No. 61. An act relating to court diversion and pretrial services.

(S.134)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. FINDINGS; INTENT

(a) The General Assembly finds:

(1) According to numerous studies over many years, pretrial diversion programs result in outcomes for participants that are better than incarceration, including reducing the likelihood that participants commit future crimes and improving substance abuse and mental health outcomes. For example, according to a study of the New York City Jail Diversion Project, 12 months after their offense, offenders who go through a diversion program are less likely to reoffend, spend less time in prison, have received more treatment, and are less likely to suffer drug relapses. In addition, a study in the Journal of the American Academy of Psychiatry and the Law indicates that diversion programs reduce the amount of time participants spend in jail for future offenses from an average of 173 days to an average of 40 days during the year after the offense. Research also demonstrates that offenders who have participated in diversion programs are better able to find employment.

(2) Diversion programs benefit the criminal justice system by reducing costs and allowing resources to be allocated more efficiently for more serious offenders. According to studies by the Urban Institute and the National Alliance on Mental Illness, diversion programs reduce costs and improve

outcomes by allowing offenders with mental illness to receive more appropriate treatment outside the criminal justice system. As reported in the Psychiatric Rehabilitation Journal, diversion programs reduce costs by decreasing the need for and use of hospitalization and crisis services by offenders.

(b) It is the intent of the General Assembly that:

(1) Sec. 2 of this act result in an increased use of the diversion program throughout the State and a more consistent use of the program between different regions of the State;

(2) the Office of the Attorney General collect data pursuant to 3 V.S.A. § 164(d) on diversion program use, including the effect of this act on use of the program statewide and in particular regions of the State; and

(3) consideration be given to further amending the diversion program statutes before Sec. 2 of this act sunsets on July 1, 2020, if it is determined that Sec. 2 of this act did not produce the intended increases in diversion program usage.

Sec. 2. 3 V.S.A. § 164 is amended to read:

§ 164. ADULT COURT DIVERSION ~~PROJECT~~ PROGRAM

(a) The Attorney General shall develop and administer an adult court diversion ~~project~~ program in all counties. The ~~project~~ program shall be operated through the juvenile diversion project ~~and shall be designed to assist adults who have been charged with a first or second misdemeanor or a first~~

~~nonviolent felony~~. The Attorney General shall adopt only such rules as are necessary to establish an adult court diversion ~~project~~ program for adults, in compliance with this section.

(b) The program shall be designed for two purposes:

(1) To assist adults who have been charged with a first or a second misdemeanor or a first nonviolent felony.

(2) To assist adults with substance abuse or mental health treatment needs regardless of the person's prior criminal history record. Programming for these persons is intended to support access to appropriate treatment or other resources with the aim of improving the person's health and reducing future adverse involvement in the justice system. A person charged with a felony offense that is a listed crime pursuant to 13 V.S.A. § 5301 shall not be eligible under this section.

(c) The ~~adult court diversion project administered by the Attorney General~~ program shall encourage the development of diversion ~~projects~~ programs in local communities through grants of financial assistance to municipalities, private groups or other local organizations. The Attorney General may require local financial contributions as a condition of receipt of ~~project~~ program grants.

(d) The Office of the Attorney General shall develop program outcomes following the designated State of Vermont performance accountability framework and, in consultation with the Department of State's Attorneys and Sheriffs, the Office of the Defender General, the Center for Crime Victim

Services, and the Judiciary, report annually on or before December 1 to the General Assembly on services provided and outcome indicators.

~~(c)~~(e) All adult court diversion ~~projects~~ programs receiving financial assistance from the Attorney General shall adhere to the following provisions:

(1) The diversion ~~project~~ program shall accept only persons against whom charges have been filed and the court has found probable cause, but are not yet adjudicated. The prosecuting attorney may refer a person to diversion either before or after arraignment and shall notify in writing the diversion program and the court of his or her intention to refer the person to diversion. If a person is charged with a qualifying crime as defined in 13 V.S.A. § 7601(4)(A), the prosecutor shall provide the person with the opportunity to participate in the court diversion program unless the prosecutor states on the record at arraignment or a subsequent hearing why a referral to the program would not serve the ends of justice. If the prosecuting attorney refers a case to diversion, the prosecuting attorney may release information to the victim upon a showing of legitimate need and subject to an appropriate protective agreement defining the purpose for which the information is being released and in all other respects maintaining the confidentiality of the information; otherwise files held by the court, the prosecuting attorney, and the law enforcement agency related to the charges shall be confidential and shall remain confidential unless:

(A) the Board declines to accept the case;

(B) the person declines to participate in diversion;

(C) the Board accepts the case, but the person does not successfully complete diversion; or

(D) the prosecuting attorney recalls the referral to diversion.

(2) Alleged offenders shall be informed of their right to the advice and assistance of private counsel or the public defender at all stages of the diversion process, including the initial decision to participate, and the decision to accept the adult diversion contract, so that the candidate may give informed consent.

(3) The participant shall be informed that his or her selection of the adult diversion contract is voluntary.

(4) Each State's Attorney, in cooperation with the Office of the Attorney General and the adult court diversion ~~project~~ program, shall develop clear criteria for deciding what types of offenses and offenders will be eligible for diversion; however, the State's Attorney shall retain final discretion over the referral of each case for diversion.

(5) All information gathered in the course of the adult diversion process shall be held strictly confidential and shall not be released without the participant's prior consent (except that research and reports that do not require or establish the identity of individual participants are allowed).

(6) Information related to the present offense that is divulged during the adult diversion program shall not be used ~~in the prosecutor's case~~ against the

person in the person's criminal or juvenile case for any purpose, including impeachment or cross-examination. However, the fact of participation and success, or reasons for failure, may become part of the prosecutor's records.

(7)(A) The adult court diversion ~~project~~ program shall maintain sufficient records so that the reasons for success or failure of the program in particular cases and overall can be investigated by program staff. These records shall include a centralized statewide filing system that will include the following information about individuals who have successfully completed an adult court diversion program:

(i) name and date of birth;

(ii) offense charged and date of offense;

(iii) place of residence;

(iv) county where diversion process took place; and

(v) date of completion of diversion process.

(B) These records shall not be available to anyone other than the participant and his or her attorney, State's Attorneys, the Attorney General and directors of adult court diversion ~~projects~~ programs.

(8) Adult court diversion ~~projects~~ programs shall be set up to respect the rights of participants.

(9) Each participant shall pay a fee to the local adult court diversion ~~project~~ program. The amount of the fee shall be determined by ~~project~~ program officers or employees based upon the financial capabilities of the

participant. The fee shall not exceed $300.00. The fee shall be a debt due from the participant, and payment of such shall be required for successful completion of the program. Notwithstanding 32 V.S.A. § 502(a), fees collected under this subdivision shall be retained and used solely for the purpose of the court diversion program.

~~(d)~~(f) The Attorney General is authorized to accept grants and gifts for the purposes of this section, such acceptance being pursuant to 32 V.S.A. § 5.

~~(e)~~(g) Within 30 days of the two-year anniversary of a successful completion of adult diversion, the court shall provide notice to all parties of record of the court's intention to order the sealing of all court files and records, law enforcement records other than entries in the adult court diversion ~~project's~~ program's centralized filing system, fingerprints, and photographs applicable to the proceeding. The court shall give the State's Attorney an opportunity for a hearing to contest the sealing of the records. The court shall seal the records if it finds:

(1) two years have elapsed since the successful completion of the adult diversion program by the participant and the dismissal of the case by the State's Attorney; and

(2) the participant has not been convicted of a subsequent felony or misdemeanor during the two-year period, and no proceedings are pending seeking such conviction; and

(3) rehabilitation of the participant has been attained to the satisfaction of the court.

~~(f)~~(h) Upon the entry of an order sealing such files and records under this section, the proceedings in the matter under this section shall be considered never to have occurred, all index references thereto shall be deleted, and the participant, the court, and law enforcement officers and departments shall reply to any request for information that no record exists with respect to such participant inquiry in any matter. Copies of the order shall be sent to each agency or official named therein.

~~(g)~~(i) Inspection of the files and records included in the order may thereafter be permitted by the court only upon petition by the participant who is the subject of such records, and only to those persons named therein.

~~(h)~~(j) The process of automatically sealing records as provided in this section shall only apply to those persons who completed diversion on or after July 1, 2002. Any person who completed diversion prior to July 1, 2002 must apply to the court to have his or her records sealed. Sealing shall occur if the requirements of subsection ~~(e)~~(g) of this section are met.

~~(i)~~(k) Subject to the approval of the Attorney General, the Vermont Association of Court Diversion Programs may develop and administer programs to assist persons under this section charged with delinquent, criminal, and civil offenses.

Sec. 3. 13 V.S.A. § 7554c is amended to read:

§ 7554c. PRETRIAL RISK ASSESSMENTS; NEEDS SCREENINGS

(a)(1) The objective of a pretrial risk assessment is to provide information to the ~~Court~~ court for the purpose of determining whether a person presents a risk of nonappearance ~~or a threat to public safety~~ or a risk of re-offense so the ~~Court~~ court can make an appropriate order concerning bail and conditions of pretrial release. The assessment shall not assess victim safety or risk of lethality in domestic assaults.

(2) The objective of a pretrial needs screening is to obtain a preliminary indication of whether a person has a substantial substance abuse or mental health issue that would warrant a subsequent court order for a more detailed clinical assessment.

(3) Participation in a risk assessment or needs screening pursuant to this section does not create any entitlement for the assessed or screened person.

(b)(1) ~~A~~ Except as provided in subdivision (2) of this subsection, a person ~~whose offense or status falls into any of the following categories shall be offered a risk assessment and, if deemed appropriate by the pretrial monitor, a needs screening prior to arraignment:~~

~~(A) misdemeanors and felonies, excluding listed crimes and drug trafficking, cited into court; and~~

~~(B) persons who are arrested and lodged and unable to post bail within 24 hours of lodging, excluding persons who are charged with an offense~~

~~for which registration as a sex offender is required upon conviction pursuant to subchapter 3 of chapter 167 of this title or an offense punishable by up to life imprisonment~~ who is arrested, lodged, and unable to post bail within 24 hours of lodging shall be offered a risk assessment and, if deemed appropriate by the pretrial services coordinator, a needs screening prior to arraignment.

(2) ~~As used in this section, "listed crime" shall have the same meaning as provided in section 5301 of this title and "drug trafficking" means offenses listed as such in Title 18~~ A person charged with an offense for which registration as a sex offender is required pursuant to subchapter 3 of chapter 167 of this title or an offense punishable by a term of life imprisonment shall not be eligible under this section.

(3) ~~Unless ordered as a condition of release under section 7554 of this title, participation~~ Participation in risk assessment or needs screening shall be voluntary and a person's refusal to participate shall not result in any criminal legal liability to the person.

(4) In the event an assessment or screening cannot be obtained prior to arraignment, the risk assessment and needs screening shall be conducted as soon as practicable.

(5) A person who qualifies pursuant to ~~subdivisions (1)(A) (D)~~ subdivision (1) of this subsection and who has an additional pending charge or a violation of probation shall not be excluded from being offered a risk assessment or needs screening unless the other charge is a listed crime.

(6)~~(A) The Administrative Judge and Court Administrator, in consultation with the Secretary of Human Services and the Commissioner of Corrections, shall develop a statewide plan for the phased, consistent rollout of the categories identified in subdivisions (1)(A) through (D) of this subsection, in the order in which they appear in this subsection. The Administrative Judge and Court Administrator shall present the plan to the Joint Legislative Corrections Oversight Committee on or before October 15, 2014~~ Any person charged with a criminal offense, except those persons identified in subdivision (b)(2) of this section, may choose to engage with a pretrial services coordinator.

~~(B) All persons whose offense or status falls into one of the categories shall be eligible for a risk assessment or needs screening on or after October 15, 2015. Prior to that date, a person shall not be guaranteed the offer of a risk assessment or needs screening solely because the person's offense or status falls into one of the categories. Criminal justice professionals charged with implementation shall adhere to the plan.~~

(c) The results of the risk assessment and needs screening shall be provided to the person and his or her attorney, the prosecutor, and the ~~Court~~ court. Pretrial services coordinators may share information only within the limitations of subsection (e) of this section.

(d)(1) At arraignment, ~~in consideration of the risk assessment and needs screening,~~ the ~~Court~~ court may order ~~the~~ a person to ~~comply with~~ do the following ~~conditions~~:

(A) meet with a pretrial ~~monitor~~ services coordinator on a schedule set by the ~~Court~~ court; ~~and~~

(B) participate in a needs screening with a pretrial services coordinator; and

(C) participate in a clinical assessment by a substance abuse or mental health treatment provider and follow the recommendations of the provider.

(2) The ~~Court~~ court may order the person to ~~follow the recommendation of the pretrial monitor if the person has completed a risk assessment or needs screening~~ engage in pretrial services. Pretrial services may include the pretrial services coordinator:

(A) supporting the person in meeting conditions of release imposed by the court, including the condition to appear for judicial proceedings; and

(B) connecting the person with community-based treatment programs, rehabilitative services, recovery supports, and restorative justice programs.

(3) If possible, the ~~Court~~ court shall set the date and time for the clinical assessment at arraignment. In the alternative, the pretrial ~~monitor~~ services coordinator shall coordinate the date, time, and location of the clinical

assessment and advise the ~~Court~~ court, the person and his or her attorney, and the prosecutor.

(4) ~~The conditions~~ An order authorized in subdivision (1) or (2) of this subsection shall be in addition to any ~~other~~ conditions of release permitted by law and shall not limit the ~~Court~~ court in any way. Failure to comply with a court order authorized by subdivision (1) or (2) of this subsection shall not constitute a violation of section 7559 of this title.

(5) This section shall not be construed to limit a court's authority to impose conditions pursuant to section 7554 of this title.

(e)(1) Information obtained from the person during the risk assessment or needs screening shall be exempt from public inspection and copying under the Public Records Act and, except as provided in subdivision (2) of this subsection, only may be used for determining bail, conditions of release, and appropriate programming for the person in the pending case. The information a pretrial services coordinator may report is limited to whether a risk assessment indicates risk of nonappearance, whether further substance use assessment or treatment is indicated, whether mental health assessment or treatment is indicated, whether a person participated in a clinical assessment, and whether further engagement with pretrial services is recommended, unless the person provides written permission to release additional information. Information related to the present offense directly or indirectly derived from the risk assessment, needs screening, or other conversation with the pretrial

services coordinator shall not be used against the person in the person's criminal or juvenile case for any purpose, including impeachment or cross-examination. However, the fact of participation or nonparticipation in risk assessment or needs screening may be used in subsequent proceedings. The immunity provisions of this subsection apply only to the use and derivative use of information gained as a proximate result of the risk assessment ~~or,~~ needs screening, or other conversation with the pretrial services coordinator.

(2) The person shall retain all of his or her due process rights throughout the risk assessment and needs screening process and may release his or her records at his or her discretion.

(3) ~~The Vermont Supreme Court in accordance with judicial rulemaking as provided in 12 V.S.A. § 1 shall promulgate and the Department of Corrections in accordance with the Vermont Administrative Procedure Act pursuant to 3 V.S.A. chapter 25 shall adopt rules related to the custody, control, and preservation of information consistent with the confidentiality requirements of this section. Emergency rules adopted prior to January 1, 2015 pursuant to this section shall be considered to meet the "imminent peril" standard under 3 V.S.A. § 844(a).~~ All records of information obtained during risk assessment or needs screening shall be stored in a manner making them accessible only to the Director of Pretrial Services and Pretrial Service Coordinators for a period of three years, after which the records shall be maintained as required by sections 117 and 218 of this title and any other State

law. The Director of Pretrial Services shall be responsible for the destruction of records when ordered by the court.

(f) The Attorney General's Office shall:

(1) contract for or otherwise provide the pretrial services described in this section, including performance of risk assessments, needs screenings, and pretrial monitoring services, and

(2) develop pretrial services outcomes following the designated State of Vermont performance accountability framework and, in consultation with the Department of State's Attorneys and Sheriffs, the Office of the Defender General, the Center for Crime Victim Services, and the Judiciary, report annually on or before December 1 to the General Assembly on services provided and outcome indicators.

Sec. 4. MISDEMEANOR POSSESSION OF DRUGS; PRETRIAL SERVICES; REPORT

(a) It is the intent of the General Assembly to encourage persons cited or arrested for a misdemeanor drug possession charge the opportunity to engage with pretrial services, and, if appropriate, enter treatment, and that, in turn, a person who complies with such conditions be eligible for dismissal of the charge.

(b) The Attorney General, the Defender General, and the Executive Director of the Department of State's Attorneys and Sheriffs shall work collaboratively to develop a specific legislative proposal to accomplish this

intent with an implementation date of July 1, 2018 and report to the Senate and House Committees on Judiciary and on Appropriations, the Senate Committee on Health and Welfare, and the House Committee on Human Services on or before November 1, 2017.

Sec. 5. LEGISLATIVE FINDINGS

The General Assembly finds that:

(1) According to Michael Botticelli, former Director of the Office of National Drug Control Policy, the National Drug Control Strategy recommends treating "addiction as a public health issue, not a crime." Further, the strategy "rejects the notion that we can arrest and incarcerate our way out of the nation's drug problem."

(2) Vermont Chief Justice Paul Reiber has declared that "the classic approach of 'tough on crime' is not working in [the] area of drug policy" and that treatment-based models are proving to be a more effective approach for dealing with crime associated with substance abuse.

(3) A felony conviction record is a significant impediment to gaining and maintaining employment and housing, yet we know that stable employment and housing are an essential element to recovery from substance abuse and desistance of criminal activity that often accompanies addiction.

(4) In a 2014 study by the PEW Research Center, 67 percent of people polled said government should focus more on providing treatment to people who use illicit drugs and less on punishment. The Center later reported that

states are leading the way in reforming drug laws to reflect this opinion: State-level actions have included lowering penalties for possession and use of illegal drugs, shortening mandatory minimums or curbing their applicability, removing automatic sentence enhancements, and establishing or extending the jurisdiction of drug courts and other alternatives to the regular criminal justice system.

(5) Vermont must look at alternative approaches to the traditional criminal justice model for addressing low-level illicit drug use if it is going to reduce the effects of addiction and addiction-related crime in this State.

Sec. 6. STUDY

(a) The Office of Legislative Council shall examine the issue of a public health approach to low-level possession and use of illicit drugs in Vermont as an alternative to the traditional criminal justice model, looking to trends both nationally and internationally, with a goal of providing policymakers a range of approaches to consider during the 2018 legislative session.

(b) The Office of Legislative Council shall report its findings to the General Assembly on or before December 15, 2017.

Sec. 7. SUNSET

Sec. 2 of this act shall be repealed on July 1, 2020.

Sec. 8. EFFECTIVE DATE

This act shall take effect on July 1, 2017.

Date Governor signed bill: June 5, 2017