

VIRGINIA STATE CRIME COMMISSION



Diversion

2021 ANNUAL REPORT

DIVERSION

EXECUTIVE SUMMARY

Since 2016, the Crime Commission has been studying various aspects of the pretrial process. In 2021, as an extension of this study, the Executive Committee of the Crime Commission directed staff to examine adult diversion. For purposes of this study, staff defined diversion as an initiative or process (formal or informal) which allows an adult defendant to avoid a criminal charge, conviction, or active incarceration by participating in or completing certain programs or conditions.

Diversion is part of a broader philosophical shift to prevention, treatment, and rehabilitation across various points in the criminal justice system. Diversion programs vary widely in their focus, scope, and outcomes; however, the overall purpose and goals of each program remain consistent. While diversion programs have a variety of potential benefits, such programs can be difficult to evaluate for various reasons.

Staff conducted a 50 state statutory review and found that almost every state has enacted laws that allow for some form of diversion. Staff further identified four key diversion points across the criminal justice system: (1) pre-law enforcement encounter, (2) pre-arrest, (3) pre-charge, and (4) post-charge. Staff determined that Virginia, like many other states, offers a mix of both statewide statutory diversion and locality-specific diversion programs. Staff identified some formal and informal diversion programs in Virginia by reviewing the Virginia Code and conducting an informal survey of numerous stakeholders; however, the full scope of diversion programming in Virginia is unknown.

At the November 4, 2021, Crime Commission meeting, staff informed Crime Commission members that new diversion legislation is not required and that the General Assembly can support diversion across Virginia by providing funding and resources for new and existing programs. Ultimately, staff advised that expanding diversion across Virginia will require additional and ongoing resources for treatment, supervision, and workforce needs, along with communication and collaboration amongst stakeholders to maximize these services and resources.

BACKGROUND AND METHODOLOGY

The Crime Commission has been studying various aspects of the pretrial process since 2016.¹ In 2021, the Executive Committee of the Crime Commission directed staff to conduct a review of diversion as part of this ongoing study. While the term diversion can have a variety of meanings,² staff defined diversion for purposes of this study as an initiative or process (formal or informal) which allows an adult defendant to avoid a criminal charge, conviction, or active incarceration by participating in or completing certain programs or conditions. The study was limited to adult diversion and did not address the juvenile justice system.

Due to the significant amount of information available on this topic, staff focused its efforts on developing a general overview of diversion and providing members of the Crime Commission with information about diversion in Virginia and in other states. Staff engaged in the following activities as part of its study on diversion:

- collected relevant literature on diversion programs and practices;
- reviewed Virginia laws governing diversion;
- surveyed localities to identify current diversion programs in Virginia;
- examined diversion laws and programs in other states;
- attended the *2021 Public Policy Conference* hosted by the Virginia Association of Community Services Boards;
- conducted informal surveys of various stakeholders in Virginia; and,
- met with various entities to learn about diversion practices in Virginia.

OVERVIEW OF DIVERSION

Formal diversion programs began to take hold in the early 1970s when prisons and jails across the United States saw a significant influx in population.³ Over the next several decades, some form of diversion was adopted in every state throughout the country. Diversion is part of a broader philosophical shift to address the root causes of crime by focusing on treatment, prevention, and rehabilitation across various points in the criminal justice system.⁴ Diversion within the criminal justice system intersects with a number of societal challenges, such as lack of education, poor mental and physical health, lack of housing, poverty, racial inequities, trauma, and unemployment.⁵ While many diversion programs focus on individuals with substance use and mental health issues,⁶ these programs are also designed to address a variety of other challenges, such as behavioral health, domestic violence, employment, and

housing. The variances across diversion programs demonstrates the array of challenges that many people who come in contact with the criminal justice system face.⁷

While diversion programs can vary widely in their focus, scope, and outcomes,⁸ the overall purpose and goals of each program remain consistent. The basic purpose of diversion is to redirect individuals from the traditional criminal justice system while simultaneously ensuring that these individuals are held accountable for their criminal behavior.⁹ Thus, diversion seeks to accomplish a number of goals when directing individuals away from the traditional criminal justice system, such as:

- decreasing collateral consequences;
- reducing recidivism;
- enhancing focus on fair and equitable justice;
- increasing defendant accountability and victim rights; and,
- improving process efficiency and cost reduction.¹⁰

Decreasing Collateral Consequences

A record of an arrest, criminal charge, or conviction can trigger a variety of collateral consequences that impede an individual's ability to become a productive member of the community long after he or she has completed the terms of his or her sentence.¹¹ Both misdemeanor and felony charges and convictions can impose significant collateral consequences on individuals.¹² The National Inventory of Collateral Consequences of Convictions found that there are over 45,000 federal and state collateral consequences that can potentially stem from a criminal conviction.¹³ Such consequences may be long-term and can include, but are not limited to, challenges to obtaining employment and housing, limitations on business opportunities, the risk of deportation for non-citizens, and barriers to higher education and/or professional licensure.¹⁴ In addition, criminal charges and convictions may impose a significant negative social stigma, which serves to amplify the difficulties that individuals face while attempting to rehabilitate their lives.¹⁵

Reducing Recidivism

When properly designed and implemented, diversion can be effective in reducing recidivism.¹⁶ Reducing recidivism is an important goal for diversion programs, especially since these programs are typically available to individuals who have been charged and/or convicted of low-level or first time offenses.¹⁷ Thus diversion programs, when successful, can reduce the

chances that a first time offender engages in further activity that leads to more contact with the criminal justice system. However, because of the differences across diversion programs, the rate of re-offending varies according to the target population and the particular characteristics of each diversion program.¹⁸

In order to achieve a lower recidivism rate, effective diversion programs seek to rehabilitate program participants. The most effective rehabilitation diversion programs are informed by social science research and local data.¹⁹ With successful rehabilitation, it is less likely that individuals will re-offend because diversion programs focus on addressing the underlying issues that they face, such as substance abuse or a mental health diagnosis.²⁰

Enhancing Focus on Fair and Equitable Justice

Diversion programs can be a mechanism to promote fair and equitable justice. As such, programs should be designed to provide equal access to participants by using objective processes and tools to identify eligible candidates.²¹ Ideally, diversion programs do not consider socioeconomic status, race, or other fundamental attributes to determine eligibility. In addition, the existence of formal and informal diversion programs can be made known to a wide variety of stakeholders, both in the criminal justice system and in the community, thereby ensuring that eligible individuals are identified and referred to such programs.

Increasing Defendant Accountability and Victim Rights

While a key component of diversion programming is treatment and rehabilitation, another important aspect involves addressing the harm that a criminal act caused an individual or the community at large.²² Victims of crime have basic rights, which may include notification of court proceedings, the right to seek monetary restitution from offenders, and the option to provide a victim impact statement.²³ Some diversion programs are victim-centered and require that a victim consent to an offender's participation in the program, while other diversion programs do not require any victim involvement.

Diversion programs with a victim restoration component can emphasize the needs of a particular victim and offer a personalized approach to conflict resolution.²⁴ For instance, the defendant may be required to engage in community service, manual labor, mediation, or write letters of apology. In contrast, some diversion programs may benefit the community at large while providing no specific benefit to a particular victim. For example, if a person is arrested for committing a robbery due to an underlying substance abuse disorder, there may be a

significant community benefit to having the offender participate in a drug diversion program, even if the specific victim does not agree that a drug diversion program is an appropriate consequence.²⁵

Improving Process Efficiency and Cost Reduction

The traditional method of how a case moves through the criminal justice system can be time consuming and expensive. Diversion can be a tool to limit expenses usually placed on the traditional criminal justice system, which can allow for the allocation of resources to more serious cases.²⁶ In many cases, a diversion program may be utilized to more quickly achieve a mutually agreed upon case resolution and thereby relieve the caseloads of overburdened courts. In addition to alleviating court caseloads, diversion programs can also be used to alleviate expenses in other parts of the criminal justice system, such as reducing the population of over-crowded jails and prisons.²⁷

Diversion Limitations and Challenges

While diversion programs offer several potential benefits, some limitations and challenges exist when it comes to implementing and evaluating such programs. Two of the most prevalent challenges associated with diversion are a lack of program resources and a limited number of available programs. Effective diversion programs require resources to implement the program and then a continuum of resources to sustain the program. Without proper resources, implementing new diversion programs and sustaining existing diversion programs is not possible.

Aside from the resource challenges, diversion programs can place burdensome requirements on participants. Such requirements can make it difficult for participants who lack financial or transportation resources, or who face time constraints due to employment and/or family obligations, to successfully complete the diversion program.²⁸ Often there are a number of regularly scheduled in-person obligations a participant must attend, and this can prove difficult for participants who are employed or who lack transportation and/or stable housing. In addition, diversion program participants can face numerous financial obligations, such as paying restitution to victims, court fees, attorney fees, and diversion program fees.²⁹ These financial obligations can be burdensome to participants, particularly those who do not have a consistent income.³⁰ Furthermore, individuals may not have the opportunity to consult with legal counsel prior to entering a diversion program, which may mean that these individuals do

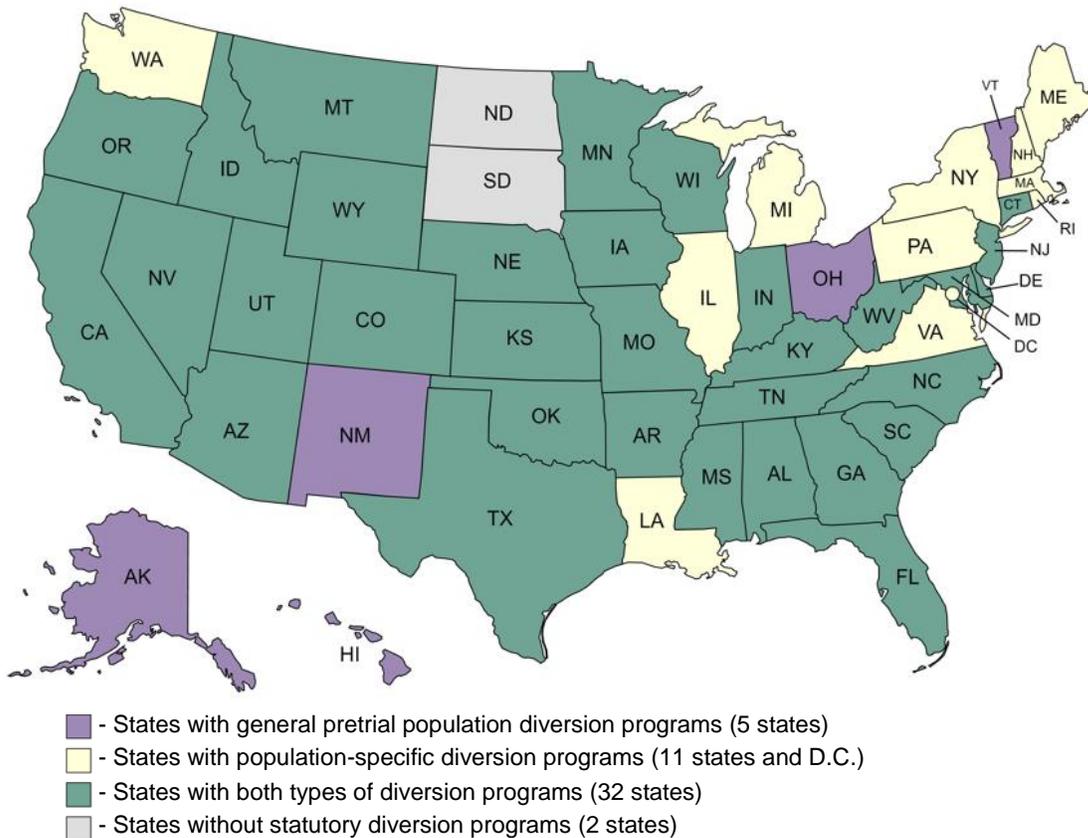
not understand that the program is voluntary or that they are not informed of all the financial and time burdens that these programs can impose. The inability to consult with legal counsel is more likely to occur when program entry occurs early in the criminal justice process.³¹

Finally, it is difficult to evaluate diversion programs and measure program outcomes due to a lack of program uniformity. As noted earlier in this report, there is no singular definition of diversion. Diversion programs are often community-based and therefore the terminology and criteria used varies across jurisdictions.³² Similarly, there are no general standards for the collection or publication of data to track specific measures, such as participant demographics, cost/time savings, and recidivism rates.³³ As such, it can be challenging to evaluate diversion programs and replicate effective practices.

Diversion Across the United States

Staff conducted a 50 state statutory review and found that almost every state has enacted laws that allow for some form of diversion.³⁴ States commonly tailor statutory diversion programs to meet the needs of either the overall state population or of specific populations within the state.³⁵ As seen in the following map, staff identified states with general pretrial population diversion programs, population-specific diversion programs, or both types of programs.³⁶ Staff also found that there are many locality-specific diversion programs operating throughout the United States. Because Virginia law currently includes numerous post-disposition diversion statutes (as detailed later in this report), staff specifically focused on states with general *pretrial* population diversion statutes. Therefore, the analysis of the general pretrial population diversion states referenced in the map and described in the next section is solely limited to pretrial diversion statutes; however, the population-specific diversion states include both pretrial and post-disposition diversion statutes.

GENERAL PRETRIAL POPULATION AND POPULATION-SPECIFIC DIVERSION ACROSS THE UNITED STATES



Map by Crime Commission staff based on legal analysis.

General Pretrial Population Diversion

Thirty-seven states authorize general pretrial population diversion programs, which are used to address the wide-ranging needs of individuals in the overall state population.³⁷ Typically, general pretrial population diversion statutes authorize a specific entity to create and/or administer a diversion program. Such authority is commonly designated to prosecuting attorneys, local courts, or other state governmental entities.³⁸ In addition, general pretrial population diversion statutes provide guidance on program eligibility requirements, and may specifically exclude certain individuals from a program based on their current criminal charge or prior criminal history.³⁹

These general pretrial population diversion statutes and programs vary significantly across states. For example, Florida law authorizes pretrial intervention programs that provide criminal defendants with counseling, education, supervision, and medical and/or psychological treatment, on the condition that the victim, the State Attorney, and the judge who presided over the initial appearance hearing consent to the defendant's participation in the program.⁴⁰

Minnesota requires each participating county attorney to establish a pretrial diversion program for adult offenders that meets statutory goals and conditions.⁴¹ Missouri authorizes general diversionary programs to be created and administered by the Missouri Department of Corrections.⁴² South Carolina allows each Circuit Solicitor the discretion to establish a pretrial intervention program in the particular circuit; however, the South Carolina Commission on Prosecution Coordination oversees the administrative procedures of these programs.⁴³

Population-Specific Diversion

Forty-three states have population-specific diversion programs which are meant to address the needs of a specific population of individuals.⁴⁴ These population-specific diversion programs can be used to serve particular classes of individuals, such as those with substance use or mental health treatment needs.⁴⁵ Furthermore, population-specific diversion programs can be utilized for individuals who are charged with specific types of criminal offenses, such as drug possession, driving under the influence, domestic relations offenses, worthless check offenses, property offenses, prostitution-related offenses, human trafficking-related offenses, crimes related to homelessness, defendants statutorily classified as young adults, defendants charged with weapons offenses under certain circumstances, and defendants charged with crimes that affect their neighborhood.⁴⁶

These population-specific diversion statutes and programs vary across states. For example, Alabama law authorizes a diversion program for defendants charged with a variety of offenses, including property offenses, whereupon successful completion of the program may result in a dismissal of the charges.⁴⁷ Arkansas law permits a program, either pretrial or post-trial, for defendants who are struggling with drug abuse.⁴⁸ Delaware law allows a defendant charged with issuing or passing a worthless check to enter into a diversion program, and if the defendant successfully completes the program, a court may dismiss the charges.⁴⁹ Nevada law authorizes a court to establish a program for the treatment of defendants with mental illness or intellectual disabilities. A defendant who qualifies for that Nevada program, and who successfully completes it, may have their charges dismissed by a court.⁵⁰

Locality-Specific Diversion

In addition to the 50 state statutory review, staff also conducted a cursory review of locality-specific diversion programs across the United States. These locality-specific diversion programs operate in specific cities and/or counties within a state, but are not available to the

statewide population. Such programs are designed to focus on the specific needs of the local population and are often funded by the locality. Staff found that several states have locality-specific diversion programs that operate in addition to the statewide statutory programs.⁵¹

Diversion Points

Staff identified four key diversion points across the criminal justice system based upon a review of the literature and of the diversion statutes and programs from across the country. These key diversion points include: (1) pre-law enforcement encounter, (2) pre-arrest, (3) pre-charge, and (4) post-charge. Diverting an individual at or in-between one of these four points can involve an assortment of stakeholders, such as law enforcement officers, prosecutors, defense counsel, judges, court officials, pretrial services agencies, and others.⁵² The discussion below, while by no means exhaustive, provides a description of each diversion point, as well as various examples of diversion programs that fall within each diversion point.

PRE-LAW ENFORCEMENT ENCOUNTER

The earliest diversion point is the pre-law enforcement encounter. At this stage, individuals receive support and treatment within the community prior to any contact with the criminal justice system.⁵³ These programs address an individual's underlying issues, such as substance abuse, mental health, homelessness, unemployment, and poverty, any of which may increase their likelihood of an encounter with law enforcement. Diversion at this stage allows individuals to avoid the collateral consequences that can stem from an arrest, charge, or conviction. Because pre-law enforcement encounter diversion occurs before an individual enters the criminal justice system, it is extremely difficult to determine the exact number of individuals who have been diverted at this diversion point.⁵⁴

One example of a pre-law enforcement encounter diversion program is Crisis Assistance Helping Out On The Streets (CAHOOTS). Launched as a community policing initiative in Eugene, Oregon, in 1989, CAHOOTS provides a response to non-violent emergencies that involve mental illness, addiction, and/or homelessness.⁵⁵ Teams of two, a medic and crisis worker, respond to a variety of crises related to mental health using harm reduction and de-escalation methods.⁵⁶

Another example of a pre-law enforcement diversion program is Assertive Community Treatment (ACT), which may also be referred to as Program of Assertive Community Treatment (PACT).⁵⁷ ACT is an evidence-based program that consists of an individualized

package of services geared towards meeting the day-to-day needs of individuals in the community who have serious mental illness by helping those individuals stay in treatment, maintain stable housing, secure and maintain employment, and engage in the community.⁵⁸ An ACT participant receives services from a multi-disciplinary team comprised of a psychiatrist, nurse, housing specialist, social worker, and an employment coach.⁵⁹ A few states have implemented statewide ACT programs, such as Delaware, Idaho, Michigan, Rhode Island, Texas, and Wisconsin. In addition, the United States Department of Veterans Affairs has implemented an ACT program, called Mental Health Intensive Case Management, which is designed to provide intensive and flexible community support for veterans diagnosed with a serious mental illness.⁶⁰

PRE-ARREST DIVERSION

The second diversion point is at the pre-arrest phase. Diversion at this point empowers or requires law enforcement officers to divert individuals into treatment in lieu of arrest under certain circumstances.⁶¹ Pre-arrest diversion commonly involves partnerships between local law enforcement agencies and other entities, such as mental health and substance abuse agencies and advocates, in order to assist individuals with mental health and/or substance use needs.⁶² However, pre-arrest diversion can also be a means for individuals to participate in community-based programs to address needs beyond just mental health and substance use.

Many law enforcement agencies across the country have implemented pre-arrest diversion programs; however, such programs are more likely to operate in larger jurisdictions with larger law enforcement agencies.⁶³ These programs vary considerably in terms of their purposes, target populations, and eligibility requirements for participation.⁶⁴ While pre-arrest diversion programs are continuing to grow in popularity, there have only been a limited number of studies conducted to evaluate and document the effectiveness of these programs.⁶⁵ The following subsections provide an overview of two different pre-arrest diversion programs: the Crisis Intervention Team (CIT) model and the Law Enforcement Assisted Diversion (LEAD) program.

Crisis Intervention Team (CIT) Model

One common model of street-level pre-arrest diversion is the crisis intervention team (CIT) model, which involves specially trained law enforcement officers who are available to respond to situations in which mental illness may be a contributing factor.⁶⁶ There are over 2,700 CIT

sites throughout the nation.⁶⁷ CIT programs have been evaluated based upon a number of metrics, including law enforcement officers' likelihood of arresting individuals with mental illness, referring individuals with mental illness to community-based services, and use of force. CIT has impacted pre-booking jail diversion, with law enforcement officers more likely to refer individuals to mental health resources and less likely to arrest them.⁶⁸ Research conducted to examine the impact of CIT on arrests found that law enforcement officers trained in CIT were less likely to arrest individuals with a mental illness as compared to control groups of non-CIT trained law enforcement officers.⁶⁹ Research has also found that CIT trained law enforcement officers were more likely to refer individuals with mental illness to community-based resources in comparison to non-CIT trained law enforcement officers.⁷⁰

The research regarding the effectiveness of CIT on law enforcement officer use-of-force remains mixed.⁷¹ For example, researchers have found that CIT status (whether or not a person was trained in CIT) was "not predictive" of the level of force used by law enforcement officers.⁷² However, law enforcement officers trained in CIT were considerably more likely than officers not trained in CIT to report that the highest level of force used in encounters with individuals with mental illness was verbal engagement or negotiation.⁷³ Other research has found only a "marginal effect" of CIT training on law enforcement officer use-of-force in encounters with individuals with mental illness. For example, one study found that CIT trained law enforcement officers were generally more likely to use higher levels of force.⁷⁴ However, when accounting for suspect demeanor, the study found that CIT trained law enforcement officers were more likely to use less force than non-CIT trained law enforcement officers when a suspect's demeanor became more resistant.⁷⁵ Further, other factors were also found to impact use-of-force, such as neighborhood disadvantage and saturation of CIT trained law enforcement officers within a neighborhood.⁷⁶ Researchers indicate that there are challenges in comparing the effectiveness of CIT programs to similar intervention programs due to the lack of research examining those other models.⁷⁷

Law Enforcement Assisted Diversion (LEAD) Program

An additional example of a pre-arrest diversion program is the Law Enforcement Assisted Diversion (LEAD) program. Established in 2011 as a pilot program in Seattle, Washington, the LEAD program focuses on diverting individuals who were suspected of committing low-level drug and prostitution offenses away from the criminal justice system toward social and legal services.⁷⁸ An evaluation conducted to examine the impact of the LEAD program on arrests and criminal charges in Seattle found that program participants were 58% less likely

to be arrested after entry into the program as compared to similar individuals who did not participate in the LEAD program.⁷⁹

The LEAD program has since been implemented in jurisdictions across the United States, and the types of eligible charges for participation have expanded from drug offenses to include an array of nonviolent misdemeanors and lesser charges.⁸⁰ For example, a LEAD pilot program in San Francisco included various offenses, such as possession of a controlled substance, sale or transportation of a controlled substance, petty theft, grand theft, prostitution, and solicitation, for participants to be a part of the program.⁸¹ An evaluation on the impact of the San Francisco LEAD program on outcomes such as misdemeanor and felony arrests indicated that participation in the LEAD program decreased the probability of future arrests.⁸² Specifically, when comparing LEAD participants and non-participants over a 12 month period, misdemeanor arrests were 6 times higher for those who were not participants in the LEAD program, while felony arrests were almost 2.5 times higher for those who were not participants in the LEAD program.⁸³

PRE-CHARGE DIVERSION

The third diversion point is pre-charge diversion, which is frequently referred to as prosecutor-led diversion. The traditional role of a prosecutor is to seek justice by charging and attempting to obtain the conviction of those who engage in criminal behavior, as well as by seeking a legally proportionate sentence.⁸⁴ More recently, however, the role of a prosecutor has broadened to include such activities as engaging community members to help solve local crime problems, collaborating with law enforcement on crime prevention, and expanding diversion opportunities.⁸⁵

There are two opportunities for intervention at the pre-charge, or prosecutor-led, diversion point.⁸⁶ The first opportunity is at the pre-filing phase, where the prosecutor does not file criminal charges if the individual completes the diversion program. The second opportunity is at the post-filing phase, where the criminal case is filed with the court and the normal adjudication process is suspended by the prosecutor while the individual participates in a diversion program. All charges are typically dismissed upon the completion of the post-filing diversion program.⁸⁷

Research regarding the effectiveness of pre-charge diversion programs has shown that they can be successful.⁸⁸ Multi-site evaluations of prosecutor-led diversion programs have found that individual programs have decreased the proportion of cases that resulted in a conviction,

reduced the frequency of re-arrest, and/or contributed to cost savings for criminal justice agencies.⁸⁹ For example, a multi-site evaluation of five prosecutor-led diversion programs was conducted to examine the impact of each program on case outcomes, use of jail, and two-year re-arrests.⁹⁰ The evaluation included five diversion programs (pre-filing or post-filing) from across three jurisdictions: Cook County Felony Drug School, Cook County Misdemeanor Deferred Prosecution Program, Milwaukee Diversion Program, Milwaukee Deferred Prosecution Program, and Chittenden County Rapid Intervention Community Court.⁹¹ All five diversion programs were found to significantly decrease the percentage of cases that ended with a conviction.⁹² For example, 3% of the cases in the Cook County Felony Drug School program ended with a conviction as compared to 63% of cases in the comparison group that did not participate in the program.⁹³ Further, all programs were also found to reduce jail sentences.⁹⁴ For example, 4% of defendants in the Milwaukee Diversion Program were sentenced to jail as compared to 50% in the comparison group who did not participate in the program.⁹⁵ Four of the five programs were also found to have decreased the frequency of re-arrest at two years from program enrollment for diversion program participants as compared to comparison group participants.⁹⁶ For example, 31% of those who participated in the Milwaukee Deferred Disposition Program were re-arrested after a period of two years as compared to 38% of comparison group participants.⁹⁷

However, these results should not be generalized to argue that all pre-charge diversion programs are effective, especially since pre-charge diversion programs are diverse in terms of program goals, such as rehabilitation, reduced recidivism, and lessening collateral consequences.⁹⁸ Further, the programs are specifically established within local jurisdictions, and each local program utilizes differing metrics of success, such as program completion, decreased recidivism, increased utilization of services, reductions in substance use, and increased mental health management.⁹⁹ Additionally, comparisons across pre-charge diversion program outcomes and impacts are difficult due to the diverse admission criteria and conditions imposed by each program.

POST-CHARGE DIVERSION

The final diversion point is post-charge diversion, which occurs after a criminal charge has entered the court system and includes deferred adjudication or disposition, specialty dockets, problem-solving courts, and jail diversion. These programs are driven by therapeutic and rehabilitative objectives and may operate with a specialized team approach meant to provide services to defendants.¹⁰⁰

A deferred adjudication or a deferred disposition are options that fall under the formal authority of the court. In general, a deferred adjudication allows the court to withhold a finding of guilt and a deferred disposition allows the court to withhold imposing a sentence. Oftentimes the court will order the defendant to complete some form of probation and/or other conditions as part of the order to defer the adjudication or disposition of a case. If the defendant successfully completes probation and/or the other conditions, then the court may dismiss the charge or fashion some other sentence that is more favorable to the defendant. A number of states have enacted statutes that address the deferred adjudication or deferred disposition processes.¹⁰¹

Specialty dockets and problem-solving courts are a specific approach to diversion which provide defendants with intensive treatment, graduated sanctions and rewards, court monitoring, and other programming, such as education or job training.¹⁰² Specialty dockets and problem-solving courts involve teams that may be brought together from a variety of offices, such as judges, prosecutors, defense attorneys, mental health workers, and other service providers.¹⁰³ Such courts can include, but are not limited to, drug courts, mental health courts, and veterans' courts.¹⁰⁴ By the end of 2020, there were over 3,800 specialty dockets and problem-solving courts operating across the United States.¹⁰⁵

Jail diversion programs are specialized programs that were created to address the issues associated with incarcerated criminal defendants with mental illnesses.¹⁰⁶ A significant number of individuals who are charged with a crime suffer from a mental illness.¹⁰⁷ Jail diversion programs aim to help participants avoid or reduce incarceration, reduce recidivism, and improve their mental health stability through regular contact with community-based treatment providers.¹⁰⁸

Evidence regarding the effectiveness of post-charge diversion programs has been mixed; however, participation in mental health courts and drug courts has been associated with increased utilization of community behavioral health services and decreased substance use and recidivism.¹⁰⁹ For example, a meta-analysis examining the effectiveness of mental health courts found a "modest effect" on recidivism for participants as compared to those were traditionally processed through the criminal justice system.¹¹⁰ Participation in mental health courts was most effective at reducing jail time after an individual completed the mental health court program.¹¹¹ A meta-analysis examining the effectiveness of drug courts found that adult drug courts are effective in reducing recidivism at one and three years post program entry.¹¹²

Despite these findings, there has been some criticism regarding the evaluation of specialty courts, especially drug courts. Researchers must overcome methodological, ethical, and legal challenges in evaluating the effectiveness of drug courts.¹¹³ Methodological concerns focus on the ability to conduct research that is deemed methodologically rigorous to understand the effects of drug courts.¹¹⁴ Randomized control trials in which individuals are randomly assigned to participate in treatment and control conditions is considered the gold standard in research.¹¹⁵ However, the random assignment of individuals within the criminal justice system is not always a practical option.¹¹⁶ The ethical concerns regarding research with drug courts centers on the vulnerability of participants.¹¹⁷ Drug court participants who take part in a research study must understand, consent to, and voluntarily enroll in the research study.¹¹⁸ The legal concerns focus on the impact that participating in a drug court research study has on the procedural due process rights of drug court participants.¹¹⁹ Drug courts may require participants to pay a variety of fees and fines, often require an extensive period of participation that can be greater in time than the period of incarceration a defendant would have served for the crime, and require relapsed defendants to serve jail or prison sentences instead of receiving continued treatment and support.

DIVERSION IN VIRGINIA

Staff found that Virginia, like many other states, offers a mix of both statewide statutory diversion and locality-specific diversion programs. Staff reviewed the Virginia Code and conducted an informal survey of numerous stakeholders in an attempt to identify formal and informal diversion programs in Virginia. Respondents to these informal surveys included general district court judges, Commonwealth's Attorneys, Public Defenders, court-appointed counsel, and pretrial services agency directors. Based on these efforts, staff identified the following diversion opportunities in Virginia:

- deferred adjudication and deferred disposition statutes;
- Crisis Intervention Team (CIT) programs;
- drug treatment courts;
- behavioral health dockets;
- Assertive Community Treatment (ACT)/Program of Assertive Community Treatment (PACT); and,
- local diversion programs.

Deferred Adjudication and Disposition Statutes

Virginia enacted legislation in 2020 that allows the court to defer any criminal case, “with or without a determination, finding, or pronouncement of guilt,” under terms and conditions agreed to by the parties or set by the court.¹²⁰ After deferring the case, the court may convict the defendant of the original charge, convict the defendant of an alternative charge, or dismiss the charge.¹²¹ Additionally, charges that are dismissed under this new Code section can be expunged pursuant to an agreement of all the parties.¹²²

While this new Code section allows for the deferred adjudication of any criminal case, most of Virginia’s diversion statutes allow for the deferred disposition of specific criminal offenses. The Virginia Code explicitly permits the court to defer the disposition of the following offenses:¹²³

- first offense drug possession;¹²⁴
- first offense domestic assault and battery;¹²⁵
- first offense underage consumption, purchase, or possession of alcohol;¹²⁶
- first offenses under the Cannabis Control Act;¹²⁷
- certain misdemeanor crimes against property;¹²⁸
- first offense prescription fraud;¹²⁹
- first offense damage or defacement of public or private buildings;¹³⁰
- spousal rape, forcible sodomy, and object sexual penetration;¹³¹ and,
- crimes committed by persons with autism or an intellectual disability.¹³²

CIT Programs

In 2009, Crisis Intervention Team (CIT) programs were codified in Virginia.¹³³ These teams are designed to assist law-enforcement officers in responding to crisis situations involving persons with mental illness, substance abuse, or both.¹³⁴

Drug Treatment Courts

The Drug Treatment Court Act was originally passed by the General Assembly in 2004.¹³⁵ Drug treatment courts are specialized court dockets within the existing structure of Virginia’s court system.¹³⁶ Participants in drug treatment courts undergo intensive treatment and are subject to judicial monitoring and strict supervision by program staff.¹³⁷ There were 61 drug treatment court dockets approved to operate in Virginia as of fiscal year 2021.¹³⁸

Behavioral Health Dockets

The Behavioral Health Docket Act was originally passed by the General Assembly in 2020.¹³⁹ Behavioral health dockets are also specialized criminal court dockets within the existing structure of Virginia's court system.¹⁴⁰ Behavioral health dockets are required to utilize evidence-based practices to diagnose behavioral health illness, provide treatment, enhance public safety, reduce recidivism, ensure offender accountability, and promote offender rehabilitation in the community.¹⁴¹ There were 13 behavioral health dockets approved to operate in Virginia as of fiscal year 2021.¹⁴²

ACT/PACT

Localities throughout Virginia have implemented ACT/PACT programs, such as Henrico County, Arlington County, the City of Alexandria, and the City of Norfolk. In addition, Virginia's Project BRAVO includes a component that makes ACT available to Medicaid recipients.¹⁴³

Local Diversion Programs (Non-Statutory)

While the Virginia Code does not include any provisions that specifically *allow* localities to implement and operate local diversion programs, the Code does not explicitly *prohibit* such programs. As a result, staff was able to identify several localities in Virginia that have implemented diversion programs in order to specifically serve the needs of their local populations.

One such local program is *Diversion First* in Fairfax County.¹⁴⁴ *Diversion First* offers alternatives to incarceration for people with mental illness, co-occurring substance use disorders, and/or developmental disabilities, who come into contact with the criminal justice system for low level offenses.¹⁴⁵

A second local program is *The First Step Program* in Virginia Beach.¹⁴⁶ This program provides individuals with an opioid abuse disorder the opportunity to walk into any Virginia Beach police precinct for assistance with obtaining treatment rather than incurring a criminal charge or suffering an overdose.¹⁴⁷

A third local program is the *Dual Treatment Track Program* in Chesterfield County and the City of Colonial Heights.¹⁴⁸ This program is a court-ordered, pretrial jail diversion program for incarcerated offenders dually diagnosed with a major mental illness and substance abuse disorder.¹⁴⁹

Finally, Augusta County introduced the *Law Enforcement Assisted Diversion Program* (LEAD) in 2021.¹⁵⁰ This program is a collaborative agreement between the Augusta County Commonwealth's Attorney's Office and the Augusta County Sheriff's Department for certain offenders to avoid charges, such as felony drug possession, and be diverted into treatment.¹⁵¹

It is important to note that these programs are just some examples of the local diversion programs that exist across the Commonwealth. Staff was unable to identify any comprehensive listing of formal and/or informal local diversion programs in Virginia. As such, the full scope of local diversion programs in Virginia remains unknown.

CONCLUSION

The Crime Commission met on November 4, 2021, and heard presentations on diversion from staff,¹⁵² the Virginia Department of Social Services,¹⁵³ the Virginia Association of Community Service Boards,¹⁵⁴ and the Virginia Association of Community-Based Providers.¹⁵⁵

Staff advised Crime Commission members that diversion is part of a broader philosophical shift to prevention, treatment, and rehabilitation across various points in the criminal justice system. Staff did not make any recommendations or propose any policy options to Crime Commission members on the topic of diversion for several reasons. First, Virginia's newly enacted statute that allows for the deferred adjudication or deferred disposition of any criminal offense had just taken effect on March 1, 2021, and the impacts of this new law were unknown.¹⁵⁶ Second, as previously noted, the Virginia Code already contains numerous provisions related to diversion. Third, the Virginia Code does not preclude the creation and operation of local diversion programs, and therefore legislation is not required to implement these local programs. Fourth, as described earlier in the report, a number of localities around Virginia are currently operating local diversion programs without the need for local diversion legislation. Finally, the extent of formal and informal local diversion programs across the Commonwealth remains unknown, and thus well-intentioned legislation meant to promote local diversion programs in Virginia could inadvertently hinder or restrict existing programs.

Staff informed Crime Commission members that the General Assembly can support diversion across Virginia by providing funding and resources for new and existing programs. The guest presenters at the Crime Commission meeting offered additional information to members on staffing and resource needs during their presentations. Ultimately, staff advised that expanding diversion across Virginia would require additional and ongoing resources for

treatment, supervision, and workforce needs, along with communication and collaboration amongst stakeholders to maximize these services and resources.

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Virginia Association of Commonwealth's Attorneys

Virginia Association of Community-Based Providers

Virginia Association of Community Services Boards

Virginia Community Criminal Justice Association

Virginia Department of Behavioral Health and Developmental Services

Virginia Department of Medical Assistance Services

Virginia Department of Social Services

Virginia Indigent Defense Commission

ENDNOTES

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APPENDIX A: General Pretrial Population Diversion Statutes

STATE	GENERAL PRETRIAL DIVERSION STATUTE
Alabama	ALA. CODE §12-17-226 et seq.
Alaska	ALASKA STAT. §12.55.078
Arizona	ARIZ. REV. STAT. ANN. § 11-361 et seq.
Arkansas	ARK. CODE ANN. § 5-4-901 et seq.
California	CAL. PENAL CODE § 1001.1 et seq.
Colorado	COLO. REV. STAT. § 18-1.3-101
Connecticut	CONN. GEN. STAT. § 54-56e
Delaware	DEL. CODE ANN. tit.11 § 4218
Florida	FLA. STAT. § 948.08
Georgia	GA. CODE ANN. § 42-3-70 et seq.
Hawaii	HAW. REV. STAT. § 853-1 et seq.
Idaho	IDAHO CODE § 19-2601
Indiana	IND. CODE § 33-39-1-8
Iowa	IOWA CODE § 907.3
Kansas	KAN. STAT. ANN. § 22-2907 et seq.
Kentucky	KY. REV. STAT. ANN. § 533.250
Maryland	MD. CODE ANN., CRIM. PROC. § 6-220
Minnesota	MINN. STAT. § 401.065
Mississippi	MISS. CODE ANN. § 99-15-105
Missouri	MO. REV. STAT. § 217.777
Montana	MONT. CODE ANN. § 46-16-130
Nebraska	NEB. REV. STAT. ANN. § 29-3601 et seq.
Nevada	NEV. REV. STAT. ANN. § 174.031
New Jersey	N.J. STAT. ANN. § 2C:43-12 et seq.
New Mexico	N.M. STAT. ANN. § 31-16A-1 et seq.
North Carolina	N.C. GEN. STAT. § 15A-1341
Ohio	OHIO REV. CODE ANN. § 2935.36
Oklahoma	OKLA. STAT. tit. 22 § 305.1
Oregon	OR. REV. STAT. § 135.881 et seq.
South Carolina	S.C. CODE ANN. § 17-22-10 et seq.
Tennessee	TENN. CODE ANN. § 40-15-101 et seq.
Texas	TEX. CODE CRIM. PROC. ANN. art. § 42A.101
Utah	UTAH CODE ANN. § 77-2-5 et seq.
West Virginia	W. VA. CODE § 61-11-22
Wisconsin	WIS. STAT. § 971.39
Wyoming	WYO. STAT. ANN. § 7-13-301

Appendix by Crime Commission staff based on legal analysis.

APPENDIX B: Population-Specific Diversion Statutes

State	Population							
	Substance Abuse	Mental Health	Veterans/ Active Military	Domestic Relations	Worthless Check	Property Crimes	Prostitution/ Sex Trafficking	Other
Alabama	§ 12-23A-1 et seq.				§ 12-17-224	§ 12-17-226 et seq.	§ 13A-6-181	
Arizona	§ 13-3422	§ 12-132 § 22-601 et seq.	§ 22-601 et seq.		§ 13-1810			Homeless: § 22-601 et seq.
Arkansas	§ 16-98-201 § 16-98-301 et seq.	§ 16-100-201 et seq. § 16-10-139	§ 16-10-139					
California	Penal Code § 1000-1000.6; § 1000.8-1000.10 § 1001.85 et seq.	Penal Code § 1001.20 et seq.	Penal Code § 1001.80	Penal Code § 1000.12; § 1001.70 et seq.	Penal Code § 1001.60 et seq.			Young Adults (18-21) charged with a felony: Penal Code § 1000.7
Colorado			§ 13-5-144	§ 19-3-310			§ 13-10-126	
Connecticut	§ 54-56i; § 17a-696; § 51-181b	§ 54-56l	§ 54-56l	§ 46b-38c				Community-specific needs: § 51-181c Specified weapons crimes: § 29-33 § 29-37a § 53-202l § 53-202w
Delaware	Title 16 § 4767			Title 10 § 1024	Title 11 § 900A			
District of Columbia	§ 48-904.01(e)							
Florida	§ 948.16	§ 394.47892	§ 948.16		§ 832.08			

State	Population							
	Substance Abuse	Mental Health	Veterans/ Active Military	Domestic Relations	Worthless Check	Property Crimes	Prostitution/ Sex Trafficking	Other
	§ 397.334	§ 948.16	§394.47891					
Georgia	§ 16-13-2 § 15-1-15	§ 15-1-16	§ 15-1-17					
Idaho	§ 19-5601 et seq.	§ 19-5601 et seq.						
Illinois	730 § 166/1 et seq.	730 § 168/1 et seq.	730 § 167/1 et seq.; 330 § 135/1 et seq.		720 § 5/17-1b			First time weapon offenders: 730 § 5/5-6-3.6
Indiana	§ 12-23-5-1 et seq. § 12-23-6.1-1 §12-23-7.1-1 et seq. § 33-23-16-1 et seq.	§ 11-12-3.7-1 et seq.; § 33-23-16-1 et seq. § 12-23-5-1 et seq.	§ 33-23-16-1 et seq.	§ 33-23-16-1 et seq.				Community-specific needs: § 33-23-16-1 et seq.
Iowa				§ 708.2B				
Kansas	§ 12-4414 et seq.							
Kentucky	§ 533.251 § 26A.400							
Louisiana	§ 13:587.4	§ 13:587.4; § 13:5351 et seq.	§ 13:5361 et seq.				Purchase of sexual activity crimes: § 15:243	Human Trafficking § 13:587.4
Maine	Title 4 § 421	Title 4 § 431	Title 4 § 433		Title 32 § 11013-A			
Maryland	[Cts. and Jud. Proc.] § 13-101.1							

State	Population							
	Substance Abuse	Mental Health	Veterans/ Active Military	Domestic Relations	Worthless Check	Property Crimes	Prostitution/ Sex Trafficking	Other
Massachusetts			276A § 10					Young Adults (18-22): 276A § 1 et seq.
Michigan	§ 333.7411 § 600-1060 et seq.	§ 600-1090 et seq.	§ 600.1200 et seq.	§ 769.4a				
Minnesota	§ 152.18				§ 628.69			
Mississippi	§ 9-23-1 et seq.	§ 9-27-1 et. seq.	§ 9-25-1					
Missouri	§ 478.001 et seq.							
Montana	§ 46-1-1101 et seq.	§ 46-1-1201 et seq.						
Nebraska	§ 24-1301 et seq.	§ 24-1301 et seq.	§ 24-1301 et seq.					
Nevada	§ 176A.230 et seq.	§ 176A.250 et seq.	§ 176A.280 et seq.					
New Hampshire	§ 490-G:2 et seq.	§ 490-H:1 et seq.	§ 490-I:1 et. seq.					
New Jersey	§ 2C:36A-1 § 30:6c-1 et seq.		§ 2C:43-23 et seq.					
New York	[Crim. Proc. Law] § 216.05							
North Carolina	§ 90-96 § 7A-793 et seq. § 15A-1341				§ 14-107.2		§ 14-204	Substance abuse and mental illness: § 7A-272
Oklahoma	63 § 2-901 et seq. 22 § 471 et seq.	22 § 472			22 § 111 et seq.	22 § 991f-1.1		
Oregon	§ 430.450 et seq.	§ 137.680	§ 137.680		§ 135.925			

State	Population							
	Substance Abuse	Mental Health	Veterans/ Active Military	Domestic Relations	Worthless Check	Property Crimes	Prostitution/ Sex Trafficking	Other
	§ 475.245 § 3.450							
Pennsylvania	35 § 780-117 42 § 916	42 § 916						
Rhode Island	§ 8-2-39.2							
South Carolina		§ 14-31-10 et seq.	§ 14-29-10 et seq.		§ 17-22-710			
Tennessee	§ 16-22-101 et seq.		§ 16-6-101 et seq.		§ 40-3-203			
Texas	§ 122.001 et seq. § 123.001 et seq.	§ 125.001 et seq.	§ 124.001 et seq.				Human trafficking victims: § 126.001 et seq.	Public safety employees: § 129.001 et seq.
Utah	§ 78A-5-201 et seq.		§ 78A-5-301					
Virginia	§ 18.2-251 § 18.2-254.1	§ 19.2-303.6		§ 18.2-57.3		§ 19.2-303.2		
Washington	§ 10.05.010 et seq. § 2.30.010 et seq.	§ 2.30.010 et seq. § 10.05.010 et seq.	§ 2.30.010 et seq.	§ 2.30.010 et seq.				Additional therapeutic court programs: § 2.30.010 et seq.
West Virginia	§ 62-15-1 et seq.				§ 61-3-39m et seq.			
Wisconsin				§ 971.37	§ 971.41			
Wyoming	§ 35-7-1037							

Appendix by Crime Commission staff based on legal analysis.

