATMENT MODALITY, LEVEL OF CARE and LENGTH OF ANY PROPOSED TREATMENT to effectively address the defendant's A/SA/DEPENDENCE and any co-occurring MI or MD;

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

PL 216.05 JDP/ COURT PROCEDURES:

1. At any time AFTER ARRAIGNMENT of an ED and BEFORE the entry of a GP or the commencement of trial (if jury, before opening statements and if bench, before the first witness is sworn), the court, AT THE REQUEST OF AN ED, MAY ORDER an A/SA EVALUATION .

An ED MAY DECLINE to participate in such evaluation AT ANY TIME.

The defendant shall provide a WRITTEN AUTHORIZATION , (in compliance with state and federal laws), authorizing DISCLOSURE of the RESULTS of the assessment to: the defendant's attorney, the prosecutor, the local probation department, the court, authorized court personnel and others specified therein for the SOLE PURPOSE of DETERMINING whether the defendant should be offered JD for the treatment of substance/alcohol abuse/dependence and any co-occurring MI or MD.

2. Upon receipt of the completed report, the court shall PROVIDE A COPY thereof to the ED and the prosecutor.

3(a) Upon receipt of the report, either party MAY REQUEST A HEARING on the issue of whether the ED should be offered A/SA treatment per this article. At such hearing (which should be held ASAPracticable to facilitate early intervention where the ED is found to need treatment), the COURT MAY CONSIDER ORAL and WRITTEN ARGUMENTS, TAKE RELEVANT TESTIMONY FROM WITNESSES OFFERED BY EITHER PARTY, and MAY CONSIDER ANY RELEVANT EVIDENCE INCLUDING EVIDENCE THAT:

(i) the defendant had, within the preceding 10 years (excluding any time spent in jail) between the commission of the acts leading to a YO ADJUDICATION and the time of the COMMISSION OF THE PRESENT OFFENSE), been ADJUDICATED A YO for: (A) a VF (PL 70.02); (B) ANY OFFENSE for which MERIT TIME is NOT AVAILABLE; and

(ii) in the case of a felony under CPL 410.91[5], any statement submitted by the victim (per CPL 380.50[2]).

(b) Upon completion of the hearing, the court SHALL CONSIDER and MUST MAKE FINDINGS OF FACT as to whether:

(i) the defendant is an ED per CPL 216.00 (1);

(ii) the defendant has a HISTORY of A/SA or Dependence;

(iii) such abuse/dependence is a CONTRIBUTING FACTOR to the defendant's criminal behavior;

(iv) the defendant's participation in the JDP COULD EFFECTIVELY ADDRESS such abuse/dependence; and

(v) INSTITUTIONAL CONFINEMENT is/may NOT be necessary for the protection fo the public.

In determining whether a particular defendant is eligible for JDP consideration, courts should follow the plain language of CPL 216.00 (1) rather than attempt to read between the lines in an effort to effectuate some judicially contrived remedy that could open the JDP door to every non-violent felon (whether statutorily eligible or not), whose crime may be related in some way to the abuse of drugs or alcohol.

Such was the case in Matter of Doorley v DeMarco 2013 NY Slip Op. 01937 (4th dep't 2013) where the Fourth Department granted the petitioner (Monroe County DA's) application for a Writ of Prohibition and Declaratory Judgment after County Court admitted defendants into the JDP who were NOT ELIGIBLE under CPL 216.00 (1) but were not SPECIFICALLY EXCLUDED under subdivisions (a) and (b).

The first defendant was granted admittance into the JDP (over the People's objection) twice under consecutive indictments charging her with Falsification of Business Records 1st degree, Identity Theft 2d and 3rd degree (for using fake ID'S to obtain cable service), and then Identity Theft 2d degree . In each case, she pled guilty as charged on the agreement that if she successfully completed the JDP, she would be allowed to withdraw her felony pleas, plea down to a misdemeanor and then be sentenced to no more than three years probation. If she failed, she would face an indeterminate term of two to four years on the original charges.

The second defendant was offered a similar deal (probation if successful in JDP, one year in jail, if not), over the People's objection, on charges of Petit Larceny, Assault 3d degree and Promoting Prison Contraband (stemming from a grocery store theft where the defendant assaulted a security guard then smuggled a cell phone into jail).

The Appellate Division held that County Court acted beyond its authority when it allowed these ineligible defendants to enter the JDP in violation of PL 216.00(1). As far as the AD was concerned, the inquiry should have begun and ended at subdivision one, and since the offenses in question were not among those qualifying for JDP consideration, the lower court had no legal basis to authorize it for either defendant. Therefore, a WRIT OF PROHIBITION (as well as a DECLARATORY JUDGMENT disallowing the court from admitting defendants not eligible under PL 216.00[1]) into the JP) were deemed to be warranted.

Note that in People v Iverson supra, by contrast, the defendant was indicted for several JDP-eligible (Class BF drug sale) offenses, and the inclusion of Conspiracy counts (ineligible offenses in their own right), which directly related to those drug sales did not disqualify him from JDP consideration."

MORE ON COURT PROCEDURES UNDER CPL 216.05:

4. When an authorized court determines per subdivision 3(b) that an ED should be offered A/SA treatment, OR WHEN THE PARTIES AND THE COURT AGREE to an ED'S participation in such treatment, an ED MAY be allowed to participate in the JDP. Before the court issues an order granting JD, the ED SHALL BE REQUIRED TO ENTER A GP to the charge(s).

BUT, NO SUCH GP SHALL BE REQUIRED when:

(a) the People and the court CONSENT to the entry of the JD order WITHOUT A GP; or

(b) based on a finding of EXCEPTIONAL CIRCUMSTANCES, the court determines that a GP SHALL NOT BE REQUIRED. Exceptional circumstances exist when regardless of the ultimate disposition, the entry of a GP is likely to result in SEVERE COLLATERAL CONSEQUENCES (e.g. loss of employment).

DEFENDANT MUST AGREE TO CONDITIONS:

5. The defendant SHALL AGREE on the record (or in writing to ABIDE BY THE RELEASE CONDITIONS set by the court which shall include: participation in a SPECIFIED PERIOD of A/SA treatment at a SPECIFIED PROGRAM(S) IDENTIFIED BY THE COURT, which may include periods of DETOXIFICATION, RESIDENTIAL OR OUTPATIENT TREATMENT (or both), as determined after considering the HCP who conducted the A/SA evaluation and any HCP'S responsible for providing such treatment or monitoring of the defendant's progress therein; and may include: (i) PERIODIC COURT APPEARANCES (which may include urinalysis); (ii) a requirement to REFRAIN FROM CRIMINAL BEHAVIORS; (iii) if the defendant needs treatment for OPIOID ABUSE/DEPENDENCE, that he/she may participate in/receive MEDICALLY PRESCRIBED DRUG TREATMENTS under the care of a HCP licensed/certified under Ed. Law Title 8, acting within the lawful scope of practice, (provided that NO COURT SHALL REQUIRE the use of any SPECIFIED TYPE/BRAND OF DRUG during the period of medically prescribed drug treatments.

6. Upon the ED'S agreement to abide by the court's conditions, the court shall issue a SECURING ORDER providing for bail or OR release on the agreed-upon conditions.

Although defendants who qualify for the JDP will have been charged with an offense which does not, in its own right, warrant monetary bail (i.e. a non-qualifying offense for bail purposes), they are subject to arrest on a bench warrant, revocation of the securing order and modification of their release status (to bail or possibly remand), if they violate the conditions of release in an important respect, or willfully fail to appear in court after reasonable notice. (See subdivision 9[a] below).

The seemingly greater potential restrictions on liberty under CPL 216.00 (notwithstanding the changes in the Bail Law requiring O.R. or release on the LEAST RESTRICTIVE NON-MONETARY CONDITIONS except for QUALIFYING OFFENSES), undoubtedly takes into account that eligible defendants are afforded an opportunity to obtain much-needed treatment for their addictions and, if successful, avoid a felony conviction (and state prison). Toward that end, they will have signed a contract acknowledging the likely consequences of non-compliance with treatment [or of failing to return to court as required], and, in almost all cases, have given up their right to be presumed innocent by pleading guilty as a prelude to admission into the program.

The new Bail Laws, by contrast, are couched in terms of release PENDING TRIAL when the presumption of innocence is still very much alive. (Counsel is well advised to read CPL 216 in conjunction with CPL Articles: 510, 520, 530 and 540).

The period of A/SA treatment shall begin as specified by the court as soon as practicable after the defendant's release (assuming he/she was in custody), taking onto account the availability of treatment, so as to facilitate early intervention with respect to the defendant's abuse/condition and the effectiveness of the treatment program. If a treatment program is not immediately available (or becomes unavailable during the JDP period), the court may release the defendant (if the defendant is in custody).

7. See text of statute for obligations of defendants with private health insurance.

8. During the period of the defendant's participation in the JDP, the court shall retain jurisdiction over the defendant. However, the court may allow the defendant to: (i) RESIDE IN ANOTHER JURISDICTION or (ii) PARTICIPATE IN TREATMENT/OTHER PROGRAMS IN THE JURISDICTION WHERE HE/SHE RESIDES (or in any other jurisdiction), while participating in the JDP under conditions set by the court and agreed to by the defendant per subdivisions (5) and (6) above.

The court MAY REQUIRE THE DEFENDANT TO APPEAR IN COURT AT ANY TIME to enable the court to MONITOR THE DEFENDANT'S PROGRESS in A/SA treatment.

The court shall provide REASONABLE NOTICE to the People, the treatment provider, the defendant and his/her counsel whenever it orders or otherwise requires the defendant's appearance in court. FAILURE TO APPEAR AS REQUIRED WITHOUT REASONABLE CAUSE (i.e. EXCUSE) THEREFOR SHALL CONSTITUTE A VIOLATION OF THE COURT'S AGREEMENT WITH THE DEFENDANT.

9. VIOLATION OF RELEASE CONDITIONS:

(a) If at any time during the defendant's participation in the JDP, the court has REASONABLE GROUNDS to believe that the defendant has VIOLATED A RELEASE CONDITION IN AN IMPORTANT RESPECT OR HAS WILLFULLY FAILED TO APPEAR BEFORE THE COURT AS REQUESTED, the court SHALL, (EXCEPT AS PROVIDED IN CPL 510.50 [2]) which provides for a 48-hour grace period before issuance of the warrant),
(b) DIRECT THE DEFENDANT TO APPEAR OR ISSUE A BENCH WARRANT to a police/peace officer directing that the defendant be TAKEN INTO CUSTODY AND BROUGHT BEFORE THE COURT WITHOUT UNNECESSARY DELAY.

CPL 510.50(2) (enacted in 2020), states that except when the principal (defendant) is charged with a new crime while at liberty, absent credible evidence demonstrating that his/her failure to appear for a scheduled court appearance was WILLFUL, the court, prior to issuing a bench warrant for failure to appear for such appearance, SHALL PROVIDE AT LEAST 48 HOURS NOTICE to the defendant or his/her counsel that he/she is required to appear, in order to give him/her an opportunity to appear voluntarily.

The provisions of CPL 530.60(1) regarding modifications of securing orders apply to proceedings under CPL 216.05 (9). Section 530.60 (1) states that:

Whenever in the course of a criminal action or proceeding, a defendant is at liberty as a result of an order of O.R., Release under Non-Monetary Conditions or Bail issued pursuant to this chapter, and the court considers it necessary to review such order, (whether due to a motion by the People or otherwise), the court may, except as provided by CPL 510.50 (2), concerning a failure to appear in court, by a bench warrant if necessary, require the defendant to appear in court.

Upon such appearance, the court, for good cause shown, MAY REVOKE the O.R. release order, the order of release on non-monetary conditions (which the JDP defendant will already be subject to), or bail.

If the defendant is entitled to O.R. release, release on non-monetary conditions or bail as a matter of right, the court must issue another such order. If the defendant is not so entitled, the court may either issue such an order or to commit the defendant (to the custody of the sheriff in accordance with this section).

SUMMARY PROCEEDING:

(b) In determining whether a defendant has violated a release condition under the JDP, the court MAY CONDUCT A SUMMARY HEARING CONSISTENT WITH DUE PROCESS and SUFFICIENT TO SATISFY THE COURT THAT THE DEFENDANT HAS, IN FACT, VIOLATED THE CONDITION.

In light of the stricter standards for bail revocation in the Bail Reform Act, however, defense counsel should argue that the defendant is entitled to more than a summary hearing including the right to cross examine witnesses. (See, for example, CPL 530.60 [2]).

In People v Shipp 2016 NY Slip Op. 03304 (4th dep't 4/29/16), (a pre-bail reform case), the Fourth Department affirmed the lower court's decision to remove the defendant from the JDP and sentence him to an indeterminate term of imprisonment upon his guilty plea to Grand Larceny 4th degree (PL 155.30[1]) after the defendant was terminated from his drug treatment program and failed to appear at the ensuing court date which resulted in the issuance of a bench warrant pursuant to which the defendant was arrested and returned to court three months later.

The Appellate Division rejected the defendant's argument that the lower court made an insufficient inquiry into whether the defendant violated his conditions which required. inter alia, that he "keep all appointments and court dates"or risk termination from the program. The court held that inasmuch as the defendant's failure to appear in court following his termination from drug treatment constituted a proper basis for the court's finding of non-compliance, there was no need to inquire into the defendant's complaints about the suitability of the treatment program and the circumstances of his removal therefrom. The court also noted that the defendant never claimed that he did not know about the court date, nor did he attempt to account for his non-appearance.

As noted in Subdivision 9 (c), if the court determines that the defendant has violated a JDP condition, the court may: MODIFY the conditions, RECONSIDER the defendant's release/bail status or TERMINATE the defendant's participation in the JDP; and, when applicable, PROCEED WITH SENTENCING in accordance with the agreement.

Truth be told, the application and impact of the new bail laws on bail/release decisions in the context of the JDP are less than crystal clear. When a client is returned on a warrant (due to alleged non-compliance with treatment and or failure to appear), absent clear language in CPL 216 to the contrary, counsel should argue for all the due process considerations and non-monetary bail release options available to non-JDP defendants who are charged with non-qualifying offenses (i.e. offenses for which monetary bail is not authorized).

The court may or may not take the position that it is not bound by the "pre-trial" bail rules in light of the defendant's guilty plea. In such case, inasmuch as the defendant is likely looking at

agreed-upon jail time for violating the JDP contract, not being at liberty will give him/her a leg-up on time-served.

Notwithstanding any other provision of law to the contrary, the court MAY IMPOSE ANY SENTENCE AUTHORIZED FOR THE CRIME OF CONVICTION IN ACCORDANCE WITH THE PLEA AGREEMENT, (or any lesser sentence authorized pursuant to PL 70.70 (2)(b) or (c), taking into account the length of time the defendant spent in residential treatment and how best to continue treatment while the defendant is serving the sentence.

FACTORS TO CONSIDER IN DETERMINING APPROPRIATE ACTION FOR VIOLATIONS:

In determining what action to take, the court SHALL CONSIDER ALL RELEVANT CIRCUMSTANCES, INCLUDING: the views of: the PROSECUTOR, the DEFENSE and the A/SA TREATMENT PROVIDER, and the extent to which defendants who ultimately complete a drug treatment regimen successfully sometimes RELAPSE by using drugs or alcohol, or by failing to comply fully with all requirements of a treatment program.

The court SHALL ALSO CONSIDER USING A SYSTEM OF GRADUATED AND APPROPRIATE RESPONSES OR SANCTIONS DESIGNED TO: ADDRESS SUCH INAPPROPRIATE BEHAVIORS, PROTECT PUBLIC SAFETY AND FACILITATE, WHERE POSSIBLE, SUCCESSFUL COMPLETION OF THE A/SA TREATMENT PROGRAM.

PUBLIC SAFETY:

While the primary objective of the JDP is to promote a defendant's rehabilitation, recovery and re-entry into society as a clean and law-abiding citizen, courts are also expected to be mindful of public safety as a critical consideration.

(d) Toward that end, subdivision (d) states that "(n)othing in this subdivision shall be construed as preventing a court from terminating a defendant's participation in the JDP for violating a ...condition when such a termination is NECESSARY TO PRESERVE PUBLIC SAFETY." (Also, the statute does not stand in the way of further prosecution of the defendant for new/different offenses committed while in the JDP):

GETTING OUT OF THE JDP:

(e) A defendant MAY AT ANY TIME ADVISE THE COURT THAT HE WISHES TO TERMINATE PARTICIPATION IN THE JDP. At that point, the court shall proceed with the case and, where applicable, IMPOSE SENTENCE in accordance with the plea agreement.

The court may impose ANY SENTENCE AUTHORIZED for the crime of conviction in accordance with the plea agreement, or any lesser offense authorized for a felony drug offender per PL 70.70 (b) or (c), taking into account the length of time the defendant spent in residential treatment and how best to continue treatment while the defendant is serving his/her sentence.

SUCCESSFUL COMPLETION:

(10) Upon the court's determination that the defendant has successfully completed the required A/SA treatment and has otherwise satisfied the conditions of the JDP, the court SHALL COMPLY with the terms and conditions that it set for final disposition when it accepted the defendant's agreement to participate in the JDP.

Such disposition MAY INCLUDE : (a) requiring the defendant to undergo a period of INTERIM PROBATION SUPERVISION (IPS), and upon successful completion thereof, permit the defendant to WITHDRAW HIS/HER GP and DISMISSING THE INDICTMENT; or (b) imposing IPS and upon successful completion, allow the defendant to WITHDRAW his/her FELONY GP and PLEAD GUILTY TO A MISDEMEANOR and then sentence the defendant in accordance with the plea agreement (which may include PROBATION per PL 65.00); or (c) allowing the defendant to WITHDRAW his/her GP and DISMISSING THE INDICTMENT.

11. Nothing in this article shall restrict or prohibit courts or district attorneys from using OTHER LAWFUL PROCEDURES OR MODELS for placing appropriate persons into A/SA treatment.

CONDITIONAL SEALING OF DRUG, MARIJUANA AND DESIGNATED OFFENSE, CPL 160.58:

In addition to allowing a defendant who was successfully completed the JDP to avoid a felony conviction (or, in some instances, any conviction at all), and stay out or state prison, the DLRA, allows such defendant (or one who has completed a DRUG TREATMENT ALTERNATIVE TO PRISON (former nomenclature), or other JUDICIALLY SANCTIONED DRUG TREATMENT PROGRAM that is of SIMILAR DURATION, REQUIREMENTS AND LEVEL OF SUPERVISION, and WHO HAS COMPLETED HIS/HER SENTENCE for such offenses, to seek to have them SEALED pursuant to CPL 160.58 (1).

The purpose of this opportunity is assist those defendants who have successfully demonstrated their commitment to sobriety and drug-free living to re-enter the community without the millstone of a felony criminal conviction hanging around their necks. As such, it promotes the DLRA'S REMEDIAL PURPOSE. (See People v Parker 2018 NY Slip Op. 2487 (2d dep't 4/11/18).

In Parker, the AD reversed the lower court's order denying the defendant's application for sealing of his convictions for CPCS 5th degree, CPCS 7th degree and CPM 5th degree (all sealing-eligible offenses under CPL 160.58[1]) because one of them, DWAID, was not eligible for sealing under the statute.

The AD held that the lower court erred in refusing to seal the drug and marijuana offenses because CPL 160.58 does not EXPRESSLY LIMIT a court's authority to seal eligible offenses (i.e. those contained in PL Art. 220, 221 and DESIGNATED OFFENSES set forth in CPL 410.91), and the statute should be read broadly to effectuate the DLRA'S REMEDIAL PURPOSE.

The lower court also erred, in the AD's view, in concluding that the defendant's successful completion of Shock Camp (which included six months of drug treatment) followed by one year

of PRS (which included five more months of drug treatment), was not of sufficient duration, requirements and supervision to render the offenses suitable for sealing.

The court noted that Shock is an intensive alternative form of correctional life which provides a highly structured and regimented daily routine which, in this case, also included several months of drug counseling (which the defendant completed and then continued while on PRS). The court also rejected the People's argument that Shock lacked a sufficient level of supervision for lack of periodic court appearances, noting that CPL 160.58 refers to judicially SANCTIONED drug treatment programs rather than SUPERVISED. (The court found the level of supervision sufficient in any event).

The court also took note of the fact that in addition to completing all the requirements of treatment, the defendant graduated form college, obtained employment and applied to graduate school. Finding the defendant eligible for sealing (notwithstanding the DWAID conviction), the AD remitted the matter to County Court to exercise its discretion under CPLR 160.58 in deciding whether to seal the records of the eligible offenses.

CPL 160.58 states that:

1. A defendant convicted of any offense defined in PL Art. 220, 221 and included in CPL 40.91, who has SUCCESSFULLY COMPLETED the JDP or one of the programs formerly known as DRUG TREATMENT ALTERNATIVES TO PRISON or ANOTHER JUDICIALLY SANCTIONED DRUG TREATMENT PROGRAM OF SIMILAR DURATION, REQUIREMENTS AND LEVEL OF SUPERVISION, AND HAS COMPLETED THE SENTENCE IMPOSED FOR THE OFFENSE(S) IS ELIGIBLE TO HAVE SUCH OFFENSE(S) SEALED PURSUANT TO THIS SECTION.

2. The court that sentenced the defendant to such program(s) may, ON ITS OWN MOTION, or ON THE DEFENDANT"S MOTION, ORDER THAT ALL OFFICIAL RECORDS AND PAPERS RELATING TO THE ARREST, PROSECUTION AND CONVICTION WHICH RESULTED IN THE DEFENDANT'S PARTICIPATION IN SUCH PROGRAM(S) BE CONDITIONALLY SEALED.

THREE PRIOR MISDEMEANOR BONUS:

If the court conditionally seals the defendant's conviction, it may ALSO conditionally seal the ARREST, PROSECUTION AND CONVICTION RECORDS FOR NO MORE THAN THREE OF THE DEFENDANT'S PRIOR ELIGIBLE MISDEMEANORS (i.e. DEFINED IN PL Art. 220 or 221).

There are several steps that must be taken in order to get such prior misdemeanors sealed including:

(a) the court's obtaining from the DCJS or FBI a fingerprint-based criminal history record of the defendant (including any sealed/suppressed information and criminal history from other jurisdictions). The parties must be allowed to examine these records;

(b) the defendant having IDENTIFIED the misdemeanor convictions for which sealing is sought;

(c) the court having received documentation (or a sworn affidavit) that the sentences imposed on the prior convictions HAVE BEEN COMPLETED;

(d) the court having NOTIFIED the DA and courts of record where such misdemeanor convictions were entered that it is considering sealing the records of such conviction. (Both the DA and court of record must be given at least 30 days notice to comment or submit materials that might aid the court in its determination);

HEARING:

3. At the request of the defendant or the DA (of the county where the defendant committed a crime that is the subject of the sealing application), the court may conduct a HEARING to consider and review ANY RELEVANT EVIDENCE from either party that will aid the court in its determination whether to seal the records of the defendant's prior arrests, prosecutions and convictions.

In making such determination, the court shall consider ALL RELEVANT FACTORS including (but not limited to): (i) the circumstances and seriousness of the offense that resulted in the conviction, (ii) the defendant's character, including his completion of a judicially-sanctioned treatment program per subdivision one, (iii) the defendant's criminal history, (iv) the impact of sealing upon the defendant's REHABILITATION, his successful, productive RE-INTEGRATION to society and upon PUBLIC SAFETY.

4. When the court orders sealing, all official records and papers relating to the arrests, prosecutions and convictions (including all duplicates and copies thereof), on file with DCJS or any court SHALL BE SEALED and not made available to any person or public or private entity; PROVIDED, HOWEVER, the division (DCJS) shall RETAIN any fingerprints, palm prints and photos or digital images thereof.

5. When the court orders sealing, the clerk of the court shall immediately notify the Commissioner of the DCJS and any court that sentenced the defendant for an offense which has been conditionally sealed regarding the records that shall be sealed pursuant to this section.

6. Records sealed pursuant to this subdivision SHALL BE MADE AVAILABLE to:

(a) the defendant or his/her designated agent; or

(b) qualified agencies per Exec. Law 835(9) and federal and state law enforcement agencies acting in the scope of such duties; or

(c) any state or local officer/agency responsible for the issuance of licenses to possess guns when the person has applied for such license; or

(d) any prospective employer of a police/peace officer (CPL 1.20[33],[34]), in connection with an application for employment as a police officer, PROVIDED, HOWEVER, that every person who is an applicant for the position of police/peace officer shall be provided with a copy of all records obtained under this paragraph and shall be afforded an opportunity to make an explanation thereto.

(7) THE COURT SHALL NOT SEAL A RECORD PURSUANT TO THIS SECTION WHILE ANY CHARGED OFFENSE (SOUGHT TO BE SEALED) IS PENDING.

UNSEALING:

(8) If, post sealing, the defendant is ARRESTED or FORMALLY CHARGED with ANY MISDEMEANOR OR FELONY, such records shall be UNSEALED IMMEDIATELY and REMAIN

UNSEALED; PROVIDED, HOWEVER, that if such new misdemeanor or felony results in a TERMINATION IN FAVOR OF THE ACCUSED (CPL 160.50) or in a CONVICTION of a NON-CRIMINAL OFFENSE (e.g. DISORDERLY CONDUCT), such unsealed record shall (again) be conditionally sealed pursuant to this section.

As is evident, CPL 216 and 160.58 can provide a golden opportunity for certain defendants whose crimes are tied up in drug or alcohol abuse (and who are willing to take responsibility for their own recovery), to bury their demons (or at least, some of them), and get on with their lives anew. But, like any second chance, whether a defendant ultimately rises like a phoenix or flops like a flounder on a fishing dock lies in his/her own hands.