

Superior Court's diversion program begins to take form

By: Barry Bridges August 8, 2019

Criminal defense attorneys say a diversion program in the Superior Court established through legislation recently signed by Gov. Gina M. Raimondo is a positive step in offering an alternative path to minor or nonviolent offenders who will thereafter not be tethered to a criminal record.

House Bill 6164A, sponsored by Rep. Robert B. Jacquard, and the identical Senate Bill 962A, sponsored by Sen. Michael J. McCaffrey, were unanimously endorsed by both chambers and received the blessing of the governor on July 16.

The legislation authorizes Superior Court Presiding Judge Alice B. Gibney to launch a program that will "offer an alternative to traditional conviction, sentencing, and incarceration by providing eligible defendants with a framework of supervision and services in lieu of incarceration and/or probation to help them make informed decisions, engage in positive behavior, and reduce the risk of recidivism."

Gibney is expected to name a judge to oversee a new Diversion Program calendar.



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The bills actually speak in more detail on a program originally outlined by a 2017 overhaul of the state's criminal justice system, a series of six bills collectively known as the Justice Reinvestment package.

Jacquard, a Providence attorney, said this year's legislation was requested by Gibney and was modeled after an existing program in the Drug Court.

"I make no claim of ownership of this legislation, as it was the idea of the presiding justice, but the basic blueprint has seen a lot of success in the Drug Court with nonviolent offenders, getting them on a path to a better life without a felony conviction," Jacquard said.

In a brief statement, the Superior Court indicated that it is collaborating with the Attorney General's Office and the criminal defense bar to have the program running by the first of the year.

'Eligible defendant'

In setting forth a litany of serious "disqualifying offenses," the legislation makes clear that not all defendants can take part in the diversion program. Offenses rendering an individual ineligible include robbery, felony driving while intoxicated, child abuse and most firearm offenses.



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Further, a defendant cannot have been convicted or pleaded nolo contendere to two or more felonies within the last five years.

North Kingstown criminal defense lawyer Robert E. Craven, who chairs the House Judiciary Committee, pointed to that aspect of the new law as significant.

“Some thought was given to folks in this position who have often had multiple contacts with the law,” Craven said. “Here, eligibility is not barred unless there are two or more felonies. So the legislation can cover not just someone who stuck their toe in the water, but who has been swimming in the wrong pool.”

As for the procedure involved in entering the program, at any time after an eligible defendant’s arraignment, but prior to the entry of a guilty plea or the commencement of trial, a referral may be made by the Attorney General’s Office, the defendant’s counsel, or a judge.

The judicial diversion manager will then ensure that the individual meets the relevant criteria and report to the diversion judge, who makes the final decision on a defendant’s admission.

Once accepted, a defendant becomes bound by a contract that details his or her requirements for successful completion of the program. The contract will delineate the court’s expectations, the conditions imposed, the responsibilities of the defendant, and treatment plan goals and strategies.

If a participant fails to meet the specified conditions, he may be terminated from the program with his case placed on the Superior Court criminal calendar.

Opioid response

According to Craven, the legislation had its genesis in the opioid crisis.

“In passing the Justice Reinvestment legislation two years ago, and in conjunction with our fight against the opioid epidemic, the thought always was to find ways to intercept people when they were capable of being saved,” he said.

But Craven also intimated that the program would be no walk in the park for participants, who will have to meet conditions such as counseling and drug testing and be subject to court monitoring for as long as 18 months.

Jacquard agreed that the program will not be suited for everyone, but will serve as a “great tool” for criminal defense attorneys who will be able to “offer a non-violent offender something substantial.”

“But this will be at minimum a one-year program, and an attorney will have to return regularly with his client to update the court,” Jacquard added. “That could be considered a source of business for lawyers, as there will be more time scheduled in court, but at the same time they are doing something that can really benefit the client.”

Moreover, the program should ultimately favor the taxpayer, Craven said.

“From a humanitarian perspective, we want everyone to have a fair chance, but from an economic perspective you are putting a person back in the workforce rather than receiving state benefits or being housed at the ACI at a cost of \$80,000 per year,” he said. “In reducing the prison population, it’s probably safe to say that the program will save the state money.”

Defense bar support



Providence lawyer Matthew S. Dawson said the criminal defense bar has been aware of the program's creation since the signing of the Justice Reinvestment package in 2017 and wholeheartedly supports the initiative.

"Diversion programs have really come into their own, and they are a great alternative to prosecution in the right cases," Dawson said.

He added that first offenses and minor offenses can impact a defendant for a lifetime. Dawson said he had a "host of examples" of drug convictions in the 1980s after which the defendants involved could not find jobs for decades.

"We have to help people, and this is a very serious step in that direction," he said.

Though the AG's Office presently has a diversion program in place, Dawson said the office is the sole arbiter of its administration.

"They pick and choose and have a number of disqualifiers that prevent people from getting into the program," he said. "I think the Legislature wants the courts to get in on that."

Jacquard agreed that the AG's program is less than optimal.

"There is a diversion program run by the AG's Office, but it doesn't provide support, which makes it harder for a defendant not to mess up and have a sentence imposed," Jacquard said.

Criminal defense lawyer Stefanie A. Murphy, who practices in East Greenwich, emphasized that upon the successful completion of the AG's diversion program, the charge is dismissed and the defendant becomes eligible to have the case sealed.

"This law will allow many more defendants the opportunity to enter into a program that will be beneficial," Murphy said. "By allowing those who qualify the opportunity to engage in counseling or anything else that is recommended, they will be able to get the support they need. By getting that help, a defendant will be less likely to commit a new offense."

For his part, AG Peter F. Neronha said he threw his "strong support" behind the new program.

In a statement, Neronha said that "[e]xpanding access to diversion is an important step in changing the way we approach criminal justice in Rhode Island because it saves money, allows low-level nonviolent offenders a chance to make things right and avoid the kind of felony conviction that can lead to a never-ending downward spiral, and allows police and prosecutors to focus on those who are the most significant public safety threats."

As for what happens next, the proverbial ball appears to be in Judge Gibney's court in terms of naming a judge to oversee the diversion program and promulgating any additional rules and regulations deemed necessary.

With counselors, in-court advocates, and additional staffing from the Public Defender and Attorney General's offices expected to be involved in the process, Craven said he was confident in the program's potential success.

"My experience with the folks who do this kind of work is that they have a real sense of who is a good candidate for such programs, who is serious and who is not serious, and who will be successful," he said. "But in the end, the diversion court will set the conditions as the gate keeper and the gate closer."

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