

Pretrial Diversion in the Federal Court System

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PRETRIAL DIVERSION is a voluntary program that provides an alternative to prosecution for an individual selected for placement in a program of supervision administered by a pretrial services or probation office. The offender who is selected for pretrial diversion enters into a contract with the U.S. attorney's office, pledging to meet certain conditions and to refrain from criminal activity for a specified period of time. Because participation is voluntary, persons may decline to enter the program and instead exercise their right to proceed with a trial on the charges against them. This article provides a demographic and administrative analysis of pretrial diversion cases in the federal court system during the five years spanning 1995 to 1999.¹ During this period, probation and pretrial services offices² activated 12,414 pretrial diversion cases, with 11,879 individuals enrolled in pretrial diversion and received for supervision by the district courts.³

History

The roots of pretrial diversion in the federal system lie in the treatment of juveniles facing judicial action in the federal courts. In 1947, the Judicial Conference recommended that courts be encouraged to use what was termed "deferred prosecution" in the cases of "worthy" juveniles, by placing them under the informal supervision of probation officers for a definite period.⁴ In the 1960s, growth in pretrial release programs spurred interest in going beyond assuring appearance in court and led to efforts to focus on addressing the reasons for arrest. In the 1970s, diversion programs expanded following the recommenda-

tions of the 1967 President's Commission on Law Enforcement and the Administration of Justice. Diversion thus emerged as a national crime control strategy.⁵

By addressing the reasons for arrest, pretrial diversion is intended to reduce the likelihood of recidivism. Under diversion, the possibility that prosecution in the defendant's case might be suspended is meant to serve as an incentive to defendants to change their behavior and habits, particularly because it is clear that prosecution will occur if diversion is not completed successfully. Changed behavior through successful completion of diversion is also of value to the community and the courts.⁶

Anticipated benefits arising from pretrial diversion also include conservation of court time and resources for more serious crimes, as well as the opportunity for rehabilitation, which can reduce the likelihood of future criminal activity.⁷ For the individual, who is often a first-time offender charged with a less-serious offense, satisfactory completion of the period of diversion offers the possibility of avoiding a charge on the record and a possible conviction. Positive outcomes for society occur when an individual receives treatment as a condition of diversion and when a pattern of illegal behavior is broken, which reduces that person's risk of becoming a repeat offender. Society also benefits when diversion results in restitution in the form of financial repayment to victims or service to the community.⁸

Diversion Procedures

In the federal system, the Department of Justice (DOJ) has responsibility for pretrial di-

version and creates policies and procedures for persons diverted from prosecution under this program.⁹ *The U.S. Attorney's Manual* includes eligibility criteria for divertees¹⁰ and describes procedures to be followed. When pretrial diversion is used, a written agreement between the U.S. attorney and the chief pretrial services or probation officer defines aspects of its implementation.¹¹ The agreement describes the responsibilities of the U.S. attorney for referring potential candidates for pretrial diversion to the pretrial services or probation office, outlines the procedures to be followed if the individual breaches the conditions of the agreement, and describes actions that are taken upon successful completion of the requirements.

A pretrial services or probation officer typically prepares a diversion report that describes the offense, the candidate's personal history, including any criminal record, and an assessment of the person's risk factors; it also contains a recommendation regarding the person's participation in a pretrial diversion program. When the officer recommends an individual as a candidate for placement in pretrial diversion, the report typically suggests possible conditions, as well as a recommended length of diversion supervision.

The National Association of Pretrial Services Agencies¹² (NAPSA) has developed a set of standards for diversion entitled *The Performance Standards and Goals for Pretrial Release and Diversion*.¹³ The original standards were developed in 1978, then revised in 1995. NAPSA defines a pretrial diversion program that includes the following standards:

- persons charged with criminal offenses are provided with alternatives to traditional criminal justice or juvenile justice proceedings;
- the accused participates in the program only on a voluntary basis;
- the accused has access to defense counsel prior to a decision to participate;
- service plans developed with the candidate are designed to address the needs of that candidate, and are structured to assist that person in avoiding behavior likely to lead to future arrests; and
- the program results in the dismissal of charges or the equivalent if the diveree successfully completes the diversion process.

In the federal court system, the use of diversion varies across districts, reflecting the discretion of the U.S. Attorney’s Offices and district characteristics. How supervision is conducted also differs depending upon the types of offenses, needs of the divertees, and supporting programs available.¹⁴

Participation in pretrial diversion is voluntary and may require a waiver of the individual’s Sixth Amendment right to a speedy trial, because participation in the program causes prosecution to be deferred pending satisfactory completion of the diversion period.¹⁵ Prosecutors have the discretion to determine whether a defendant is suited for pretrial diversion, but are not authorized to selectively prosecute defen-

dants based on impermissible considerations such as race or religion.¹⁶

Methodology

The district courts record pretrial services data primarily via the Probation and Pretrial Services Automated Case Tracking System (PACTS). Once the data reach the Statistics Division of the Administrative Office of the United States Courts, extracts from the data are posted in the Pretrial Services Act Information System (PSAIS) database, which produces the published workload tables and other data on pretrial services activity.¹⁷

The first step in creating the database for the analysis reported in this paper consisted of gathering electronic records of all PSAIS cases for which the case type was reported as DIVERSION (Type = D).¹⁸ Two categories of diversion records were selected for analysis: records of diversion cases activated and records of persons received for diversion supervision. The examination of pretrial services cases activated addressed cases in the PSAIS database that were activated between October 1, 1994, and September 30, 1999, and for which pretrial diversion records were opened.¹⁹ A case may be activated when the pretrial services office opens the record of an individual who is a candidate for diversion, or when the candidate has been accepted for diversion and has entered into a diversion agreement.²⁰

The population of persons received for diversion supervision consists of persons who were accepted for pretrial diversion and, after agreeing to participate, entered into diversion supervision during the study period. These records were based on a file of cases in the PSAIS database for which the defendants were received for supervision between the dates listed above and for which a period of at least one month of diversion supervision was recorded on the record.²¹

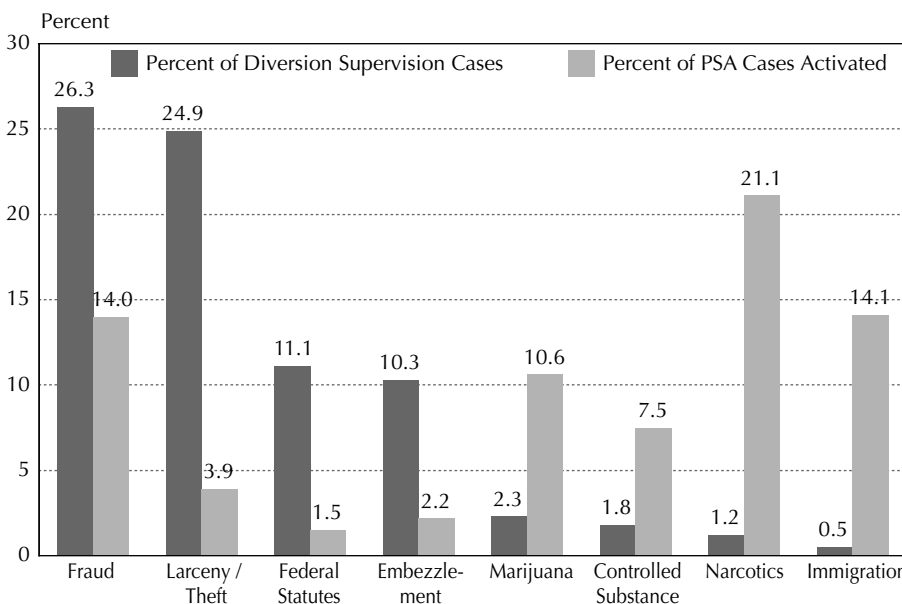
Descriptive Findings

Offenses for Which Diversion Is Used

Over the five-year period between 1995 and 1999, the most common major offenses charged in cases in which the defendants were enrolled in pretrial diversion were fraud and larceny/theft (See Figure 1). In 26 percent of all pretrial diversion cases reported, the major offense charged was fraud, which includes among other types of fraud, bank fraud, postal fraud, and interstate wire fraud. Cases in which the major charge was larceny or theft constituted the next-largest category, with 25 percent of all divertees during the study period facing charges such as theft of U.S. property, other misdemeanor theft, and postal larceny/theft. The third-largest category, “federal statutes,” involved 11 percent of cases; for these the major offenses included national park and recreation offenses, obstructing the mail, and contempt, among a wide variety of other offenses. Embezzlement was the fourth-largest category; 10 percent of divertees during the period faced charges involving embezzlement from banks and the postal system, and embezzlement of public money or property. Together, these four categories of major offenses charged accounted for 73 percent of all cases in which the individuals received pretrial diversion.

The types of offenses involved in diversion cases differ from the overall distribution of offenses that comprise the federal courts’ non-diversion pretrial services population for the same period. Whereas “white-collar” crime accounted for the majority of major offenses for the diversion cases, pretrial services cases as a whole during the period largely involved crimes related to drugs (39 percent overall, including narcotics, marijuana, and controlled substances) and immigration (14 percent). These categories were markedly less represented in diversion cases, as only 5 percent of divertees had a drug offense cited as the major offense, and only one half of one percent of divertees were cited for immigration violations as the major offense.

Figure 1
Major Offense Charged in Diversion Supervision and Regular Pretrial Services (PSA) Cases



It is not surprising that relatively few defendants for whom the primary offense charged is an immigration offense are offered diversion. Even though many immigration crimes may not involve violence on the part of these defendants, many of these defendants are not citizens and many lack ties to the community, which suggests they might not be good candidates for successful completion of a diversion program. Pretrial diversion is rarely offered as an alternative to prosecution for immigration defendants charged with illegal entry, who will be deported soon after trial.

Although diversion programs may offer drug treatment, only a small proportion of diversion cases involve individuals whose major offense is drug-related. Defendants for whom a drug crime is the major offense accounted for 39 percent of pretrial services cases activated over the five-year period, but made up only 5 percent of the pretrial diversion supervision population. The nature of the charges appears to limit the perceived appropriateness of diversion from prosecution. It is worth noting, however, that individuals under pretrial diversion supervision whose primary offense is in a category other than drug offenses may receive drug treatment during their diversion period as a collateral condition of their participation in the program.²²

Demographic Characteristics

The demographic characteristics of divertees, as a group, are somewhat different from pretrial services defendants overall. Compared to defendants whose cases are activated in pretrial services in general, individuals enrolled in pretrial diversion and received for diversion supervision were more likely to be female, white, non-Hispanic, U.S. citizens, college educated, and employed than were members of the pretrial services population in general. These characteristics of divertees as a group largely reflect the demographic characteristics of persons charged with the types of offenses most likely to be involved in diversion cases, as discussed in the previous section.

Gender. Forty-four percent of the individuals who were diverted from prosecution and received for pretrial diversion supervision during the five-year period were female. This was a much higher proportion than in pretrial services cases activated overall, for which, during the same period, only 16 percent of defendants were female. Several factors appear to account for this difference. Female defendants, as a group, are less likely to have prior offenses²³ and are more often charged with

offenses for which pretrial diversion is frequently used (see discussion above on offense categories).²⁴ For example, during the study period, across all pretrial services cases activated, fraud was the most serious offense charged for 21 percent of women, compared to 13 percent of men. Larceny/theft was the most serious offense for 8 percent of women, and 3 percent of men; embezzlement was the offense for 7 percent of women, 1 percent of men.

Race/Ethnicity. In the five-year period between 1995 and 1999, 63 percent of divertees were reported as being white, 28 percent black, and 4 percent Asian. Nine percent of divertees were Hispanic, and 81 percent were non-Hispanic.²⁵ In contrast, 36 percent of defendants in pretrial services overall during the study period were Hispanic. By combining the race/ethnicity groupings, the following characteristics are observed. The most distinctive demographic difference in race/ethnicity between the pretrial diversion population and the population of pretrial services defendants at large is in the representation of Hispanic defendants. As shown in Table 1, white Hispanic persons constituted approximately one-third of defendants in cases activated in pretrial services during the five-year period, but accounted for only 8 percent of persons participating in pretrial diversion. Conversely, more than one half of divertees were white non-Hispanic. Several factors appear to contribute to the difference in representation, primarily centering on patterns of offenses charged and the interaction with race/ethnicity and other demographic characteristics; these issues are covered more thoroughly in the discussion section of this paper.

TABLE 1
Race/Ethnicity of Defendants

	Pretrial Diversion	Regular Pretrial Diversion
White Hispanic	8%	34%
Black Hispanic	1%	2%
White non-Hispanic	54%	33%
Black non-Hispanic	27%	25%
Other/Unknown	10%	6%

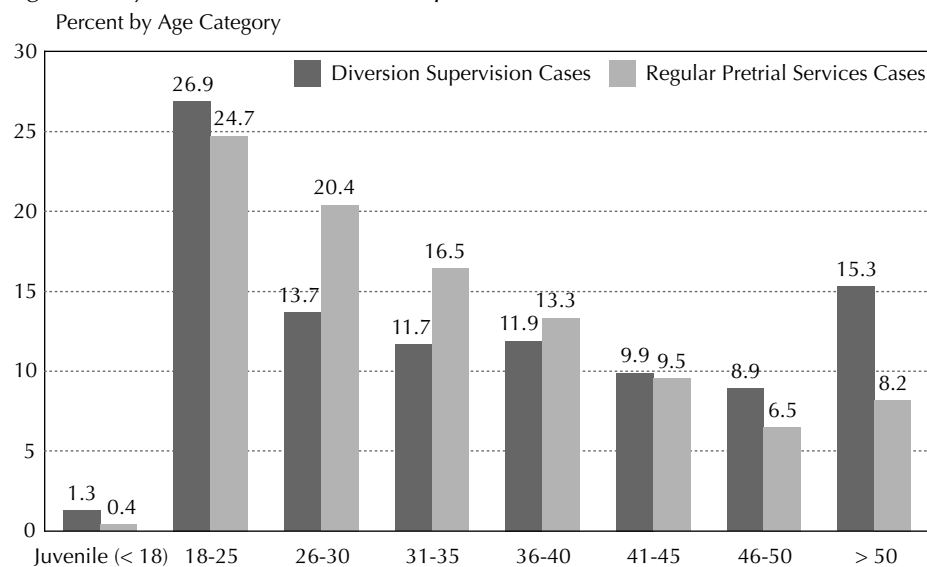
Citizenship. Ninety-three percent of divertees were U.S. citizens, 5 percent were legal aliens, and less than 1 percent were illegal aliens.²⁶ Defendants with cases activated in the regular pretrial services system during

the same five-year period were less likely to be U.S. citizens (67 percent were citizens), more likely to be illegal aliens (19 percent of cases), and more likely to be legal aliens (9 percent of cases). Selection for participation in pretrial diversion is based on the likelihood that an individual will comply with the requirements of a diversion contract. Thus, it is not surprising that so few cases of non-citizens appear in pretrial diversion records, since the profile of many aliens who enter the pretrial services system includes the lack of a support structure in the community or home. Also, defendants known to be illegal aliens already have demonstrated non-compliance with the law based on their illegal status. Similarly, to the degree that recommendations for pretrial diversion are based on issues similar to those affecting detention decisions, research on pretrial detention reveals that citizenship appears to be the strongest, non-statutory predictor for release or detention. This largely reflects a presumption that defendants who have illegal alien status are more likely to flee if not detained.²⁷

Age. The age characteristics of divertees were as follows.²⁸ During the study period, the average age was 36 years. One percent were juveniles (under age 18), 27 percent were age 18-25, and 15 percent were age 50 and above. Figure 2 shows the distribution of divertees by age grouping, along with the age distribution of defendants in pretrial services cases activated for comparison. This figure shows that younger (age 25 and below) and older (age 46 and above) individuals were more highly represented in the diversion group than among regular pretrial services defendants as a whole.²⁹

The presence of a slightly greater percentage of younger individuals in pretrial diversion is consistent with the roots of pretrial diversion, which lie in efforts to rehabilitate juvenile offenders and let them avoid the stigma associated with the formal juvenile court system.³⁰ Thus, young offenders without prior offense histories more often are considered as candidates for pretrial diversion. Conversely, that the pretrial diversion population has a larger percentage of older defendants than the population of persons in the pretrial services system as a whole appears to reflect the nature of offenses for which pretrial diversion is offered. As noted above, defendants offered pretrial diversion are more likely to be charged with "white-collar" crimes, whereas drug offenses and immigration offenses are underrepresented among the

Figure 2
Age at Entry into Pretrial Diversion Supervision



major offenses with which defendants offered diversion are charged. As a group, older defendants are less likely to be defendants in drug and immigration cases, so with those defendants less likely to be offered diversion, the age distribution among participants in pretrial diversion is skewed to include more individuals in the oldest age group (over 50). Fraud defendants, who are more often candidates for pretrial diversion, are usually older.³¹

Education. Divertees were twice as likely as persons in regular pretrial services cases to have an education level that includes at least some college,³² with 46 percent having an education level reported to include some college credits or completion of an undergraduate or advanced degree. In contrast, 23 percent of defendants in the pretrial services system in general were reported to have attended or completed college. Defendants participating in pretrial diversion had a higher level of educational attainment, which largely reflects the types of offenses charged to defendants offered pretrial diversion. As discussed above, pretrial diversion cases typically involve white-collar crime. The profile of defendants charged with offenses such as fraud and embezzlement, for example, includes a larger percentage of college-educated persons than does the profile of defendants in the population of pretrial services defendants in general.

Employment. Sixty-eight percent of diverttees were employed, compared to 46 percent of defendants in the pretrial services system in general. As with the other demographic variables, the characteristics associated with employment are likely to be more

positively associated with predicted success in pretrial diversion.

Prior Record. It is no surprise that very few of the pretrial diversion records contained diverttees with a criminal record, either for a misdemeanor or a felony. Of the nearly 12,000 cases examined for this paper, fewer than 25 records reflected a history of misdemeanor or felony arrests. In contrast, of the overall pretrial services population, approximately half had some record of prior criminal activity.³³ The data confirm that federal diverttees are nearly always persons for whom the present charges represent their initial involvement with the criminal justice system.

Administrative Characteristics

Duration of Diversion. Defendants placed on pretrial diversion during the study period had diversion status for as little as one month, and as long as five years. Data for the five-year period show that the median duration was 12 months, which occurred in 53 percent of the cases. The next most common period of diversion was 6 months (25 percent of cases), followed by 18 months (16 percent of cases). A diversion period of two years was reported for 1 percent of pretrial diverttees received for supervision.

Community Service and Restitution. Conditions included in a pretrial diversion program may include a requirement to pay restitution, a requirement to serve a specified amount of community service, or both. In 50 percent of the cases studied, neither condition was part of the agreement; in 7 percent, both conditions were specified. In 26 percent

of the cases, individuals placed on pretrial diversion were directed to pay restitution under their diversion agreements. At the low end of the scale, in 46 cases the restitution amount was a token one dollar; the amount was \$500 or less in 702 cases (23 percent of cases for which restitution was required). The median amount of restitution ordered was approximately \$2,000. At the high end of the range, in 1 percent of cases for which restitution was required as a condition of diversion, the amount the diverttee was directed to pay was greater than \$100,000. Restitution was most often part of a diversion agreement when the major offense involved embezzlement, fraud, or traffic offenses. In over 90 percent of cases involving drug offenses, sex offenses, racketeering, assault, immigration, and firearms cases, no restitution was required under the diversion agreement.

In 32 percent of cases, the individuals participating in pretrial diversion were required to perform community service as part of their diversion agreements. Differences occurred among districts in the assignment of community service. Two districts required community service under most of their pretrial diversion agreements: the Eastern District of Virginia did so in 518 of 564 diversion agreements (92 percent),³⁴ and the Eastern District of North Carolina did so in 289 of 340 diversion agreements (85 percent). The district with the largest number of defendants under diversion supervision during the study period, the District of New Jersey, required community service in fewer than 1 percent of cases (7 out of 819). The average number of hours of community service prescribed was 62. Hours required ranged from fewer than 10 (21 cases) to 500 or more (6 cases). The median number of hours prescribed was 50, and the most commonly prescribed number of hours was 100 (714 cases). The category of offense with the largest proportion of diverttees assigned to perform community service was larceny/theft; 39 percent of defendants facing larceny/theft charges were required to perform community service as a condition of their diversion.

Outcomes. The diversion records revealed that, overall, for diversion cases terminated during the five-year period, a satisfactory disposition was achieved in 88 percent of the cases.³⁵ In these cases, the final disposition of the individual serving under the diversion agreement was that he or she completed the period successfully and the case was not prosecuted.³⁶ Of the offense categories represented

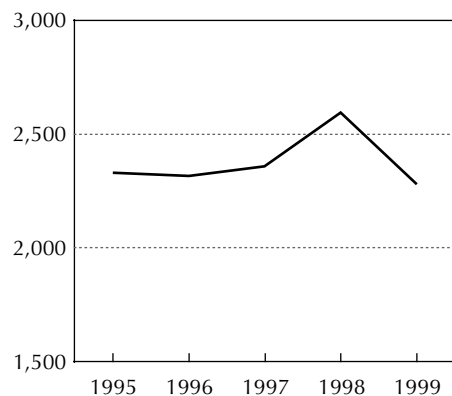
by at least 100 records in the data set, federal firearms (93 percent), narcotics (92 percent), and federal statutes (90 percent) were the categories associated with highest rates of successful completion of the diversion period. Failure to complete the pretrial diversion period satisfactorily occurred most often in cases for which the major offense was related to marijuana (only 82 percent completed diversion successfully, with 18 percent failing to do so), followed by a success rate of 85 percent when the major offense was related to forgery, assault, or traffic.

Pretrial Diversion Practices Across Federal Judicial Districts

Figure 3 presents data by year for the five-year period. Nationwide, the number of individuals received for federal pretrial diversion supervision averaged 2,376 over the period, ranging from a low of 2,279 in 1999 to a high of 2,595 in 1998. The rise in 1998 was consistent with an overall increase in pretrial services caseload; between 1997 and 1998, pretrial services case activations increased 13 percent, and the number of pretrial services defendants received for supervision rose 12 percent.³⁷

Over the five-year period, the number of regular pretrial services cases activated averaged 70,311 per year, and an average of 30,033 individuals were received for non-diversion pretrial services supervision per year. The number of cases activated grew 34 percent between 1995 and 1999, and the number of pretrial services defendants received for supervision grew 6 percent. The pattern of offenses for which defendants on pretrial service supervision were released likely parallels the defendants' likelihood of obtaining pretrial diversion. The difference in the rate of growth largely reflects the increase in the numbers of

Figure 3
Individuals Received for Pretrial Diversion Supervision, by Year



drug and immigration cases, for which the defendants were more likely to be detained.

The use of pretrial diversion varied considerably across the 94 judicial districts. During the five-year period, all districts had at least one case in which a defendant was placed in pretrial diversion supervision, but 18 districts averaged fewer than five diversion cases per year.³⁸

Five districts accounted for 28 percent of diversion supervision cases nationally during the five-year period. The District of New Jersey had the greatest number of persons in pretrial diversion; its 819 divertees constituted 7 percent of all persons receiving diversion supervision nationally. Other districts with high numbers of diversion supervision were the Eastern District of Michigan, which had 792 cases (also representing 7 percent of the national total); the Western District of Texas, which had 609 cases; the Eastern District of Virginia, which had 564 cases; and the Eastern District of New York, which had 533 cases.

In the district with the highest number of diversion supervision cases, the District of New Jersey, the proportion of diversions to overall number of regular pretrial services supervision cases was 28 percent.³⁹ Four other districts had higher proportions.⁴⁰ The highest was that of the Northern District of Alabama, which had 842 pretrial services supervision cases and 384 individuals received for pretrial diversion, producing a diversion-to-regular supervision proportion of 46 percent over the five-year period.⁴¹ The next highest proportions occurred in the Western District of Oklahoma (43 percent),⁴² the Middle District of Pennsylvania (34 percent), and the Western District of Pennsylvania (30 percent).

Higher proportions of diversion supervision cases to regular pretrial services supervision cases may reflect unique policies of the U.S. attorneys in those districts, as well as the presence of larger proportions of cases in which the offenders and the major offenses fit the model for diversion.⁴³ At the other end of the distribution, several districts with relatively large numbers of pretrial services supervision cases during the five-year period reported relatively few individuals received for pretrial diversion supervision. For example, the District of New Mexico, the Southern District of California, and the Southern District of Texas each had a number of pretrial diversion supervision cases over the five-year period that amounted to only 2 percent of the total number of defendants received for regular pretrial services supervision. These

districts are at the southwestern border of the United States, and their pretrial services caseload is heavily weighted with immigration and drug offenders. As a consequence, a much smaller proportion of defendants in these districts are identified by prosecutors as candidates for pretrial diversion.

The Link Between Major Offense, Criminal History, and Pretrial Diversion

A primary conclusion from this analysis is that the major offense charged, as well as the lack of a criminal history, appear to be the most significant factors for participation in pretrial diversion in the federal court system. The demographic characteristics of the population of individuals received for pretrial diversion supervision suggests that this is a unique subgroup largely composed of defendants charged with non-violent offenses such as fraud and embezzlement.⁴⁴ In general, the profile of defendants charged with such offenses tends to be reflected in the population of pretrial diversion participants, with some differences arising from age, gender, education, and race/ethnicity.

One of the unique characteristics of the pretrial diversion population is its minority group representation profile. Although the group of divertees examined for this paper is similar to the entire pretrial services defendant profile in terms of the representation of black defendants,⁴⁵ a primary distinction exists in the proportion of Hispanic defendants enrolled in pretrial diversion. Hispanic defendants made up 36 percent of the pretrial services defendant population in general for 1995–1999 period, but only 9 percent of pretrial divertees. The relationship of these characteristics results from the connection between Hispanic ethnicity and cases in which immigration violations are the major offenses charged. Because defendants in immigration cases are largely Hispanic, and defendants charged with immigration offenses are rarely candidates for pretrial diversion, Hispanics are under-represented in the pretrial diversion population.⁴⁶

Examination of Successes and Failures in Pretrial Diversion

As noted above in the discussion of outcomes, pretrial diversion ended with unsatisfactory completion of the diversion period in 12 percent of cases for which the disposition was reported. On some demographic variables, the profile of persons who failed to complete

pretrial diversion mirrored the profile of those who succeeded. The two groups were similar with regard to gender distribution, proportion of Hispanic defendants, and distribution of citizenship status.

One group of divertees more likely to have a successful outcome consisted of older defendants (ages 41 and above), who as a group accounted for 34 percent of the pretrial diversion population examined in the study, but made up only 19 percent of the group that failed to complete diversion successfully. Some groups were more likely to have unfavorable outcomes to their diversion experience. For example, black divertees were over-represented in the group of unsuccessful diversion cases; they constituted 28 percent of divertees overall, but made up 45 percent of the group that did not complete diversion successfully. Younger defendants were similarly represented in the group of pretrial diversion cases that ended unsatisfactorily; 41 percent of those who failed to succeed at diversion were ages 25 and under, although they constituted only 28 percent of the diversion population as a whole. The results for education level were mixed, although generally the higher a defendant's education level the more likely that person was to complete pretrial diversion successfully.

That diversion was completed successfully in 88 percent of the cases suggests that most of the defendants selected for diversion were motivated and capable of fulfilling the conditions of their diversion agreements. Another successful outcome of pretrial diversion is a reduced likelihood of future criminal behavior.⁴⁷ As noted above, however, one quarter of the records showed that diversion lasted six months or less, which is not a particularly long time. In general, data on the impact of pretrial diversion on recidivism are not readily available,⁴⁸ although some evidence indicates that in some circumstances, defendants who have been diverted have lower recidivism rates than those who were convicted.⁴⁹

Conclusions

Enrollment of defendants in pretrial diversion in the federal court system has provided an alternative to traditional criminal justice proceedings for more than two thousand persons annually. The number of pretrial diversion cases fluctuated within a relatively narrow range between 1995 and 1999, while the total number of regular pretrial services cases opened rose each year during this same period.

Participants in pretrial diversion are more likely to be persons charged with criminal

offenses such as fraud, larceny, theft, embezzlement, and violations of other federal statutes than are persons charged with drug or immigration offenses. Demographic characteristics associated with "white-collar" and non-violent offenses are reflected in the profile of the pretrial diversion population during the five-year period examined in this paper. As a group, compared to the regular (non-diversion) pretrial services population, the profile of persons received for pretrial diversion supervision shows they are more likely to be female, U.S. citizens, employed, and relatively older, and to have an educational background that includes at least some college. The data show that the success rate of persons enrolled in pretrial diversion during this period was very favorable, as satisfactory completion of the diversion period and conditions occurred in 88 percent of diversion cases closed.

Overall, the data suggest that where pretrial diversion in the federal court system is offered, it generally works well. The information assembled from this summary of the administrative records may assist in future efforts to examine alternatives to prosecution. It suggests the characteristics of persons most likely to succeed at pretrial diversion, thereby indicating where the use of diversion could be expanded and increasing opportunities to fulfill the original intentions for pretrial diversion: providing rehabilitation, impacting recidivism, and preserving court resources.

Appendix Note

Data Issues

The majority of the analyses reported in this paper are based on data on file as of the end of calendar year 2000. The data set that was analyzed thus used the most current and correct data for the five-year period studied. Some of the numbers presented in this paper may not match tables published by the Administrative Office of the U.S. Courts because of cases that were reported to the Statistics Division after published tables were finalized. In addition, some data elements and factors related to the calculation of totals in tables of pretrial diversion data were revised, so one should exercise caution when interpreting trends in published data.

A recurring data issue has been the identification of patterns of overcounting that arose from programming that double-counted records under certain scenarios. During the 1990s the courts made a transition to PACTS, gradually replacing earlier

dial-up procedures for data entry by which they entered data directly into the PSAIS. The programming used to produce the published tables showing numbers of pretrial diversion cases activated and individuals received for diversion supervision did not always reflect new edits and coding procedures. For example, some cases activated as complaints or indictment/information are recorded as closed and converted to diversion cases, with a "reason for closing" code that identified the case as pretrial diversion. However, instructions for how to handle the reporting changed during the mid-to-late 1990s, and courts were instructed to open a new case as an activation of a "Type D" record when the diversion was entered into post-charge. In 1999, the programming was corrected to eliminate double counting that appeared in some tables during the transition period. The analyses in this paper use the data for the five-year (1995 through 1999) and apply the corrected coding and counting methodology to all the data examined.

Endnotes

¹ Data reported in this paper are based on the fiscal year in which cases were activated.

² Excludes data from the District of Columbia; for the most part, the Statistics Division of the Administrative Office of the U.S. Courts does not maintain pretrial services data from the District of Columbia.

³ During a given period, the number of defendants received for pretrial diversion supervision is typically lower than the number of pretrial diversion cases activated. Officers activate a pretrial diversion case when a pretrial diversion report is written on a candidate for diversion, but not all defendants for whom reports are written are enrolled in pretrial diversion.

⁴ See Victor H. Evjen, *The Federal Probation System: The Struggle to Achieve It and Its First 25 Years*, 61 FEDERAL PROBATION, 81-92 (March, 1997), for a review of the history of the Federal probation system, which includes a discussion of the roots of deferred prosecution.

⁵ For a discussion of the expansion of pretrial diversion during the 1970s, see Thomas Blomberg, *Widening the Net: An Anomaly in the Evaluation of Diversion Programs*, in Malcolm W. Klein and Katherine S. Teilmann (Eds), *Handbook on Criminal Justice Evaluation*, Beverly Hills, California: Sage, 1979.

⁶ See National Association of Pretrial Services Agencies (NAPSA), *1 Pretrial Diversion Abstract Information Report* (January, 1998), for a review of the purposes and practices involved in pretrial diversion; available at <http://www.napsa.org/docs/divabst.html>.

⁷ Carol Cabell, *Pretrial Diversion Provides Benefits, Saves Time and Money*, FEDERAL COURT MANAGEMENT REPORT, 1 and 3 (May, 2000); NAPSA, *supra* note 3.

⁸ A discussion of the roots of pretrial diversion in the use of deferred prosecution in juvenile offender cases can be found in Stephen J. Rackmill, *Printzlien's Legacy, the "Brooklyn Plan," A.K.A. Deferred Prosecution*, 60 FEDERAL PROBATION, 8-15, (June, 1996). For an extensive review of state and federal cases dealing with pretrial diversion, see Debra T. Landis, *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant's Consent to Noncriminal Alternative*, 4 A.L.R. 4th 147 (2000 Supplement).

⁹ See Cabell, *supra* note 6. For example, Section 712 of the Department of Justice *Criminal Resource Manual* outlines procedures for submitting fingerprints to the FBI as part of the background investigation prior to diversion. 18 U.S.C. Section 3154 identifies the requirements for probation and pretrial services agencies to collaborate with the U.S. attorney to collect information and make reports for pretrial diversion.

¹⁰ USAM 9-22.100 states that a person is ineligible for pretrial diversion if he or she has two or more prior felony convictions, is an addict, is a public official (or former public official) accused of violating a public trust, or is accused of an offense related to national security or foreign affairs. In addition, diversion may not be used if the person is accused of an offense which, under Department of Justice guidelines, should be diverted to the State for prosecution.

¹¹ Thomas J. Wolf, *What United States Pretrial Services Officers Do*, 61 FEDERAL PROBATION, 23 (March, 1997).

¹² The National Association of Pretrial Services Agencies (NAPSA) is the national professional association for the pretrial release and pretrial diversion fields. Incorporated in 1973, NAPSA's stated goals include serving as a national forum for ideas and issues in pretrial services and promoting research and development in the field. A complete overview of NAPSA, including the organization's mission statement, is available at <http://www.napsa.org/mission.html>.

¹³ NAPSA (January, 1998), *supra* note 5.

¹⁴ For example, a "fast track" form of diversion supervision has been applied in certain districts where military bases are located and used in cases where the offense is shoplifting. The divertee is typically a family member of an active duty military person, or someone else with access to military installations and military shopping facilities. In this program, the pretrial diversion agreement calls for the individual to pay for his or her participation in a "shoplifters anonymous" workshop or in a program of tapes and written correspondence courses that are scored by an organization in New York. When the

individual successfully completes the program, receives a certificate, and commits no other crime within 90 days, the period of diversion supervision is considered to be completed successfully. The pretrial services office in El Paso in the Western District of Texas (TX-W) has used this type of program since mid-2000, with shoplifting offenders enrolled in pretrial diversion with the agreement of the judge advocate general on the military base nearby. The Western District of Oklahoma has instituted a similar program. Telephone interviews with: Cynthia Cranford, pretrial services supervisor in the Western District of Oklahoma (January 12, 2001) and with George Rodriguez, pretrial services supervisor in the El Paso office of the Western District of Texas (January 30, 2001).

¹⁵ The pretrial diversion agreement includes a statement that the divertee consents to a delay based on his or her voluntary participation in the pretrial diversion agreement, waives any defense to prosecution on the grounds that this delay operated to deny his or her rights under Rule 48(b) of the Federal Rules of Criminal Procedure and the Sixth Amendment to the Constitution of the United States to a speedy trial, and waives any right to bar prosecution by reason of the running of the statute of limitations for a period of months equal to the period of the agreement. *Also see* Rackmill, *supra* note 7, page 14.

¹⁶ See *U.S. v. Richardson*, 856 F.2d 644, 647 (4th Cir. 1988).

¹⁷ See Appendix Note for a discussion of published tables and data used for the analysis reported in this paper.

¹⁸ There were 17,312 records on file with TYPE=D in the PSAIS database, including cases activated through part of CY 2000.

¹⁹ A case was included if it was activated during the study period as TYPE = D (pretrial diversion). A total of 12,414 diversion cases activated during the five-year period. In some cases, diversion records were activated and pretrial diversion reports were prepared, but diversion was subsequently denied.

²⁰ Candidates who are not accepted for diversion, or who decline to participate in pretrial diversion when it is offered, remain in the regular pretrial services system and their cases proceed normally.

²¹ Cases were included if the case was reported as TYPE = D (pretrial diversion), a supervision district was reported, and a period of diversion of at least one month was indicated. A total of 11,879 divertee supervision records were posted during the five-year period. For this examination of diversion supervision, courtesy supervision cases (TYPE = J) were not included.

²² Data on offenses other than the most serious offense charged are not recorded in PSAIS, and thus were not available for analysis.

²³ See Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 80 (Summer, 1994), which summarizes sources indicating greater male involvement in violent crime, including research showing gender differences in the prevalence of crime. Males commit more violent crime, and more offenses, during both the juvenile and the adult years. The greater number of offenses for males reflects both their greater participation rate in crime and their more frequent commission of offenses once they start participating.

²⁴ See *Infra*, Figure 1. All together, fraud, larceny/theft, and embezzlement were the major offenses charged in 62 percent of the pretrial diversion cases examined in the five-year period.

²⁵ Ethnicity was unknown or not reported in the remaining records.

²⁶ Citizenship was unknown or not reported in the remaining records.

²⁷ See Thomas Bak, *Pretrial Detention in the Ninth Circuit*, 34(4) SAN DIEGO LAW REVIEW, 993-1051 (1998).

²⁸ Age was calculated as of the date the individual was received for supervision.

²⁹ Age categories in published data on age of pretrial services populations were revised in 1997; the data for age of pretrial services defendants is based on the Pretrial PROFILES for 1997, 1998, and 1999 on file in the Statistics Division of the Administrative Office of the U.S. Courts.

³⁰ See C. Panzer, *Reducing Juvenile Recidivism Through Pre-Trial Diversion Programs: A Community's Involvement*, 18 JOURNAL OF JUVENILE LAW, 186-207 (1997).

³¹ For example, fraud was the major offense charged in approximately 25 percent of cases activated in pretrial services for older defendants (age 41 and higher) over the five-year period, but for younger defendants (age 25 and below), fraud was the major offense in approximately 7 percent of cases.

³² Including "some college," "college graduate," and "post-graduate" as highest education level.

³³ The percentages reflected in the annual profiles of the pretrial services population typically range between 47.7 percent and 50.5 percent.

³⁴ In the Eastern District of Virginia, the U.S. attorney's office requires all divertees to pay some or all of the costs of prosecution, and almost every divertee has a standard condition to perform community service. Communication with Carolyn Ortwein, Chief Pretrial Services Officer, Eastern District of Virginia (June 18, 2001).

³⁵ Outcome data were available for 10,662 records of individuals who received pretrial diversion supervision during the five-year period. Of these, 9,405 cases were terminated with satisfactory status, and 1,257 with unsatisfactory status. For 800 records of TYPE = D, the record was closed when

the person was assigned to another district for courtesy diversion supervision and a new record of TYPE = J was created (and the "J" records were not included in the current analysis).

³⁶ The Department of Justice *Criminal Resources Manual* provides instructions for reporting via an FBI disposition form when an offender successfully completes a diversion program.

³⁷ The data for persons received for supervision for the 1995–1999 period came from an analysis completed in 2000, which used a corrected program that eliminated the overcounting of supervision records that had occurred prior to 1999.

³⁸ Data for the District of Columbia are not normally included in pretrial data gathered and reported by the Statistics Division of the Administrative Office of the U.S. Courts; however, three TYPE D records were activated with diversion supervision shown in the District of Columbia.

³⁹ The District of New Jersey reported 819 pretrial diversion supervision cases during the five-year period. A total of 2,875 pretrial services supervision cases were reported for the entire nation in the annual reports of the Director of the Administrative Office of the U.S. Courts for 1995 through 1999.

⁴⁰ As routinely measured, the number of "regular" pretrial services defendants received for supervision is tracked separately from the number of defendants received for supervision under pretrial diversion agreements—that is, pretrial diversion numbers are not percentages of the total supervision workload, but are considered apart from and in addition to the regular pretrial services supervision workload. The workload formulas instituted by the Administrative Office of the U.S. Courts in

June 2000 provide workload credit for both types of supervision when tallying the workload factors.

⁴¹ An additional factor affecting the proportion in the Northern District of Alabama was a change during the five-year period in the number of pretrial services supervision cases that resulted when the district, which does not have a separate pretrial services office, formed a separate pretrial services unit, thereby expanding its capacity for regular pretrial services supervision workload. Telephone Interview with Don Mosley, Pretrial Services Officer, Northern District of Alabama (January 13, 2001).

⁴² According to the pretrial supervisor in the Western District of Oklahoma, the greatest impetus for increasing pretrial diversion cases in the district came from the military judge advocate general (JAG) on the nearby military installation, who tends to use pretrial diversion on the large number of petty misdemeanor cases activated there. Many are petty misdemeanor cases, which often involve theft by military family members. Telephone interview with Cynthia Cranford, Pretrial Services Supervisor, Western District of Oklahoma (January 12, 2001).

⁴³ For example, in the Northern District of Alabama, defendants charged with misdemeanor marijuana possession in one of the national forests located there are frequently candidates for diversion. Telephone Interview with Don Mosley, *Supra*, note 41.

⁴⁴ Records in the pretrial services database do not provide data on multiple offenses, but list only the major offense charged in each case.

⁴⁵ See *Infra*, Table 1. Black (both Hispanic and non-Hispanic) defendants constituted 28 percent of pretrial diversion supervision cases and 27 percent of regular pretrial services cases.

⁴⁶ A recent (March 2001) 12-month profile of defendants in cases activated in which immigration violations are the major offenses charged showed that 86 percent were Hispanic. Similarly, Hispanic persons make up approximately 44 percent of drug defendants, although drug offenders constitute only 5 percent of divertees.

⁴⁷ The data available for the analyses performed in the preparation of this paper did not allow an examination of recidivism rates for divertees, as it was not possible to match records in the diversion files with subsequent offense records.

⁴⁸ Data on the effectiveness of pretrial diversion in preventing recidivism are elusive. Among the factors confounding reporting of recidivism by divertees is the fact that following successful completion of a period of diversion, the individual normally has no conviction and no record.

⁴⁹ See Lea L. Fields, *Pretrial Diversion: A Solution to California's Drunk-Driving Problem*, 58 FEDERAL PROBATION, 20-27 (December, 1994), for a discussion of how diversion provides for quicker evaluation and treatment for offenders charged with driving under the influence (DUI) than what would occur if the individual were to await a trial date and conviction before enrolling in a program of rehabilitation and/or education. Fields cites data from the state of Oregon showing that a sample of DUI defendants who underwent diversion had lower recidivism than did a randomly selected sample of DUI defendants who were convicted.