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Submitted to:

**Joint Public Hearing on Implementation and
Funding of the Rockefeller Drug Law Reform
Legislation**

**Assembly Standing Committee on Codes
Assembly Standing Committee on Correction
Assembly Standing Committee on Alcoholism and
Drug Abuse**

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Thank you for inviting me to speak today at this important hearing to study the implementation of reforms to the Rockefeller Drug Laws, also known as the Drug Law Reform Act. My comments today will focus on the big picture – what things look like from 30,000 feet up, if you will.

Let me begin by providing some background and context to my comments. My organization, the Drug Policy Alliance, was intimately involved in the campaign to reform these laws, and we've closely followed the implementation process in the courts, in the community, and in programs providing drug treatment and other alternatives to incarceration. To inform our advocacy and monitoring efforts, we've talked to a broad range of stakeholders across the state.

To learn about the implementation in the courts, during the last year we sent researchers to interview judges, court personnel, defense attorneys and prosecutors in New York City. In addition, we traveled to Buffalo, Rochester, Syracuse, Ithaca and Albany to interview judges, defense attorneys, reentry specialists, members of the county reentry task forces, district attorneys, community members, treatment providers, formerly incarcerated people, and elected officials. These meetings provided insight into the perspective and experience of implementation, which differ region to region.

Additionally, we surveyed courts in nearly 25 counties across New York, and we met with officials from OCA to learn both about their interpretation of the reforms and what trainings they provided to judges to ensure effective utilization of the newly restored judicial discretion.

To monitor the resentencing process, in the summer of 2009 we organized meetings with leaders from public defense agencies. What did they need to make the resentencing process work? The lawyers wanted case managers to help produce reentry plans for their clients, since the judge would be more likely to grant resentencing if the defendant had a reentry plan. We couldn't provide case managers per se, so we organized human service agencies in the greater New York City area, and secured commitments from over 125 of them to provide, in an expedited fashion, support for those petitioning for resentencing. These organizations each assigned a staff person to be available to defense attorneys to accept any eligible defendant with the understanding that there was, for the most part, no funding provided for any of this (some limited the case management funds were not allocated until this fiscal year and have yet to be released).

In the fall of 2009, to address the repeated call for case workers, we partnered with the Legal Aid Society to recruit and train social workers to collaborate with defense attorneys in support of the resentencing process. These case workers met with clients inside of prisons, and/or by phone, then devised reentry plans in support of the resentencing petitions.

To monitor diversion and track emerging new case law, in the fall of 2009, we contacted every single public defender agency in New York State and then, in January 2010, in partnership with the Center for Community Alternatives, we launched a monthly conference call series for defense attorneys. The calls are held to discuss resentencing and diversion, to share information and legal arguments, and to identify problems and potential solutions. Those monthly calls continue today under the leadership of CCA, and include participating defense attorneys from all over the state.

In addition to these activities, we've convened numerous meetings with the advocacy community, drug treatment providers, legal defenders, community groups, reentry specialists and other stakeholders, to share information, identify problems, and, where possible, to coordinate shared efforts. We're now in the process of synthesizing our findings and activities into a summary report, to be published in 2011. We've learned quite a bit from this project. Today I want to focus on three problems that are systemic in nature and will require your persistent leadership if they are to be solved.

Problem 1: Differing interpretations of the reforms limit their scope and integrity. Drug law reform was passed as part of the budget process, and as such, there is no legislative memo explicitly detailing legislative intent. Some individual state agencies have fashioned their own interpretation, and the outcome is troubling. We believe the Legislature was quite clear in their intent to advance a public health approach -- one need only to read the numerous statements, press releases and speeches by policymakers calling for reform. Or perhaps one could read the first policy paper published by Speaker Silver and released in January 2009 at the New York Academy of Medicine at a conference about public health and safety approaches to drug policy. That paper reads, in part:

Drug abuse is not only a criminal justice issue but also a public health issue—and if we can address the public health problem, much of the criminal justice issue will be addressed as well; this means creating more alternatives to incarceration.

In crafting the reforms, the Legislature understood that not everyone arrested for low-level drug offenses needs drug treatment – other alternatives to incarceration may be more appropriate and effective. Nor is prison an effective rehabilitation tool for people arrested for low-level drug offenses – it’s the most costly, and least effective, sentencing option. In addition to restoring judicial discretion, the Legislature created the Judicial Diversion process to make alternatives to incarceration available to a broad array of eligible defendants. People arrested for certain drug and property offenses could be assessed by credentialed health professionals, and those who needed treatment could get it in programs including, but not limited to, drug courts. Those who didn’t need treatment, but were still eligible for diversion, could be placed in another alternative to incarceration program.

Unfortunately, OCA has interpreted drug law reform differently – namely as an expansion of drug courts, wherein only those needing treatment receive Judicial Diversion. This has reduced utilization of other alternatives to incarceration. In county after county, we’ve learned of defendants who, while statutorily eligible for diversion, are instead deemed “ineligible” for diversion because they don’t need drug treatment. Worse, some courts exclude people because they’re receiving treatment the court doesn’t agree with -- for instance, the Manhattan judicial diversion courts automatically exclude people who are on methadone from participating in judicial diversion. Would we exclude diabetes patients who take insulin? It is an indefensible practice that contradicts forty years of medical science and effective treatment methodologies, and is counter to a public health approach.

When state institutions and agencies are not in agreement about the meaning or intent of such sweeping reforms, effective implementation is impossible. And, numerous questions begin to emerge: could OCA’s narrow eligibility interpretation, which may reduce the number of otherwise eligible participants in ATT’s, be a contributing factor to the rise in jail sentences? If OCA’s interpretation of the drug law reforms is different than the Legislative intent, how can we be assured that judges have been provided with sufficient training to understand their new responsibility? To clear up any confusion on the part of the courts and state agencies, the Legislature should clarify the intent and purpose of drug law reform by restating its commitment to developing a public health approach and utilizing a broad array of alternatives to incarceration.

Problem 2: Lack of leadership in coordinating implementation has undermined the reforms and diminished their potential transformative effect. The rollback of the Rockefeller Drug Laws represent arguably the most significant state sentencing reforms in the country in nearly 40 years. It’s reasonable to expect that implementation would require extensive coordination. Towards that end, in the months after the reforms passed, DPA made repeated requests to Governor Paterson to appoint a Reform Implementation Coordinator (or Czar) to manage the implementation effort. We suggested this person come from the public health field and be responsible for convening the various government and community stakeholders to coordinate efforts and ensure effective implementation.

Of course, this wasn’t done. Today, from Buffalo to Long Island, we find significant confusion and disagreement about what drug law reform means, frustration with the real or perceived lack of coordination between state agencies in its implementation, and annoyance at repeated instances of one agency saying one thing and another

something entirely contradictory. This is true, for instance, in tracking funds for implementation. Utilizing funds from the Stimulus Package, the Legislature allocated \$67 million over two years for to pay for the reforms. Much of these funds have yet to be released, and if you try to find where that money is now, you'll very likely get different answers from OASAS and DCJS and Probation depending on who you talk to and on what day.

Implementation has thus been relegated state agencies and the judicial branch without much effective oversight or management by the Executive or the Legislature. We know that state agencies meet to discuss implementation, but this doesn't necessarily mean that there is a coordinated effort, with the exception of data collection and analysis –state agencies have done an increasingly good job in coordinating their efforts in this regard. The lack of coordination has led to very different perspectives on drug law reform implementation, an example of which emerged when the Assembly held hearings last December about the reforms. Representatives from DCJS, OASAS, and OCA testified that implementation was coming along swimmingly; when service providers and advocates testified, they expressed confusion and frustration resulting from lack of coordination.

Let's not forget that these reforms represent a seismic shift in criminal justice and drug policy in New York – implementation won't be easy and will require good management. But who is managing? Who is responsible for day-to-day issues regarding implementation? Who is making sure the funds allocated by the Legislature for the reforms have been distributed? Who is facilitating conversations between the service providers in numerous fields and the state agencies like DCJS, DOCS, Parole and OASAS? Who is making sure that every single incarcerated person eligible for resentencing is connected with legal counsel and a case worker to develop a reentry plan? From our viewpoint, it appears to be no one.

Since the Governor didn't appoint an Implementation Coordinator or Czar, the Legislature should consider other means to manage implementation in a more hands-on fashion. One option is to create a special Joint Committee to monitor implementation and report regularly and publicly on the progress. Another option is to ask the new Governor or Attorney General to appoint someone to monitor and manage implementation across numerous agencies and communities.

Problem 3: There is no meaningful effort to address racial disparities and systemic racial bias in the criminal justice system. Because of the complex interaction of socioeconomic disadvantage, racial profiling and discriminatory sentencing policies, more than 60% of the people in prison are now racial and ethnic minorities. According to the DC based Sentencing Project, for Black males in their twenties, 1 in every 8 is in prison or jail on any given day. These trends have been intensified by the disproportionate impact of the "war on drugs," in which three-fourths of all persons in prison for drug offenses are people of color. The Rockefeller Drug Laws led to astonishing racial disparities in New York's criminal justice system that are even worse than the national average. Studies show that rates of addiction, illicit drug use and illicit drug sales are approximately equal between racial groups. But while Black and Latino people make up only 33% of New York State's population, they comprise nearly 90% of those currently incarcerated for drug felonies. This is one of the highest levels of racial disparities anywhere in the nation, and is a human rights disgrace.

Despite the reforms, these racial disparities continue today across New York's criminal justice system and there is every reason to believe they will persist unless action is taken to address the problem. How did these disparities come to be? Why is the fact of such extreme institutional racial bias not enough, in and of itself, to spur reform? What's being done to prevent such disparities from continuing under the new regime? Why are there similar disparities throughout our criminal justice system, our juvenile justice system, our child welfare system, our educational system? What is the long-term economic, social and human impact of systemic racial bias upon those communities who are subject to both the institutional bias and the resulting disadvantages and consequences? Given the severity of the problem, these questions warrant our immediate attention. But after a protracted battle to reform these laws, there seems to be no meaningful effort to ask, let alone answer, any of these questions.

Systemic and institutional racial bias is a complex problem that is easier to ignore than to tackle and solve. A multi-prong approach of regulation, education, and monitoring is necessary to address the cause and effect of institutionalized racial and ethnic bias that became commonplace over nearly 40 years of the Rockefeller Drug Laws. A few recommendations:

- Education on institutional racism, structural violence, disproportionate incarceration of Blacks and Latinos and the resulting consequences and challenges facing these communities must be provided – and in some cases required -- for criminal justice system employees. There is precedent for such an effort. In New York City, to address and reduce the extraordinary racial disproportionality in the child welfare system, the Administration for Children’s Services is sending both rank-and-file and executive staff through “undoing racism” workshops provided by the People’s Institute for Survival and Beyond, a respected organization that has worked with hundreds of government, educational and community groups across the country, including the state child welfare agencies in such places as Kentucky and Texas. This can and should be done in the criminal justice system in New York.

- Preemptive measures to prevent racial disparities in the criminal justice system must be instituted, such as racial and ethnic impact statements. These are similar to fiscal and environmental impact statements. Policymakers contemplating new social initiatives or construction jobs routinely conduct such fiscal or environmental assessments, which are now widely considered responsible mechanisms of government. A Racial and Ethnic Impact Statement would assess the affect on racial and ethnic minorities of any bill, joint resolution, or amendment which proposes a change in the law which creates a criminal offense; significantly changes an existing public offense or the penalty for an existing offense; or changes existing sentencing, parole, or probation procedures. DPA and other organizations have more information about these important new policy tools.

- More data about race and ethnicity is needed. The Legislature should order a quantitative research study of each stage of criminal justice system involvement to provide an evidentiary basis for determining where disparate treatment based on race occurs. Such research could give the Legislature and agencies a quantitative means of examining issues and developing strategies for addressing problems. It would also be important in demonstrating the need to provide training and support to the agencies on effective mechanisms of addressing institutional racism. An important first step would be mandating that police departments, DA's offices, criminal courts and state agencies dealing with jails, prisoners, probationers and parolees be required to collect and make available to the public data on race, ethnicity, geography, gender and offense (and in offenses, we would include summonses). This data would then be analyzed on a regular basis using existing methodologies for detecting racial disparities.

In closing, I want to summarize our three main recommendations: First, to foster correct interpretation of the reforms to the drug laws, the Legislature should make clear to state agencies their intent in drafting and passing said reforms. Second, effective leadership and management of reform implementation is sorely needed and long overdue. Third, institutional racial bias will continue without action on the part of state government. We need to uncover the factors and elements which make such extraordinary bias possible at an institutional level, and then devise effective measures to address it and bring equity and fairness to the criminal justice system.

Almost 40 years ago, the draconian Rockefeller Drug Laws set the stage for a criminal justice approach to drug policy in New York and across the country. Now the laws have been reformed with the promise that New York is embarking on a new direction in drug policy, a public health and safety approach. Let’s learn from our past mistakes, but let’s not allow old failures to reincarnate themselves in these new initiatives. We have the opportunity of a lifetime to transform a failed system, but it won’t happen without keen oversight and coordination. You’ve done so much, and now, we need you to do more, so we can realize this opportunity to create a more just and equitable system. We’re prepared to stand with you in this effort, as are so many others across our state. Thank you.