THE EFFECTIVE USE OF PRETRIAL DIVERSION IN CRIMINAL CASES

Public Defenders Committee
Federal Criminal Procedure Committee

Approved by the Board of Regents
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THE EFFECTIVE USE OF PRETRIAL DIVERSION IN CRIMINAL CASES

Amid growing public concern over excessive and at times racially inequitable prosecutions and incarceration, the College's Public Defenders Committee, later joined by the Federal Criminal Procedure Committee, began consideration of steps that could be taken as courts resume normal operations to drive many more cases to a fair, speedy and compassionate resolution. Although it has existed in the federal system for decades, one under-utilized tool is diversion. The two Committees respectfully submit for public consideration this Whitepaper, urging the U.S. Department of Justice ("DOJ") to encourage U.S. Attorneys around the country to invest aggressively in diversion as an alternative to criminal conviction.[1] We also present a series of proposals that DOJ could suggest to the nation's 94 U.S. Attorneys promoting diversion as an alternative to prosecution and encouraging local innovation.

What Is Diversion?

Though implemented differently around the country, pretrial diversion generally refers to "a voluntary option which provides alternative criminal case processing for a defendant charged with a crime that ideally, upon successful completion of an individualized program plan, results in a *dismissal of the charge(s)*."[2] In contrast to incarceration alternatives, such as drug or youth courts, which are generally offered and/or overseen by judicial officers, diversion requires a *prosecutor* to defer prosecution while a defendant undergoes an individually tailored program of community-based rehabilitation, and to dismiss the case if the defendant successfully completes the program. Unlike incarceration alternatives, diversion thus spares the defendant the stigma and consequences of a criminal conviction and provides society with the benefit of training and job placement of previously unemployed or underemployed individuals.[3]

Originally implemented in the federal system for juveniles in 1947,[4] diversion was formally recognized by the U.S. Department of Justice as an adult sentencing alternative in the 1970s when it acknowledged its use in the U.S. Attorney's Manual (now the "Justice Manual").[5] Then as now, DOJ

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1 Some members of the Federal Criminal Procedure Committee are currently employed by the Department of Justice. Each of those members has abstained from joining this statement.

2 National Association of Pretrial Services Agencies, Performance Standards and Goals For Pretrial Diversion/Intervention 1 (Nov. 2008) (emphasis added) (hereafter "Performance Standards"), https://drive.google.com/file/d/14IBuYF9IazA_HNqmqMzgvYCgZ_rO-bsn/view. *See* Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 Berkeley J. Crim. L. 47 (Fall 2017) (hereafter "Scott-Hayward").

3 *Pretrial Diversion from the Criminal Process*, 83 Yale L.J. 827 (1974). Some of the programs discussed in the balance of this memorandum, such as South Carolina's BRIDGE program and the Central District of California's CASA program, are not pure diversion programs; successful participants receive *either* probation or dismissal, in the case of CASA the choice being made upon acceptance into the program.

4 Thomas E. Ulrich, *Pretrial Diversion in the Federal Court System*, 66 Federal Probation 30 (Dec. 2002) (hereafter "Ulrich")

5 *See* U.S. Dep't of Justice, Just. Manual, § 9.22.010 (2018) (hereafter "Just. Manual"), https://www.justice.gov/usam/usam-9-22000-pretrial-diversion-program. Prior to the 2018 publication of the Justice Manual, DOJ's Criminal Resource Manual provided significantly more detailed diversion guidance to U.S. Attorneys. *See* Criminal Resource Manual § 712 (inapplicable since 2018), https://www.justice.gov/archives/jm/criminal-resource-manual-712-pretrial-diversion (hereafter "Crim. Res. Manual").

nominally viewed diversion as a useful tool to prevent future criminal activity by engaging in societal restitution, saving prosecutorial and judicial resources, and—most importantly—enhancing justice and public safety.[6]

Study after study confirms that pretrial diversion works. For example, a nationwide analysis done by the Administrative Office for the U.S. Courts in 2002 found that, over a five-year period, 88% of diverted federal defendants successfully completed their diversion programs and exited the system without a conviction.[7] Additionally, a comprehensive 2005 study of diverted New York City offenders found that they were more likely than other defendants to be in the community, as opposed to jail or treatment centers, twelve months after their arrest.[8] Similarly, a 2010 study commissioned by DOJ concluded that "[o]ffenders who participate in pretrial diversion programs demonstrate positive outcomes when compared with [others] who go through the traditional criminal justice system."[9]

Most diverted defendants successfully complete their programs and avoid rearrest. For example, 89% of participants successfully graduated from California's Central District "Conviction and Sentence Alternatives" program ("CASA") according to a 2015 report.[10] The Eastern District of New York's Pretrial Opportunity Program ("POP") cited a 76% success rate that same year.[11] In March of 2017, the United States District Court of South Carolina's BRIDGE Program reported that 54% of participants successfully completed its program, generating approximately $7 of judicial cost-savings for every dollar spent. [12]

A charging decision, appropriate at the outset, should be revisited when new information presents itself. As a general matter, when charges are preferred, the prosecutor knows much more about the offense than about the offender. Mitigating information often develops during the pendency of charges, as does a sense of the defendant's mental state and the existence of potentially mitigating circumstances. Given additional pretrial runway, even defendants themselves can gain greater insight into their own character and strengths and weaknesses, which can provide a deeper understanding of the reasons they offended and their capacity for growth and change.

Studies suggest that diversion may do more to promote public safety than successful prosecution. Diverted defendants generally pose a lower risk of repeat offending than their convicted counterparts. For example, of those successfully completing a model program run by Cook County, Illinois, only 3% committed another felony in the ensuing year; 86% did not reoffend at all.[13] Of the

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6 *Id.*

7 Ulrich at 33-34.

8 Broner, N.et al., *Outcomes of mandated and nonmandated New York City jail diversion for offenders with alcohol, drug, and mental disorders*, 85 The Prison Journal (18) (2005), https://www.academia.edu/38196116/Outcomes_of_mandated_and_non_mandated_New_York_City_jail_diversion_for_offenders_with_alcohol_drug_and_mental_disorders.

9 Catherine Camilletti, Pretrial Diversion Programs, *Research Summary* (Bur. of Justice Assistance, Oct. 2010), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PretrialDiversionResearchSummary.pd

10 Scott-Hayward at 90. According to the Federal Public Defender's office, graduation rates continue to hover at 90%.

11 *Alternatives to Incarceration in the Eastern District of New York: The Pretrial Opportunity Program and The Special Options Services Program*, Second Report to the Board of Judges, 22 (2015).

12 Hon. Bruce Howe Henricks (D.S.C.), Written Statement to U.S. Sentencing Commission – Drug Courts at 9 (2017) (hereafter "Henricks"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/Hendricks.pdf). BRIDGE is not a pure diversion program, as some participants receive sentences of probation or time-served.

13 Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES, Dec. 12, 2016, at A1.

43 graduates of the BRIDGE drug-court program in South Carolina, only five reoffended, and two of the five re-enrolled in the program.[14] Texas, which changed its diversion policies twice during a thirteen-year study period, found that when diversion was more readily available, criminal charges, bookings, and convictions all decreased by as much as 65%. Restricting diversion opportunities had the opposite effect: an 86% increase in convictions.[15] Similar findings have been reported in Florida, which found that two-year recidivism rates among offenders with a court deferral agreement were significantly lower compared with convicted offenders.[16] The simple truth, confirmed by the Inspector General for DOJ, is that "avoiding a felony conviction decreases the likelihood of ever receiving a future conviction."[17]

Aside from enhancing public safety, diversion is usually a less expensive and more compassionate tool than criminal prosecution. By preventing another incarceration, diversion saves considerable U.S. tax dollars. According to 2019 calculations by the Administrative Office of the U.S. Courts, the federal government spends nearly $40,000 annually to incarcerate a Bureau of Prisons inmate;[18] in contrast, the Probation Service reports the annual cost of supervision at less than $5,000.[19] The U.S. Sentencing Commission found this true for state incarceration-alternative sentencing programs, for which it concluded: "Most . . . that have been evaluated have shown cost savings compared to traditional case dispositions."[20]

Significantly, diversion avoids the large costs, monetary and otherwise, created when a defendant is convicted of a felony. Some of these costs flow as a matter of law and constrict a former defendant's ability to lead a socially, economically, and politically productive (and law abiding) life.[21] These can include "civil" sanctions that limit one's ability to access public benefits, public or government-assisted housing, and federal student aid. Other consequences can include employment restrictions, disqualification from military service, disenfranchisement, and, for non-citizens, expulsion from the country.[22]

Being an "ex-con" has real-world consequences not just on the previously convicted but also on their communities and families. De facto employment restrictions challenge an ex-offender's

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14 Henricks at 11.

15 Michael Mueller-Smith and Kevin T. Schnepel, *Avoiding Convictions: Regression Discontinuity Evidence on Court Deferrals for First-Time Drug Offenders*, 14-15 (Nov. 2016) (hereafter "Avoiding Convictions"), https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2016/11/avoiding_convictions_nov2016.pdf

16 Chiricos, T., Barrick, K., Bales, W. and Bontrager, *The Labeling Of Convicted Felons and Its Consequences For Recidivism*, 45 Criminology No. 3, 547–581. (2007).

17 Avoiding Convictions at 16. *See* DOJ Office Of The Inspector General, Audit Of The Department's Use Of Pretrial Diversion And Diversion-Based Court Programs As Alternatives To Incarceration 15 (July 2016) (hereafter "Inspector General Audit"), finding that two-year recidivism rates of diverted defendants in the Central District of Illinois were half that of convicted counterparts, with a majority of the subsequent offenses being drug-related or violations of supervision. According to the DOJ's Office of Justice Programs, favorable recidivism results were also reported by San Francisco's "Behavioral Court" though a program run the Brooklyn Treatment Court showed no statistically different frequency in subsequent drug convictions differences between participating and non-participating defendants. *See* https://data.ojp.usdoj.gov/dataset/CrimeSolutions-Gov-Programs/ipvm-nxtr (Program IDs 4,985 & 4,994).

18 *See* Bureau of Prisons, Annual Determination of Average Cost of Incarceration Fee (Nov. 19, 2019), https://www.federalregister.gov/documents/2019/11/19/2019-24942/annual-determination-of-average-cost-of-incarceration-fee-coif.

19 Both costs must be set forth in every presentence investigation report. *See* 18 U.S.C. § 3572(a)(6) and USSG § 5E1.2(d)(7).

20 U.S. Sent'g Comm'n, Federal Alternative-to-Incarceration Court Programs 13 (Sept. 2017) (hereafter "Federal Alternative"), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf.

21 Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. Rev. 623, 633 (2006).

22 *Id.* at 636

ability to meet their basic needs and to financially support their family. At the same time, most of those returning with convictions settle in America's poorest urban centers, which lack the resources necessary for successful reentry and reintegration.[23] Not surprisingly, 30% of ex-offenders are rearrested just six months after release; approximately half eventually return to prison.[24]

Families pay a steep price for a loved one's incarceration. Many children of ex-convicts suffer from social rejection, anxiety, depression, and school-related issues. They more frequently end up in foster care during or after a parent's incarceration.[25] And removing an actual or potential breadwinner can spell disaster for families already living at the margins. The nation is already staggering from the head-spinning number of adults reentering society after being criminally convicted, now totaling almost 65 million Americans—roughly two out of every seven people in the United States over the age of 18.[26] Diversion represents an opportunity to keep the number from growing, ameliorating the burden to communities that ultimately have to support and reabsorb convicted defendants.

We recognize that the decisions to commence and prosecute a criminal case are not easy ones. Prosecutors rightly must consider deterrence and, where the offender has injured or otherwise harmed others, the rights of crime victims. But diversion is not necessarily at odd with either goal. When conditioned on the satisfactory completion of a program of rehabilitation, diversion is not a free ride. And in appropriate cases, it offers crime victims greater hope for restorative justice and restitution from an employable or employed former defendant. When diversion succeeds, as studies suggest it typically does, it can be a win-win all around.

Why Is a DOJ Push for Diversion Necessary?

In our opinion, diversion remains a grossly underutilized tool in the federal system. Our own informal poll of federal defenders nationwide turned up very few formal diversion programs. And where they do exist, defendants are rarely offered diversion as an alternative to a guilty plea and sentence.

Published data confirm our poll results. A recent report from the U.S. Sentencing Commission indicates that there has been a "continued decreasing trend in the imposition of alternative sentences."[27] While in 2004 the nation benefitted from an estimated 253 state, local, and federal diversionary programs,[28] over the last decade diversion has consistently amounted to less than 1% of all pretrial cases.[29] As of year-end 2020, the Administrative Office of the U.S. Courts reports that nationally only 496 defendants were under federal diversion supervision, down by roughly two-thirds from ten years ago.[30] By comparison, the federal courts sentenced 64,565 defendants last year,

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23 Sharifa Rahmany, The Dark Cloud of Collateral Consequences: Ex-Offenders Serving Civilly Imposed Sentences Post-Incarceration, 48 No. 6 Crim. Law Bulletin ART 1, 3 (2012).

24 *Id*.

25 *Id*. at 4, 5.

26 Edward Lyon, *Collateral Consequences of Mass Incarceration*, Prison Legal News (February 1, 2021), https://www.prisonlegalnews.org/news/2021/feb/1/collateral-consequences-mass-incarceration/.

27 Courtney R. Semish, Alternative Sentencing In The Federal Criminal System 1 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf.

28 Scott-Hayward, at 56.

29 *Id.*, at 67 (between 2001 and 2015, diversion cases dropped from 2.3% of all pretrial activations to less than 1%).

30 Admin. Office of U.S. Courts, Judicial Caseload Indicators ("D-Cases" Spreadsheet) (Dec. 31, 2020), available at https://www.

meaning that a federal offender has substantially less than a one-in-a-hundred chance of earning diversion.[31]

And even these numbers, small as they are, overstate the frequency with which diversion is offered. Historically, a relative handful of federal judicial districts accounts for the bulk of diversionary outcomes. A 2002 study found that 20 districts averaged fewer than five diversion cases annually while only five accounted for 28% nationwide. The DOJ's Office of Inspector General found the situation unchanged in 2016.[32] Looking at 2012-14 data, it found that just three districts accounted for one-third of all diversions. Comparing U.S. Attorney's offices that offer diversion with those that don't reveals no consistent set of economic, political, or social characteristics that explain the difference.

In most districts, as a practical matter, diversion is not an option because, in our view, DOJ has not sufficiently prioritized it. The Justice Manual devotes only fifteen lines to diversion, half of which set standards of ineligibility. This is a retrenchment from a prior version that offered a more expansive discussion of diversion.[33] But even that guidance vested in the U.S. Attorneys only the ability to divert defendants; it did not provide any mandate, direction, or encouragement that they do so. We join in the DOJ Inspector General's conclusion that, without a strong and urgent change of direction coming from the top, U.S. Attorney's offices around the country are unlikely to show any greater enthusiasm for diversion than they have shown in the past.[34]

Now is an ideal time for DOJ to encourage local prosecutors to institutionalize diversion and to make it more widely available. Though no secret to policymakers, the cost and counter-productivity of mass incarceration have finally sunk in to the public consciousness. So, too, has the permanent and unnecessary damage done to individuals and communities when criminal conviction, and likely incarceration, are the expected outcome of every criminal case.

What Policy Changes Are We Recommending?

As just noted, DOJ currently provides U.S. Attorneys little guidance for setting up a diversion program and no motivation to offer it as an alternative. We propose that DOJ amend the Justice Manual to require each U.S. Attorney's office to establish a structured diversion program and to invest in it. As "alternatives to incarceration" programs have shown, local innovation best drives local implementation, so we do not counsel that DOJ force any particular template on its 94 federal judicial districts. That said, we believe that DOJ should provide suggested answers to some of the common questions that pervade diversion programs: "Who Is Eligible," "Who Gets to Decide," "What Procedures Govern Participation," and "How to Measure Success."

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uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=&pn=All&t=69&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D=.

31 United States Sen'g Comm'n, Sourcebook 56 (2020).

32 Inspector General Audit at 15.

33 U.S. Dep't of Justice, Just. Manual, § 9.22.010 (2018), https://www.justice.gov/usam/usam-9-22000-pretrial-diversion-program. For the prior version, *see* n.4, *supra* at 2.

34 Inspector General Audit at 32.

Eligibility. Diversion programs have historically excluded minority defendants and skewed participation in favor of white, college-educated defendants.[35] In our view, this is the product of structured eligibility criteria that disadvantage people of color and those with few resources in some districts. In other districts, the absence of specific criteria leads to under-representation. For example, many formal diversion programs generally limit eligibility to defendants who can connect their offense conduct with a treatable mental health or drug-related condition. While a starting point, we recommend that diversion should also be open to defendants whose behavior is uncharacteristic and/or appears related to *life experiences* that treatment and/or the provision of services can address.

The RISE program, adopted by the judges of the District of Massachusetts, provides a good example. In this program, eligible defendants include those whose "history reflects significant deficiencies in family support, education, employment, decision-making, or pro-social peer networks as a result of which the defendant would benefit from a structured program . . . ."[36] Unlike many districts where diversion becomes an option only if the line prosecutor initiates it, RISE and other successful diversion programs accept applications from any defendant who can make the required showing.

"Eligibility criteria should not operate like exclusion criteria,"[37] as is generally the case now. In some districts, drug offenders involved in commercial distribution are ineligible for diversion. In our view, diversion should be an option for those accused of either possession or distribution, so long as there is reason to believe the offense conduct was aberrational or the offender is amenable to treatment and rehabilitation. Nor should a procedural rule, such as an application deadline thirty days from the defendant's initial appearance, artificially curtail participation. As noted earlier, the suitability of an applicant may not become known until well down the road, which DOJ at one time recognized when its former guidance recommended that applications be accepted "at any point . . . prior to trial."[38]

That said, out of respect for regional differences, U.S. Attorneys should be afforded discretion to tailor eligibility so that diversion is offered most frequently to those most likely to benefit from it and to exclude those charged with offenses considered so serious as to be disqualifying. Some districts may exclude sex offenders, recidivists, and those charged with crimes of violence. But because individual circumstances matter, we think DOJ should urge local prosecutors not to restrict unduly those who can apply for diversion. DOJ should also suggest that districts consider more liberal application of their eligibility criteria in favor of defendants who, while out of custody on prolonged pretrial release during the COVID-19 quarantine, conducted themselves in a law-abiding, productive, and responsible manner.

Decision-making. Because diversion ultimately is an exercise of prosecutorial discretion, the U.S. Attorney must function as the ultimate gatekeeper. But in districts operating the most successful diversion programs, such as those in the District of Massachusetts and the Central District

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35 Ulrich at 32-33; *see* Federal Alternative at 9 (true as to drug courts).

36 THE RISE PROGRAM, at 2, https://www.map.uscourts.gov/sites/map/files/2017%20RISE%20Program %20Statement.pdf). RISE is expressly neither a diversion nor incarceration-alternative program, as the judge determines the benefits of successfully completion and only after the defendant achieves it.

37 Scott-Hayward at 94.

38 Crim. Res. Manual § 712(A)(2), https://www.justice.gov/archives/jm/criminal-resource-manual-712pretrial-diversion.

of California, prosecutors exercise the prerogative in collaboration with other criminal justice system participants. Every application goes to a standing committee consisting of a disinterested prosecutor, a senior public defender or CJA attorney, and a representative of the U.S. Probation Office.[39] If the prosecutor-representative ultimately exercises a veto, it is done after considering what others, with different perspectives and information, may bring to bear.

At Congress's direction, the U.S. Probation Office has developed a template for evaluating defendants who seek diversion, giving particular attention to identifying those who stand to benefit the most from intensive supervision and the avoidance of a criminal conviction.[40] Consistent with its former policy,[41] we believe DOJ should urge adoption of a rule generally requiring a pre-diversion evaluation of and report on any applicant who, in the view of the district's intake committee, makes a reasonable case for diversion.

Procedures. An issue that frequently arises in designing diversion programs is whether a defendant seeking diversion must first enter a guilty plea, which is then held in abeyance unless and until the defendant successfully completes their diversion program, at which point charges are dismissed. Prosecutors understandably prefer requiring a guilty plea because it all but ensures the successful prosecution of a diversion candidate who drops or washes out of the program. Defense lawyers generally oppose guilty-plea requirements, largely because they start what should be a process of rehabilitation and restoration with the dishonorable tag of "admitted felon." Additionally, they note that, should the defendant reoffend, the U.S. Sentencing Guidelines treat successful diversion arising from a program requiring a finding or an admission of guilt in a prior judicial proceeding as a prior conviction, even though charges were dismissed.[42]

DOJ at one time came down on the defense side on this issue, when its former guidance suggested that diversion candidates be required to "acknowledge responsibility for his or her behavior, but . . . not asked to admit guilt."[43] We believe this approach to be preferable in the vast majority of situations. That said, in particular cases federal prosecutors should remain free to require an admission of guilt that an unsuccessful diversion candidate would have great difficulty walking back. This might include a defendant's admission of guilt before the diversion committee in a form concretely establishing it as knowingly made and voluntary or, less frequently, a formal in-court guilty plea (e.g., one counting as a conviction under the Guidelines).

Successful "incarceration-alternative" programs generally require participants periodically to appear before a district or magistrate judge to discuss both their progress and any obstacles to their success. Some current models have used the active and regular participation of a judicial officer to great effect. Progress is measured against a series of benchmarks—established by the selection

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39 This mirrors what several districts have done to identify candidates for compassionate release under the First Step Act, 18 U.S.C. § 3582(d)(1)(A), and retroactive application of drug law, sentencing guideline and statutory changes: *See, e.g.,* 2020 Attorneys of the Year: District of Minnesota Compassionate Release, Minn. Lawyer (Feb. 18, 2021) (D. Minn. Compassionate Release Plan).

40 *See* 18 U.S. Code § 3154(10).

41 Crim. Res. Manual § 712(D).

42 U.S.S.G. § 4A1.2(f) & Application Note 9. The guideline makes explicit that "[d]iversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted."

43 *See* Crim. Res. Manual §712(F) ("The offender must acknowledge responsibility for his or her behavior [in a Pretrial Diversion Agreement], but is not asked to admit guilt."), https://www.justice.gov/archives/jm/criminal-resource-manual-712-pretrial-diversion.

committee at the front-end and monitored by a Probation Officer during the diversion period—that may include requirements that the defendant find and maintain employment, enhance his or her job skills, seek out opportunities for education, acquire stable housing, participate in mental health and drug treatment, act responsibly toward family and the community, participate in cognitive behavioral therapy, and take part in a restorative justice program. We believe DOJ should urge the U.S. Attorneys to adopt this model, working with the chief judges of their districts to identify a subset of judges most likely to embrace and promote the goals of diversion.

Different jurisdictions have chosen different periods of diversion supervision. We believe that DOJ should instruct the U.S. Attorneys, as its own regulations currently provide, that the period of diversion supervision should ordinarily last no longer than eighteen months.[44]

Measuring Success. Although it is tempting to recommend that DOJ promulgate targets for the percentage of defendants who receive offers of diversion, a one-size-fits-all standard fails to account for differences in the composition of case filings or offender profiles. That said, we believe DOJ should give its imprimatur to diversion by suggesting that prosecutors run their diversion programs liberally in a manner best calculated to achieve their goals while maintaining public safety and adequately accounting for the views of crime victims. Beyond that, the frequency of diversion offers should remain a matter of local discretion.

"What is measured improves."[45] To that end, we recommend, as did the DOJ Inspector General five years ago, that DOJ require U.S. Attorneys to tally and report data on the number of diversion applications made annually, the frequency with which their offices offer diversion, the offense and offender profile of those who receive diversion and those who do not, the completion rates of those under diversion supervision, and the reasons for those failing to complete the program.[46] Tracking these metrics will not only help to evaluate and improve diversion programs, it will promote their use.

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44 Just. Manual § 9.22.010. This has consistently been DOJ policy, see Crim. Res. Manual § 712(F), with the eighteen-month limit expressly incorporated into the Department's previously recommended Pretrial Diversion Agreement. See Crim. Res. Manual § 712, USA Form 186, https://www.justice.gov/archives/jm/ criminal-resource-manual-715-usa-form-186-pretrial-diversion-agreement.

45 Generally attributed to the management consultant Peter M. Drucker.

46 Inspector General Audit at 32.

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