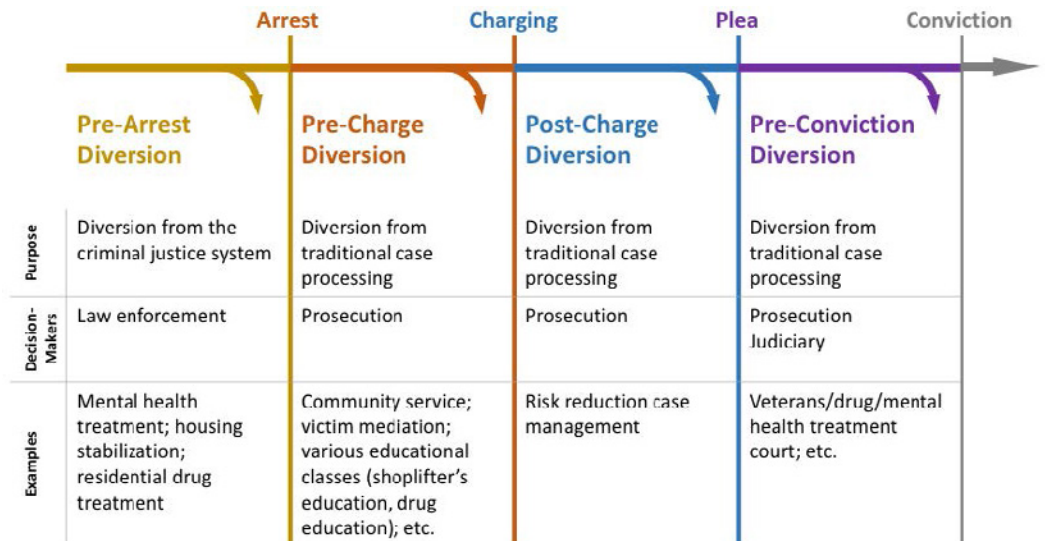


## DIVERSION 101: DIVERSION OPPORTUNITIES AT KEY JUSTICE SYSTEM DECISION POINTS

In this series, we have examined what diversion is and what it is not, the four primary purposes of diversion, whether diversion contributes to public safety, and how the “what works” research can be used to determine who should be considered for diversion. This article takes a closer look at the key justice system decision points at which diversion can take place, the purpose of diversion at each point, the decision-makers, and examples of diversion options.

### Key Justice System Decision Points: Diversion Opportunities, Purposes, and Decision-Makers



One of the conditions that confounds discussions about diversion is the fact that it is not a static intervention applied at just one step in the justice system. Rather, justice system professionals may utilize diversion at any one of four key decision points—or, in different cases and for different purposes, at all of them.

### Pre-Arrest Diversion

The decision to divert pre-arrest resides with law enforcement officers. This type of diversion is commonly referred to as police-led diversion, and occurs when law enforcement officers encounter circumstances that suggest that avoiding the criminal justice system

altogether serves the best interests of the community and the individuals alleged or suspected to have violated the law. Such circumstances vary widely but may include, for example, a youth engaged in non-serious behavior who, in the judgment of the officer, is best handled by a parent or guardian, or a person whose behavior is deemed to be better addressed through community services (e.g., persons in need of detoxification, mental health treatment, or a stable living environment). Oftentimes, these decisions are borne out of informal agency policy and are highly discretionary. In some instances, however, departmental policy may dictate the circumstances under which these diversions take place.<sup>1</sup>

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## Pre-Charge and Post-Charge Diversion

Once law enforcement determines that informal diversion from the criminal justice system is not warranted—and probable cause for formal charging exists—diversion options become the purview of the prosecutor. Prosecutors may opt for one of two types of diversion:

- Pre-charge diversion options are exercised when prosecutors choose not to formally charge—or indict—and, instead, offer an alternative course of action, typically in the form of a set of behavioral and programmatic requirements. In these instances, formal charges are not filed and are held until specific conditions are met. If and when conditions are satisfied, charges are *nolle prosequi*.<sup>2</sup> If conditions are not met satisfactorily, the prosecutor will typically proceed with formal charges. It is not uncommon for offers of pre-charge diversion to be based upon the instant offense that an individual is facing. However, applying the “risk principle”<sup>3</sup> to this decision would suggest that pre-charge diversion is most appropriate for persons assessed as low risk to reoffend rather than for persons facing allegations of low-level criminal violations. The severity of a criminal violation and one’s risk to reoffend are not one and the same.
- Post-charge diversion options are exercised after formal charges (an “indictment” or “criminal complaint”) are filed. In these instances, the prosecution may stipulate requirements that must be met to resolve and close the case. The charges may be dismissed or reduced if these conditions are satisfactorily met. If they are not, formal prosecution of the charges will commence, likely following the traditional case processing path, or the stay will be lifted and the individual will be sentenced if they previously pled guilty. Similar to common practice with pre-charge diversion today, many prosecutors’ offices offer post-charge diversion options based upon the instant offense. Under the risk principle, these options—which typically carry with them more intensive levels of intervention—would be most appropriate for individuals assessed as medium risk and/or for individuals who struggle to meet pre-charge diversion requirements and need additional support to succeed.

The important distinction between pre- and post-charge diversion is whether a record of formal charges is made. This distinction carries with it significant potential impact. For example, formal charges establish a criminal history which may impact employment eligibility and involve other collateral consequences.<sup>4</sup>

## Pre-Conviction Diversion

Pre-conviction diversion occurs further into the traditional criminal justice process, after charges have been filed. A pre-conviction diversion option, such as referral to a specialty court (e.g., mental health court, veterans court) may result at the suggestion of defense or prosecution but, at this stage of case processing, must also be approved by the court. Successful completion of a pre-conviction diversion may result in the charges being dismissed or a conviction for a reduced charge.

### A Note about the Sequential Intercept Model (SIM)

The Sequential Intercept Model (SIM) is a strategic planning tool that assists communities with identifying opportunities for change, assessing resources, and filling gaps in services for individuals with mental health and substance use disorders by mapping six points, or “intercepts”: Intercept 0 = Community Services; Intercept 1 = Law Enforcement; Intercept 2 = Initial Detention/Initial Court Hearings; Intercept 3 = Jails/Courts; Intercept 4 = Reentry; and Intercept 5 = Community Corrections (Policy Research Associates, 2017). The diversion framework offered in this article series corresponds with Intercepts 0–2. Pre-arrest diversion options fit within Intercepts 0–1, whereas pre-charge, post-charge, and pre-conviction diversion options fit within Intercept 2.

## 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*.

American Bar Association. (2018). *Collateral consequences of criminal convictions judicial bench book: The National*

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*Inventory of Collateral Consequences of Criminal Convictions* (Document No. 251583). Retrieved from the National Criminal Justice Reference Center website: <https://www.ncjrs.gov/pdffiles1/nij/grants/251583.pdf>

Bonta, J., & Andrews, D. A. (2017). *The psychology of criminal conduct* (6th ed.). New York, NY: Routledge.

Policy Research Associates. (2017). *The Sequential Intercept Model: Advancing community-based solutions for justice-involved people with mental and substance use disorders*. Retrieved from <https://www.prainc.com/wp-content/uploads/2017/08/SIM-Brochure-Redesign0824.pdf>

## Notes

<sup>1</sup> For instance, the Law Enforcement Assisted Diversion (LEAD) program in Seattle, Washington, operates under a specific public health framework that requires identification of a target population, use of an intensive case management approach, and the coordination of law enforcement, prosecutors, program staff, community-based service providers, and the community at large. More information can be found at <https://www.leadbureau.org>

<sup>2</sup> *Nolle prosequi*, or *nolle prosequi* as it is often abbreviated, is a legal term meaning “will no longer prosecute” and is a formal declaration made by a prosecutor to the judge that all or part of a criminal case is being dropped.

<sup>3</sup> The “risk principle” holds that programming should be matched to a person’s assessed level of risk to reoffend; those at higher risk require higher levels of intervention to reduce their likelihood of recidivism (Bonta & Andrews, 2017). This concept is further expanded upon in the seventh article in this series, *A Synopsis of Pertinent Research*.

<sup>4</sup> Collateral consequences are the penalties, restrictions, and disqualifications that affect people long after the direct consequences of their conviction—for example, imprisonment or other loss of freedom—have ended. The American Bar Association’s National Inventory of the Collateral Consequences of Conviction lists approximately 46,000 collateral consequences, including restrictions on employment, education, housing, public benefits, voting rights, and mobility; impact on family relationships; and so on (American Bar Association, 2018). Collateral consequences are also discussed in the third article in this series, *Do Diversion Options Put Public Safety at Risk?*

## About This Article Series

This is the fifth 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.

### Previous Articles in This Series

*What Is Diversion?*

*The Purposes of Diversion*

*Do Diversion Options Put Public Safety at Risk?*

*Using the “What Works” Research to Determine Who Should Be Considered for Diversion*

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The Bureau of Justice Assistance seeks to support criminal justice policymakers in the establishment of data- and policy-driven diversion options. This paper is one in a series designed to provide clarity around this important justice system issue.

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