

DIVERSION 101: WHAT IS DIVERSION?

Diversion: Any of a variety of programs that implement strategies seeking to avoid the formal processing of an offender by the criminal justice system. Although those strategies, referred to collectively as diversion, take many forms, a typical diversion program results in a person who has been accused of a crime being directed into a treatment or care program as an alternative to criminal prosecution and imprisonment. Diversion is possibly as old as the justice system itself. <https://www.britannica.com/topic/diversion>

Given that diversion “is possibly as old as the justice system itself,” it is perhaps surprising how little clarity there is around what diversion is and what it is intended to do. While diversion programs have become commonplace, they vary widely in their focus, scope, and outcomes. For example, some may argue that the following justice system interventions fall under the umbrella of “diversion”:

- referrals to mental health services made by law enforcement officers (as an alternative to arrest and formal criminal justice processing)
- referrals to drug/shoplifting/drunk driving/etc. education programs (in lieu of traditional case processing)
- agreements made between prosecutors and defendants around the completion of community service work, restitution, and/or participation in victim mediation sessions (also in lieu of traditional case processing)
- drug, veterans, mental health, OWI/DWI, and other specialty courts
- participation in cognitive-based risk reduction programming.

Most diversion options offer the promise of preserving system resources, avoiding the collateral

consequences of traditional case processing, while still holding individuals accountable for their behavior, expanding the role of victims in the criminal justice process, and/or linking individuals to needed services quickly. However, that is where their similarities end.

Clarifying the Term “Diversion”

A close examination of diversion options reveals differences across a host of factors:

- when and by whom they are initiated (they can be triggered at multiple points in the system by multiple stakeholders: law enforcement officers, prosecutors, defenders, court officials, pretrial staff, or others¹)
- the extent to which they are legally binding (whether they are informal agreements between parties or codified legal arrangements)
- their purposes
- the populations served
- the terms and conditions of participation
- their potential outcomes for the participant (e.g., participation in diversion programs can result in charges being filed or not, in convictions of record, or in case dismissal or expungement).²

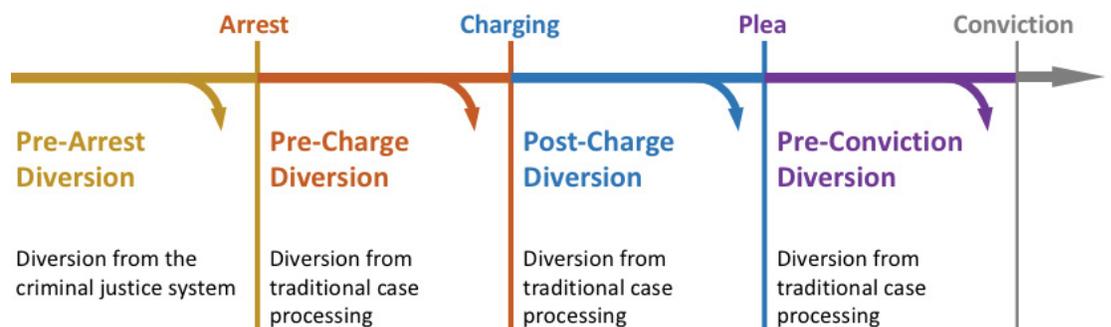
Because of these differences, it can be challenging to talk about diversion and its potential benefits. Perhaps most importantly, the tendency of some to refer to different forms of diversion similarly—particularly when interventions appear similar on the surface while operating quite differently—stands as a significant barrier to evaluating diversion’s impact and replicating effective programs. To this point, a national survey of diversion programs concluded that “with many diversion programs in existence across the country, there are no overarching standards for collecting or publishing data for the purposes of evaluating different types of programs against common sets of performance measures such as cost savings or reduced recidivism” (Center for Health & Justice at TASC, 2013, p. 2).

There are many benefits to the availability of diversion options at multiple criminal justice decision points. However, the hodgepodge nature of today’s “diversion” programs creates confusion about what diversion is and is not; which purposes and options are appropriate at various decision points; what the measures of effectiveness should be (and, to that end, what data are needed); and what existing models are available and appropriate for replication.

Given the difficulties associated with the term “diversion,” a first step in our efforts is to establish a new lexicon:

- **Pre-arrest diversion:** In cases where probable cause to arrest exists, law enforcement officers take an alternative course of action to arrest—such as “lecture and release” or referral to a program or service—to address the presumed underlying cause of the alleged criminal behavior (e.g., mental health concern, substance abuse, lack of safe, stable housing, etc.). Pre-arrest diversion results in no arrest or referral for charges.
- **Pre-charge diversion:** Following a referral for prosecution by law enforcement, prosecutors withhold filing charges and provide an alternative course of action (e.g., stipulate that an individual remain crime-free for a specified period of time, participate in education classes, conduct community service or other types of victim restoration). Satisfactory completion of pre-charge diversion typically results in charges not being issued.
- **Post-charge/pre-conviction diversion:**³ Following the filing of charges by prosecution, or as part of the plea negotiation process, an agreement may result in one or more specified conditions (e.g., participation in one or more programs or services including, in some jurisdictions, specialty court). Satisfactory completion of diversion at this stage typically results in the dismissal or reduction in level (felony to misdemeanor or forfeiture) of formal charges.

Key Justice System Decision Points: Diversion Opportunities⁴



What Is Not “Diversion”?

Although many options fall in the general category of “diversion,” we suggest that several forms of criminal justice processing historically considered to be diversion options do not, in fact, fall under the umbrella of diversion as defined herein.

Pre-trial release and supervision are not “diversion” options.

The term “pretrial release and supervision” is widely used; however, we suggest that, rather than being a form of diversion, this term reflects the status of a defendant in the criminal justice process. Individuals who are in a pretrial status may be managed in a variety of ways, but their release considerations (i.e., whether a defendant is detained during the pretrial phase of their case and, if not, the appropriate terms and conditions of their release) are determined on the basis of legal and evidence-based practices rather than on methods to divert an individual from the criminal justice system or from traditional case processing.

Post-conviction specialty courts are not “diversion” options.

Specialty courts (e.g., drug, veterans, mental health, etc.) represent a particularly complex element of the discussion of diversion insofar as they are made available to defendants either pre-conviction (in lieu

of traditional case processing) or post-conviction (as part of the sentencing process), depending upon a jurisdiction’s practices. We suggest that specialty court options made available pre-conviction—where placement is expedited and typically incentivized through a reduction in charges or criminal penalty—are in fact a form of diversion. However, post-conviction specialty court placements that are made based upon sentencing through traditional case processing and that do not dismiss or reduce charges are not diversion options as described herein.

Probation and other sentencing options in lieu of jail or prison are not “diversion” options.

Some criminal justice professionals argue that probation and other forms of sentencing that are imposed in lieu of jail or prison are forms of diversion (i.e., diversion from incarceration). Because these sanctions are imposed post-conviction through traditional case processing methods, we suggest that they fall outside of the definition and purpose of “diversion.”

References

The following resources were cited in this paper. For resources pertinent to the entire series, see the last article in the series, *Additional Diversion Resources*.

Center for Health & Justice at TASC. (2013, December). *No entry: A national survey of criminal justice diversion programs and initiatives*. Retrieved from http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf

Labriola, M., Reich, W. A., Davis, R. C., Hunt, P., Cherney, S., & Rempel, M. (2018, April). Prosecutor-led pretrial diversion: Case studies in eleven jurisdictions. Retrieved from Center for Court Innovation website: https://www.courtinnovation.org/sites/default/files/media/documents/2017-11/pretrial_diversion_case_study_report_final_provrel.pdf

Notes

¹ While multiple stakeholders can *trigger* diversion options, only law enforcement, prosecution, and the courts can place an individual on diversion.

² For more information on diversion options, see Labriola et al., 2018.

³ The term “booking” (as in “pre-booking” and “post-booking”) are commonly used when referring to diversion. For purposes of clarity, we avoid these terms, since, in some jurisdictions, “booking” refers to a process that takes place at police precincts, whereas in others it refers to a jail intake process. Likewise, in some jurisdictions, prosecutorial charging occurs within a short period of time following arrest whereas in others charging may occur after a significant period of time has lapsed.

⁴ While post-conviction diversion options serve a critical role in the criminal justice system, discussion of these options is beyond the scope of this series. Instead, this series will focus specifically on diversion options that span the pre-arrest, pre-charge, and post-charge/pre-conviction decision points.

About This Article Series

This is the first in a series of papers that examine pre-conviction diversion options, provide clarity around their purposes, propose guiding principles, and explore their public safety and other benefits. The articles, which build upon one another, honor the foundational work that has been done by others and continue to advance our thinking and work in this area.

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