FEDERAL CRIMINAL DIVERSION ACT OF 1977

HEARING

BEFORE THE

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 1819—THE FEDERAL CRIMINAL DIVERSION ACT OF 1977

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95TH CONGRESS
1ST SESSION

S. 1819

IN THE SENATE OF THE UNITED STATES

JUNE 30 (legislative day, MAY 18), 1977

Mr. DECONCINI (for himself, Mr. ABOUREZK, Mr. KENNEDY, and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To reduce the cost of operating the Federal criminal justice system, reduce the criminal caseload of the Federal courts, and establish alternatives to criminal prosecution for certain persons charged with nonviolent and, in selected instances, violent offenses against the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Criminal Diversion Act of 1977".

SEC. 2. Congress hereby finds and declares that the interest of operating the Federal criminal justice system efficiently, protecting society, and rehabilitating individuals

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charged with violating criminal laws can be served by creating innovative alternatives to prosecution; that such alternatives will reduce the criminal caseload of the Federal courts, and provide more effective and humane rehabilitation programs for eligible persons; that such diversion can be accomplished in appropriate cases without losing the general deterrent effect of the criminal justice system.

SEC. 3. As used in this Act, the term—

(1) "eligible individual" means any person who is charged with a nonviolent offense against the United States, or a violent offense where no substantial physical injury to the victim occurs committed under circumstances such that it is reasonably foreseeable that the individual will not continue to commit violent offenses and where the violent act has not been part of a continuing pattern of violent behavior, and who is recommended for participation in a Federal criminal diversion program by the attorney for the Government in the district in which the charge is pending;

(2) "Federal criminal diversion program" may include, but is not limited to, medical, educational, vocational, social and psychological services, corrective and preventative guidance, training, counseling, provision for residence in a halfway house or other suitable place, and other rehabilitative services designed to protect the pub-

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lic and benefit the individual, restitution to victims of the offense or offenses charged, and uncompensated service to the community in which the offense charged occurred or to a community in the district in which the charge is pending;

(3) "plan" includes those elements of the program which an eligible individual needs to assure that he will lead a lawful lifestyle;

(4) "committing officer" means any judge or magistrate in any case in which he has potential trial jurisdiction or in any case which has been assigned to him by the court for such purposes; and

(5) "administrative head" means a person designated by the Attorney General as chief administrator of a program of community supervision and services, except that each such designation shall be made with the concurrence of the chief judge of the United States district court having jurisdiction over the district within which such person so designated shall serve.

SEC. 4. The administrative head of each Federal criminal division program shall, to the extent possible, interview each person charged with a criminal offense against the United States within the district whom he believes may be eligible for diversion in accordance with this Act and suitable for such program and, upon further verification by such

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head that the person may be eligible, shall assist such person in preparing a preliminary plan for his release to a program of community supervision and services.

SEC. 5. (a) The committing officer may release an eligible individual to a Federal criminal diversion program if he believes that such individual may benefit by release to such a program and the committing officer determines that such release is not contrary to the public interest. Such release may be ordered at the time for the setting of bail, or at any time thereafter. In no case, however, shall any such individual be so released unless, prior thereto, he has voluntarily agreed to such program, and he has knowingly and intelligently waived, in the presence of the committing officer and with the advice of counsel, unless counsel is knowingly and intelligently waived, any applicable statute of limitations and his right to speedy trial for the period of his diversion.

(b) In no case, however, shall a person charged with a criminal offense against the United States be released for diversion until all persons injured by the act or acts charged as offenses have filed an agreement in writing with the administrative head that the person charged may be so released.

SEC. 6. (a) The administrative head of a Federal diversion program shall report on the progress of the individual in carrying out his plan to the attorney for the Government

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and the committing officer at such times and in such manner as such attorney deems appropriate.

(b) In any case in which an individual charged with an offense is diverted to a program pursuant to this Act and such diversion is terminated and prosecution resumed in connection with such offense, no statements made or other information given by the defendant in connection with determination of his eligibility for such program, no statements made by the defendant while participating in such program, no information contained in any such report made with respect thereto, and no statement or other information concerning his participation in such program shall be admissible on the issue of guilt of such individual in any judicial proceeding involving such offense.

SEC. 7. (a) In any case involving an eligible individual who is released to a Federal criminal diversion program under this Act, the criminal charges against such individual shall be continued without final disposition for a twelve-month period following such release, unless, prior thereto, such release is terminated pursuant to subsection (b) of this section, or such charge against such individual is dropped within such twelve-month period. Such charge so continued shall, upon the expiration of such twelve-month period, be dismissed by the committing officer.

(b) The committing officer, at any time within such

twelve-month period referred to in subsection (a) of this section, shall terminate such release, and the pending criminal proceeding shall be resumed, if the attorney for the Government finds such individual is not fulfilling his obligations under the plan applicable to him, or the public interest so requires.

(c) If the administrative head certifies to the committing officer at any time during the period of diversion that the individual has fulfilled his obligations and successfully completed the program, and if the attorney for the Government concurs, the committing officer shall dismiss the charge against such individual.

SEC. 8. (a) The chief judge of each district is authorized, in his discretion, to appoint an advisory committee for each Federal criminal diversion program within his district. Any such committee so appointed shall be composed of the chief judge as chairman, the United States attorney for the district, and such other judges or individuals with such district as the chief judge shall appoint, including individuals representing social services or other agencies to which persons released to a Federal criminal diversion program may be referred under this Act.

(b) It shall be the function of each such committee so appointed to plan for the implementation for any Federal criminal diversion program for the district, and to review, on

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a regular basis, the administration and progress of such program. The committee shall report at such times and in such manner as the chief judge may prescribe.

(c) Members of a committee shall not be compensated as such, but may be reimbursed for reasonable expenses incurred by them in carrying out their duties as members of the committee.

SEC. 9. In carrying out the provisions of this Act, the Attorney General shall—

(1) be authorized to—

(A) employ and fix the compensation of such persons as he determines necessary to carry out the purposes of this Act;

(B) utilize, on a cost reimbursable basis, the services of such United States probation officers and other employees of the judicial branch of the Government, other than judges or magistrates, as he determines necessary to carry out the purposes of this Act;

(C) employ and fix the compensation of, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, such

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persons as he determines necessary to carry out the purposes of this Act;

(D) acquire such facilities, services, and materials as he determines necessary to carry out the purposes of this Act; and

(E) enter into contracts or other agreements, without regard to advertising requirements, for the acquisition of such personnel, facilities, services, and materials which he determines necessary to carry out the purposes of this Act;

(2) consult with the Judicial Conference in the issuance of any regulations or policy statements with respect to the administration of any Federal criminal diversion program;

(3) conduct research and prepare reports for the President, the Congress, and the Judicial Conference showing the progress of all Federal criminal diversion programs in fulfilling the purposes set forth in this Act;

(4) certify to the appropriate chief judge of the United States district court as to whether or not adequate facilities and personnel are available to fulfill a Federal criminal diversion program, upon recommendation of the advisory committee for such district;

(5) be authorized to provide technical assistance to any agency of a State or political subdivision thereof, or

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to any nonprofit organization, to assist in providing programs of community supervision and services to individuals charged with offenses against the laws of any State or political subdivision thereof;

(6) provide for the audit of any funds expended under the provisions of this Act;

(7) be authorized to accept voluntary and uncompensated services;

(8) be authorized to provide additional services to persons against whom charges have been dismissed under this Act, upon assurance of good behavior and if such services are not otherwise available; and

(9) be authorized to promote the cooperation of all agencies which provide education, training, counseling, legal, employment, or other social services under any Act of Congress, to assure that eligible individuals released to Federal criminal diversion programs can benefit to the extent possible.

SEC. 10. For the purpose of carrying out the provisions of this Act there is authorized to be appropriated for the fiscal year ending June 30, 1978, the sum of $3,500,000, and for fiscal years 1979, 1980, and 1981, $3,500,000 each year.

THE FEDERAL CRIMINAL DIVERSION ACT OF 1977

MONDAY, JULY 11, 1977

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Dennis DeConcini (chairman of the subcommittee) presiding.

Staff present: Romano Romani, staff director; Robert Feidler, counsel; Timothy McPike, deputy counsel; and Kathryn M. Coulter, chief clerk.

Senator DECONCINI. The subcommittee will come to order.

Good morning. Today is the first day of hearings on S. 1819, the Federal Criminal Diversion Act of 1977, a bill designed to provide alternatives to prosecution for persons arrested for violation of Federal laws. This bill is consponsored by Senator Abourezk, Senator Kennedy, Senator Thurmond, and myself.

Ten Federal demonstration programs have been in existence for several years under the provisions of the Speedy Trial Act, 18 U.S.C. 3152. An evaluation of these programs is being prepared by the Justice Department and will be presented to the subcommittee at further hearings to be held in September.

Diversion has apparently been effective in reducing caseloads and court costs and in reducing recividism on the State and local levels since the first projects were initiated in 1965. The list of professional groups endorsing the diversion concept has continued to grow.

To note a few supporters, diversion has been endorsed by: The National District Attorney's Association; the American Bar Association; the American Correctional Association; National Council on Crime and Deliquency; and the National Advisory Commission on Criminal Justice Standards and Goals.

The purpose of these hearings will be twofold. We will attempt to explore the problems involved in relating a diversion program to a Federal justice system. We will here rely heavily on the experience of the various State programs to provide us with alternative concepts of diversion and alternative procedures for implementation. We will also rely on the experience of the 10 Federal demonstration projects under the provisions of the Speedy Trial Act. With this input we hope to "fine tune" the proposed legislation, starting from a structure essentially that of the Federal projects.

The second purpose of these hearings is to establish an evaluation plan for the proposed diversion programs utilizing the advances in evaluation techniques since the early local programs. The evaluations hopefully will overcome some of the methodological flaws and will avoid the conceptual biases that have caused recent criticism of the diversion concept. In short, we hope to determine if, in fact, diversion is preferable to other modes of processing and disposition.

To this end the legislation has been drafted as a sunset bill, and requires the district advisory councils and the Attorney General to conduct project evaluations. Here again, we will be relying heavily on the evaluations of the Federal demonstration projects, and will also inquire into the methodology of those evaluations.

Therefore, we have asked a variety of professionals from different diversion-related disciplines to testify before us: judges, prosecutors, probation officers, legal scholars, diversion project heads, and social scientists who have been evaluating existing programs.

I have been involved with diversion since the first Arizona program was implemented under my administration as Pima County attorney. In my view the program there did accomplish court efficiency and more humane disposition of cases, and I hope the same may be accomplished on the Federal level.

Nevertheless, sound criticism of the diversion concept persists, and clear evaluations in the field are difficult to conduct. We must keep in mind that the end we seek is a just, efficient, and effective criminal justice system. Any new development that promises to promote this end must not only be enthusiastically explored but also objectively examined. This is the balance we hope to achieve with this legislation.

This morning we will hear testimony from Judge Irwin Brownstein of the New York State Supreme Court, which is the trial-level State court; from Steve Neely, Pima County attorney; from Guy Willetts of the Pretrial Services Division, Probation Department, Administrative Office of the U.S. courts; and by Robert Leonard, district attorney, Flint, Mich., and president-elect for the National District Attorney's Association.

Senator Wallop has been advised of the meeting and may be joining us shortly. Also, notice has been given in the Congressional Record of these hearings properly.

Our first witnesses this morning will be Guy Willetts and John Hornberger. We would like for you both to come forward, please.

I wish to welcome you to the subcommittee and thank you sincerely for taking the time to be with us this morning. I understand you have submitted statements and we would like you to pursue those at this time.

STATEMENT OF GUY WILLETTS, PROBATION DIVISION, PRETRIAL SERVICES BRANCH, ADMINISTRATIVE OFFICE, U.S. COURTS; ACCOMPANIED BY JOHN HORNBERGER, PROBATION DIVISION, PRETRIAL SERVICES BRANCH, ADMINISTRATIVE OFFICE, U.S. COURTS

Mr. WILLETTS. Thank you, Senator.

Mr. Chairman, and members of the subcommittee, I appreciate the opportunity to comment on this proposed legislation entitled, "Federal Criminal Diversion Act of 1977".

Neither the Judicial Conference nor the committee on the administration of the probation system has had the opportunity to consider it. Therefore, at this point, I speak only for the Administrative Office based on my experience as Chief, Pretrial Services Branch.

William J. Campbell, senior U.S. district judge from the northern district of Illinois, testified in February of 1974 before the House Judiciary Subcommittee No. 3 regarding the views of the Federal judiciary on legislative proposals H.R. 9007 and S. 798 pertaining to diversion. Review of this draft bill reflects that it contains a number of Judge Campbell's proposals. Mr. Donald Chamlee of the probation division has looked comparatively at your draft with H.R. 9007 and S. 798 and concludes that your bill is an improvement over S. 798. Judge Campbell's testimony and Mr. Chamlee's comments are attached for your information.

My remarks are based on the existing operation of deferred prosecution—diversion—in the Federal probation system and the experience derived from our pretrial services demonstration project—Public Law 93-619—"The Speedy Trial Act of 1974," Title II—Pretrial Services Agencies.

Historically, the Federal probation system has cooperated with the Department of Justice in the administration of a limited program of deferred prosecution informally known as the Brooklyn Plan. The problem is that there has never been a legislative mandate to carry out this procedure in the Federal system. Consequently, it has not been utilized extensively or uniformly by the courts or the U.S. attorneys.

Statistics—annual report of the director of the administrative office—show a continuing rise in deferred prosecution cases under supervision since 1969—765 cases—to 1976—1,763 cases.

The advent of the Speedy Trial Act of 1974 may have been an influential factor in this growth. Figures for the last 2 fiscal years—1975-76—reflect a dramatic increase in cases received; 1975, 1,143; and 1976, 1,711.

Diversion must be controlled if it is to be effective or a meaningful process. In short, cases that would normally be dismissed should not be diverted. There is no advantage or saving if the cases that are diverted are not suitable for prosecution. Although many of the weaknesses inherent in previous bills addressing this procedure are noticeably absent in this draft, no provision is included to assure that only cases that are prosecutable may be considered as potential diversion cases. Safeguards to preclude abuse of the procedure are essential if the diversion concept is to be a viable one.

I turn now to the draft and offer the following comments:

Paragraph 1—we suggest that we delete the term "nonviolent and, in selected instances, violent" to give more latitude to the administrators of the program.

As for section 2, in the last sentence we would add, "if properly administered". This would give emphasis to proper guidelines to control the types of cases that are diverted.

As for section 3(1) injury to victim and continuing criminal activity—conspiracy organized crime—should be considered in selecting cases for the diversion procedure, or in committing persons to community treatment programs.

Section three (2), we would include "to abide by certain other conditions as determined by the committing officer." This would give the administrators of the program the opportunity to design, and the committing officer to impose, conditions of supervision.

As for section three (3), the plan includes "a statement of"—maybe I should refer to the copy of the bill. Yes, on page 3 I am referring to. "Plan" includes a statement of those elements of the program. We think it would be clearer if we added that language.

Senator DECONCINI. Would you give us that again?

Are you talking about subsection (3)?

Mr. WILLETTS. Yes. "Plan" includes "a statement of elements of the program which an eligible individual needs to assure that he will lead a lawful lifestyle;".

If I might digress a moment from my prepared comments and give some justification for including those words, I would like to.

We have learned from experience that it is best to have written conditions and a plan that is written down. Then there is no misunderstanding if a person violates those conditions or fails to follow that plan.

Senator DECONCINI. In that case, you say you found best that they sign that and that they agree this is the plan they are going to live by; is that it? You want to make it a contractual basis even though it may not be legally binding; is that right?

Mr. WILLETTS. Yes, in a sense, yes. It gives for a clear understanding of what the expectations are in the release plan.

In subsection (5), section 3, "the probation officer or the chief pretrial services officer"—I will read that section.

> "Administrative head" means a person designated by the Attorney General as chief administrator of a program of community supervision and services, except that each such designation shall be made with the concurrence of the chief judge of the United States district court having jurisdiction over the district within which such person so designated shall serve.

We would suggest that "administrative head" mean a probation officer or the chief pretrial services officer in this instance.

Senator DECONCINI. Let me ask a question on that particular subsection.

The last part of that where we say, that is, we make reference to the designation with the concurrence of the chief judge of the U.S. district court—do you feel that is necessary?

Mr. WILLETTS. Yes, sir, I do. My reason would be this. Under our present system the chief judge has the most authority of any person in the criminal justice system at the district level. Any activity, or let us say, any appointment made without his concurrence does not necessarily carry as much weight as it does if it is with his blessing.

Senator DECONCINI. I see.

Mr. WILLETTS. We recognize the autonomy of the U.S. attorney's office. You recognize the autonomy of the chief district court judge. But there should be a meeting of the minds in order for the person appointed to have the respect of the two most important officers dealing with this program, which is, of the judge and the U.S. attorney. I think it is necessary.

Senator DECONCINI. Thank you.

Mr. WILLETTS. As for section 4, it is in the form of a response, "The administrative head of each Federal criminal diversion program

shall, to the extent possible, interview each person charged with a criminal offense against the United States."

In the 10 Federal pretrial services demonstration districts, we are already interviewing accused persons immediately following arrest. For that reason we believe that we are in an ideal position to assume the responsibility for detecting, if you will, early in the process those cases which are potential diversion cases.

I can illustrate that by the pretrial services project in the southern district of New York where that is what they are doing at the present time. Their arrangement with the U.S. attorney is to screen, at the request of the U.S. attorney, all incoming cases and call attention to the assistant U.S. attorney those cases, which in their judgment meet the criteria established by that District, and by the U.S. attorney, for diversion.

At that point the case is referred to the U.S. attorney for his consideration. If he agrees, then in this particular district he requests the probation office, the Federal probation officer, to prepare a background report recommendation and submit to him for his final decision. If it is diverted it is referred to probation for their supervision.

In a moment—at this point I shall illustrate also this. In the district of Maryland, the Pretrial Services Division unit is doing exactly the same. They are screening. They are calling to the attention of the U.S. attorney those cases that might be diverted. But if the U.S. attorney agrees in this case, then he refers the case back to the pretrial services unit for background, for report, for recommendation, for plan, and if the case is diverted, it is diverted to the pretrial unit for supervision.

That illustrates the full range of the way that the pretrial program under title II is operating in diversion at this point.

As for section 5, subsection (a), we would suggest this. We suggest that we insert "on the recommendation of the attorney for the Government", that is, the committing officer may release. This puts the U.S. attorney in the process. It appears in one instance that we were taking him out a moment ago in one area. But the idea is not to take him out, but just to keep the two coordinated on the decisionmaking in reference to a diversion case.

Senator DECONCINI. Let me ask you a question.

Going back to the earlier question in having the district judge approve the appointing chief administrator, do you see any problem with the separation of powers there regarding the prosecutor being the executive and the district judge being the judiciary?

Mr. WILLETTS. Well, eventually when I get to the end of my comments, we will suggest that the chief administrator be appointed by the court, with the approval of the U.S. attorney. Actually, it would reverse the process, as you have it here. This would be in keeping with the comments that I am making now.

Senator DECONCINI. Fine. Continue, please.

Mr. WILLETTS. In section 5(b), I would like to read that section and elaborate if I may.

> In no case, however, shall a person charged with a criminal offense against the United States be released for diversion until all persons injured by the act or acts charged as offenses have filed an agreement in writing with the administrative head that the person charged may be so released.

My experience, and that of my colleagues, I believe, would indicate that is totally impractical. I could elaborate on that further, if necessary.

Senator DeConcini. Please do.

Mr. Willetts. I could give you an example of a personal experience. I worked as a probation officer for 7 years and handled some diversion cases. I can recall a case of three sisters, teenage girls, one of whom was of low-average intelligence and the other two were mentally retarded. They took a number of old age assistance checks out of mailboxes in the community where they lived. They cashed them at the local supermarket. I do not recall the actual number of victims in this instance, but it would exceed, I think, four or five persons who were receiving old age assistance, plus the supermarket operator who cashed the checks.

I did the initial investigation for the U.S. attorney's office. I did the background workup on each of the defendants. I made the recommendations for release plan.

The three sisters were released under 12-months' supervision with the condition that they made restitution. They had no means of support other than the older sister's working at a menial job.

In my view, it would have been next to impossible to explain to each of those victims, elderly people who had gone without their checks for 30, 60, or 90 days, the concept of diversion and why these young girls were not being prosecuted by the court and asked them to sign an agreement that they be released under this procedure.

I do not believe it would have been possible to convince the injured parties in this instance that this was the proper thing to do.

Senator DeConcini. In that particular program that you are talking about, was there a confrontation of the victims and the offenders? Did they ever meet each other?

Mr. Willetis. Absolutely not.

Senator DeConcini. Would that make any difference, in your opinion, if you had a system that attempted to put together those two people?

Mr. Willetts. I do not believe it would make a difference, based on my experience, with these offenders and with victims over the last 15 years. No, sir. I do not.

Senator DeConcini. When your example of the fraud checks came about, was there a feeling of remorse by the offender? Were you satisfied that they were going to correct their ways? Even though the victim did not feel happy about it, and was not about to sign any agreement, was the offender duly impressed with the fact that she had caused some real problems?

Mr. Willetts. I feel in all three instances there was. Two of the offenders were mentally retarded, however.

In the case of the sister who was employed and who was earning a living, the 12-month supervision period for her was very impressive. It was of value to her because she lost her employment. It was necessary to find her another job, which she obtained and worked throughout the supervision period.

Senator DeConcini. Do you think there is any merit if you left that in on a discertionary basis? In this case, the administrative office could say, "Well, let us go ahead and try to get an agreement or get a

statement from the victim." The idea would be that would help in the long run to insure that the program would be properly handled. But this would not be a mandatory requirement.

Do you think that is too risky?

Mr. WILLETTS. I seriously doubt that it would be utilized because of the difficulty in trying to modify, if you will, the injured party's thinking.

I can think of instances. If it is a rather youthful offender, and the person injured is a particular type of individual who was interested in rehabilitation, if you will, although that term is not very well accepted today, but interested in giving a person a second chance, let me put it that way, I can see that it is conceivable that it might work. I have serious reservations about it being a beneficial provision overall in the process.

Senator DECONCINI. Thank you.

Mr. WILLETTS. I turn now to section 6(a):

> The administrative head of a Federal diversion program shall report on the progress of the individual in carrying out his plan to the attorney for the Government and the committing officer at such times and in such manner as such attorney deems appropriate.

I think that is incorrect in that the committing officer sets the conditions. He should determine when it is appropriate, along with the administrative head, that is, when violations of those conditions should be reported.

I concur that they should be reported to the attorney for the Government.

The idea would be for the committing officer, the attorney for the Government, and the administrative head of the agency to work out mutual, agreeable tems. The administrative head would have the responsibility of making sure that it is reported to the court and the U.S. attorney when these conditions are complied with.

But if the committing officer is going to approve the plan and, of course, the U.S. attorney would also, but if the committing officer is going to set the conditions and approve the plan, then he should plan a large role in determining to what point that person can go in violating these conditions before you make a report.

I would, at least, include both, if I did not put the judicial officer in the primary role there.

I turn to section 6(b) now. That raises an interesting question.

In reference to confidentiality, the question is this: In view of section 6(b) and the restrictions on release of information—let us assume that the divertee does violate his conditions of release and a decision is made to prosecute.

In view of the confidentiality contained in this paragraph, which I do not argue with, then who prosecutes and who hears the case? It is a different judicial officer and a different U.S. attorney. Information regarding the violation and the case is available to the U.S. attorney. The court has heard the information. The court has heard the facts as they relate to this accused.

In that case, could they objectively sit and hear the case if he is prosecuted? I think that is a question that should be addressed. I am not so sure how is would be resolved. But, having recently gone through the throes of trying to establish an ongoing program, from title II,

it is difficult to answer some questions if it is not sed pellout more clearly. This leaves a question of whether this would be possible or not.

Senator DECONCINI. How would you spell it out any clearer? Do you have any suggestions?

Mr. WILLETTS. In reference to the court, I do not think it is a problem, in that there are a number of judges. A judge who sat on the trial in the case could easily be different from the one who dealt with the diversion procedure. This would be in the same sense that a different assistant U.S. attorney could also prosecute.

In either event, however, the court record is available to any judge. The U.S. attorney's file is also available to any assistant U.S. attorney.

I think that you would have to say this:

Except to officials, officers of the pretrial diversion agency, the prosecutor's office, and the court.

Senator DECONCINI. If the evidence we are talking about is nonadmissible and is excluded, even though the prosecutor has it available and can see it, and perhaps the judge can get the diversion file and take it out himself, nevertheless, it seems to me that is as far as you can go. It will not be admissible. So, the prosecution is going to have to be brought forward on the existing evidence at the time.

Mr. WILLETTS. Other than.

Senator DECONCINI. That may place an additional burden on the prosecutor not to attempt to introduce something that was not there prior to the person being diverted. It seems to me that is a challenge that ought to be worth the chance, I guess you would say, that if a prosecutor blows it, then I think it will blow the whole case.

Mr. WILLETTS. Yes.

The other thing I can suggest is that the legislation suggests or requires that a different prosecutor or different judge actually proceed with the case if it is revoked and goes to trial. That would take the burden off of the two individuals.

Senator DECONCINI. Let me ask you this about another judge. When we get to the judiciary testimony this morning, we will get a better idea of this, but do you think that the judges in the programs you are aware of really go into some depth as to what the plan is and what the program is and what the agreement is, or is it more of an administerial act where they approve this because of the constitutional rights and that sort of thing? How do you find that?

Mr. WILLETTS. It varies with judges. However, most judges are interested in the specifics of a plan in a given case. If they have seen the individual and if they know the facts—and they would know the facts in this instance—and if they know the social background of the person, then they are interested in knowing that the plan relates to that individual's needs.

I think it is reasonable to assume that once they have gained experience with the people who are supporting this program, such as the chief administrator in a diversion agency, then they are going to rely on him. As the program develops, for lack of a better term, as long as the judge does not get burned or as long as the U.S. attorney does not bet burned then they will approve the plan that is presented without asking a lot of questions.

I think this comes with the development of the program and the integrity of the agency serving the court and the U.S. attorney. Initially, there will be a lot of questions. But if the credibility of the agency is good—I do not want to use the word rubberstamp, and I think that is what is in your mind—but it depends. After the credibility of the agency is established, then it depends on the individual judge or U.S. attorney. Some want to be more involved than others. The personality of the individual and the background of the individual will determine to what extent they want to go into a lot of detail.

Senator DECONCINI. Thank you.

Mr. WILLETTS. Section 7(b):

> The committing officer, at any time within such twelve-month period referred to in subsection (a) of this section, shall terminate such release, and the pending criminal proceeding shall be resumed, if the attorney for the Government finds such individual is not fulfilling his obligations under the plan applicable to him, or the public interest so requires.

We have a problem with the term "shall" and suggest that "may" be used in that instance:

> May terminate such release and the pending criminal proceeding may be resumed, if the attorney for the Government finds such individual is not fulfilling his obligations under the plan applicable to him, or the public interest so requires.

We suggest that the term "may" be substituted for the word "shall."

Senator DECONCINI. If you do that, in essence are you not eliminating the discretion of the prosecutor? Does not this give the prosecutor—I hate to use the word—the hammer, so to speak?

You are saying that he shall terminate it?

Mr. WILLETTS. We think he has just as much latitude with "may" as he has with "shall." He has it anyway. He can elect to prosecute that case if the person does not live up to the terms of his release at any point.

As I view it, he retains the right to determine whether or not to prosecute.

Senator DECONCINI. Yes; and I think he does under "shall." It says "resumed." It does not mean that he must bring it to trial that he cannot bargain it out or something. I do not think you could mandate anything like that.

Mr. WILLETTS. I think this is the implication we get from it. It is being mandated. That restriction should not be placed on it.

Senator DECONCINI. I think that is a good point. You do not want to force him to bring it to the bar if, in fact, it is a bad case, or if he does not feel it is necessary now to do so.

Thank you.

Mr. WILLETTS, Maybe not, but it appears here he would be forced to proceed with it. We feel that he still should have the flexibility there and discretion.

Senator DECONCINI. What I am a little concerned about is that these are not liable to be very heinous cases or cases that are first priority of the prosecutor. So, he is liable to let it go if they fall out or if they are terminated. The idea is to keep the prosecutor involved. If they let him go, then the whole diversion process goes down.

Mr. WILLETTS. This relates back to the point we made earlier.

Senator DECONCINI. I think your point is well taken.

Mr. WILLETTS. I turn now to section 8(a):

> The chief judge of each district is authorized, in his discretion, to appoint an advisory committee for each Federal criminal diversion program within his district. Any such committee so appointed shall be composed of the chief judge as chairman, the United States attorney for the district, and such other judges or individuals with such district * * *

I concur that if you are going to have an advisory board, certainly the chief judge or his designee and the U.S. attorney should be a part of that board. The statement I am going to make now is somewhat premature. However, I feel individually compelled to say that I am not so sure that an advisory board concept is as good as many people thought it would be over the last 4 or 5 years. This is based on our last 2 years' experience with the 10 demonstration projects, 5 of which worked under a board of trustees and 5 of which operate under the administrative structure of the Administrative Office of the Probation Bureau.

My observation is that it is very difficult to get a chief judge, particularly in large districts, and a U.S. attorney, particularly in large districts, and other very important people, if you will, together to consider the needs of a relatively small program, considering how priorities go in a criminal justice system.

Senator DECONCINI. Do you see any advantage in shifting away from this kind of advisory committee and making it more of a citizens advisory committee? I underline the word advisory from the standpoint of having the citizen participation and also hopefully finding jobs for people who might respond, that is, to provide resources to the administering officer.

Would that, in your opinion, make any difference or be any more advantageous?

Mr. WILLETTS. My view, at this point, is that it is very difficult and very time consuming. The responsibility for this falls on the part of the chief administrator of the program, whomever he may be. It is very difficult to have a public relations program to the extent that you can involve and keep sufficiently informed a number of lay persons, if you will.

I believe ideally that it is a good approach. In practice it is very difficult to make it work.

If we go back to the community organization concept where you deal with the hierarchy or the power structure in the community, and if you want to be successful, then I think the board of trustee concept, if you will, in diversion and pretrial services, are somewhat analogous to that in that the name, that is, the judge, the U.S. attorney, the public defender, and the two attorneys licensed to practice in that court and two community organization representatives—it is theoretically a good approach.

What I want to leave with you is that practically, though, it is difficult to make it work.

I would suggest this. If you retain the advisory board concept, then I would put the defense in there also. That would be the public defender.

Senator DECONCINI. Do you think it is best not to have an advisory board? Would you care to express an opinion on that? Do you think it is unnecessary?

Mr. WILLETTS. I honestly do. That is a personal opinion. It is not validated by as much information as I would like at this point. I think 2 years from now I will be more willing to make a statement and stand on it. But I do have serious reservations at this point.

Senator DECONCINI. You make a good point as to the ability of a district judge to really take part in it and be there and want to understand it.

Mr. HORNBERGER. Senator, we have found that our people doing the job in the field, that if they have knowledge of all of the available resources in the community, then they are able to provide the services that you are possibly anticipating that such an advisory council would perform.

It has been our experience, and my experience as a probation officer of some 20 years, that there are resources there in the community, and that any probation officer or pretrial services officer, or what have you, is knowledgeable and can take advantage of them. It has been my experience with boards, advisory councils of other organizations, that in that sense they are essentially not too effective.

Senator DECONCINI. Here we have the discretion built in. If a judge felt it was necessary, and if a judge put it together and called it together, then maybe he or she would feel more inclined to really be involved.

I appreciate those remarks.

Mr. WILLETTS. As previously noted, the 10 pretrial services agencies established by the Administrative Office of the U.S. Courts under title II of the Speedy Trial Act are already interviewing Federal offenders shortly after arrest.

One has assumed the responsibility for screening for potential diversion cases. One has served as the coordinator while others are performing the full range of functions necessary to an ongoing diversion program.

We have provided this committee with letters from chiefs of the Federal pretrial services project which reflect in more detail their current involvement in diversion practices.

My final observation would be that with existing administrative structure and staff augmented by the proposed annual budget—$3.5 million—the Administrative Office of the U.S. Courts could implement a diversion program in the 91 judicial districts.

Senator DECONCINI. Let me ask you one question, Mr. Willetts, before you leave. I appreciate your testimony.

I realize that you have under study now the analysis of a number of diversion projects, but do you have an opinion, or do you care to express an opinion as to the diversion concept as to the widening or expanding of the jurisdiction or the net of the criminal justice system? Does it really simplify it?

Mr. WILLETTS. Yes, sir, I have definite feelings about the concept. I think it is a good one. I think it is viable. I think it can work if properly administered.

You have to have someone heading up the program who feels, as I do, that it is an alternative to trial, conviction, probation, and prison. You have to have someone who is willing to convince others in the criminal justice system that it is a viable alternative.

In my judgment—and this is based on my personal experience—there may be as many as 10 or 15 percent of criminal cases that are actually processed through the system which could be dealt with in this fashion.

For example, I base that on the pretrial services unit in Detroit over the past year. They processed in excess, in cooperation with the U.S. attorney's office, of 100 cases through this procedure. This would be out of probably a total number of 1,500 cases. These are very rough figures. We could get specifics if you would like.

When you have the U.S. attorney, the court, and the administrator of the program willing to agree on the concept, then it can work very well. It works well when they work together.

I do not want to belabor this point, but one reason that we would suggest that the top administrator of the program in a given district not be totally responsible to the U.S. attorney is that U.S. attorneys change frequently.

The court agencies are the most stable of the criminal justice system. So, if you change the heads of the agencies frequently, then you tend to lose continuity. If you have a good program established—

Senator DECONCINI. The mere fact that you have another U.S. Federal attorney should not be able to alter it that much; is that right?

Mr. WILLETTS. That is right. As you know, this is reality. It is the way the system operates.

That is one reason why we feel that probably the administrator should be responsible to someone other than the U.S. attorney.

Second, I think he would be more free to express objection in the event a case does not necessarily meet what the district has determined is their guideline for a potential diversion case.

Senator DECONCINI. Thank you very much. We appreciate the testimony.

Mr. Hornberger, would you like to add anything?

Mr. HORNBERGER. Senator, I have nothing to add to Mr. Willetts' testimony. I believe you have been provided with statements from our 10 districts involved in demonstration projects. At this point I see no reason for me to take up your time and discuss them at this point in time.

Senator DECONCINI. All of those will appear in the record. We thank you for submitting them and for your time today.

[Material to be supplied follows:]

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK PROBATION OFFICE,
June 30, 1977.

Re Deferred Prosecution Act of 1977.

Mr. GUY WILLETS,
Chief, Pretrial Services Branch, Division of Probation, Administrative Office of the U.S. Courts, Supreme Court Building, Washington, D.C.
(Attention of Mr. John E. Hornberger, Pretrial Services Specialist).

DEAR MR. WILLETS: This new proposed act does not come as a surprise, in view of the previous acts submitted and the experiments with the ten pilot groups, five connected with Probation Departments and five under community agencies, which were initiated in 1974. Please note the similarity with the experiment of the Pretrial Services Agencies, particularly the ten groups split five and five, in the four-year programs. We were not included as one of the ten deferred prosecution groups after this department, members of the Court, and, in particular, then-U.S. Attorney Paul J. Curran, refused to accept an outside agency for the Southern

District of New York. Mr. Curran insisted that the Probation Department and not a community agency should provide the services and procedures dictated by the Deferred Prosecution program, also known as the "Brooklyn Plan." Also, Mr. Curran refused to adopt the guidelines demanded by the Department of Justice since the Probation Department of the Southern District of New York already had a successful Deferred Prosecution program under the auspices of the U.S. Attorney of this district with the approval of our Court at that time. There were virtually no restrictions and our program, then and now, has been most successful. Your attention is referred to Mr. Curran's final report of activities of the U.S. Attorney's Office from January, 1973, to October, 1975, entitled Improvements in Criminal Justice, with the subcaption "Deferred Prosecution." These three pages give ample justification for a deferred prosecution program run by the Probation Department.

At that time, 1974, a very powerful figure was attempting to get a third agency to provide the services, and had an individual selected as the administrator, and had attempted to force this agency and individual upon the office of the U.S. Attorney. If you recall, you and then-Chief Porbation Officer John Connolly had discussions regarding the possibility of our being accepted for this program in March, 1975 or earlier. Please note the memorandum dated March 24, 1975.

Contrary to those programs operated under the auspices of the Department of Justice, ours does not have any limitations. The U.S. Attorney's Office can recommend persons who have been arrested for drug offenses, assaults, bank robbery, or who have mental or emotional problems, two or more prior convictions, or a history of drug abuse or addiction. We have accepted some of the most difficult cases, and, as revealed in a number of our semi-annual reports, our success rate is very good in spite of the high risks taken. We have been extremely successful with individuals with mental or emotional problems and histories of drug addiction. The restrictions referred to are contained in the memorandum received from the Administrative Office, entitled Pretrial Diversion (8/21/75).

We have a simple program, which has been made even simpler by the Pretrial Services Agency. The Pretrial Services Agency and the Pretrial Diversion Unit (Deferred Prosecution) are excellent mates. From the outset, we have firmly believed that the Pretrial Services Agency should be involved in deferred prosecution and that the Pretrial Services Agency is an integral part of the Probation Department and not a separate agency. As a result, our Pretrial Diversion Unihas consistently and continuously been involved in crisis intervention and PSA cases, particularly with individuals who have extensive histories of mental illnetss Members of the Pretrial Diversion Unit have placed individuals known only to the Pretrial Services Agency into mental institutions and a number of them were given deferred prosecution. With the aid of FINS and the bail summary report, both of which are provided to defense and government attorneys during the bail consideration process, individuals are considered for deferred prosecution quickly and in greater numbers than in the past. The two units work closely together. Services are being provided to these individuals, free of charge, and virtually all those services have been obtained with the aid of the Pretrial Diversion Unit.

As Ms. Estell L. Collins, Supervising Pretrial Services Officer, has stated: "The Pretrial Services Officer by the very nature of his work has been able to identify and verify certain cumulative factors which tend to substantiate whether an individual should be considered as a Deferred Prosecution case." The Pretrial Services Agency is the first "social agency" and first nonenforcement agency with which a newly arrested person comes into contact, and the Pretrial Services Officer is available and able to identify certain social, educational, vocational, and mental problems, and other factors which may indicate that an individual is suitable for deferred prosecution. Therefore the officer is able to suggest to the U.S. Attorney that the person be given this consideration. However, at this time, most of the referrals are made by the Assistant U.S. Attorney, usually at the suggestion of the Probation Department or private counsel. A number of cases are received by judges subsequent to indictment with the approval of the U.S. Attorney.

After the referral is made, the file of the Pretrial Services Agency is made available to the Pretrial Diversion Unit; a working relationship exists between the two, and quick decisions and speedy determinations are made as a result.

In our report submitted to the U.S. Attorney on April 22, 1977, it was revealed that 127 individuals were referred to the Probation Department for investigation with reference to the granting of deferred prosecution between September 1, 1976 and February 28, 1977. These persons range in age from 15 to over 50, and their offenses are listed in this report, including bank robbery, extortion, threat to government property, harassment of foreign guests, and others.

I believe that the Pretrial Services Agency and the Pretrial Diversion Unit (Deferred Prosecution) must remain within the judicial setting. We believe that our programs for both agencies are the best. Perhaps we are blowing our own horn, and are guilty of pride, but, if the two operations are evaluated, we think we can prove our point—that both should be allowed to remain as they are.

Finally, for your review, and in the hope that it will prove helpful, we are herewith transmitting material relating to deferred prosecution, including the manual for our Pretrial Services Agency (p. 45 and following).

I hope this has been of help to you. It had to be thrown together because of the time limitations.

Very truly yours,

MORRIS KUZNESOF, *Chief, U.S. Probation Officer.*

REPORT OF ACTIVITIES, JUNE 1973 TO OCTOBER 1975

U.S. ATTORNEY, SOURTHERN DISTRICT OF NEW YORK

IMPROVEMENTS IN CRIMINAL JUSTICE

DEFERRED PROSECUTION

A prosecutor can always look good by presenting a large volume of relatively minor cases, especially where a defendant has admitted the offense. Such cases can be handled routinely with a minumum of lawyer's effort and build up a statistical picture of a large percentage of guilty pleas and convictions. I am proud to say that in this District we have resisted the temptation to play that statistical game and have found a better and more just way of handling many of the cases.

For a number of years in this District we had what is widely referred to in law enforcement circles as a "Brooklyn Plan," a system of deferred prosecution for adolescent defendants. The basic premise of the Brooklyn Plan is to give a youth caught in the grip of the law an opportunity to be rehabilitated without suffering the stigma of a criminal conviction which can deprive him of the possibility of decent employment in the future.

In 1973, the Brooklyn Plan in this office was expanded to reach adult defendants Since then over 180 adult defendants have had their cases deferred pending a period of rehabilitation. This has been done by this office working with John T. Connolly, the Chief U.S. Probation Officer and his staff in this District, and utilizing the services of existing State and local agencies and charitable organizations without cost to the federal government.

The deferred prosecution program in operation in this District gives the prosecutor flexibility to withhold the full power of the law in those cases where it appears that the defendant's crime was a result of a problem which may be susceptible to correction. For example, if it appears that a defendant charged with uttering forged treasury checks is an alcoholic, it may be possible to put that defendant in a program such as Alcoholics Anonymous to correct the problem—rather than to punish the defendant. This is obviously a humane and just way to deal with such persons and in my judgment is superior to the former method of automatically prosecuting the defendant, perhaps repeatedly, and leaving to the sentencing court the burden of evaluating an appropriate sentence.

The program in this district is not used as a substitute for prosecuting what otherwise may be weak cases or crimes which a prosecutor may have some reluctance to prosecute, such as mail embezzlement by postal employees. The case must be clearly a prosecutable offense and in fact one with only one possible result, conviction of the defendant. The Assistant in charge of the prosecution may decide at any point in the prosecution; before arraignment and indictment, or after indictment and before trial, that a just result can be obtained by deferring prosecution. If a defendant and his counsel consent to the deferred prosecution an agreement is entered into and the defendant is brought before the court for the purpose of executing the agreement and waiving his right to a speedy trial under the Constitution and local court rules. If a defendant responds to the treatment and supervision devised by the Probation Officer the charge is either not made, or, if having been made, is dismissed on the government's motion.

My judgment in the propriety of such a program has been confirmed by the Department of Justice, which, in the summer of 1974 considered whether deferred prosecution should be a part of a prosecutor's options on a nationwide basis. Partly as a result of a review of the success of the program in this District, a pilot program was established in Chicago. Based on that experience, there are now ten federal Districts where pilot deferred prosecution programs are in effect.

The Congress is also considering legislation involving deferred prosecution programs. I believe that legislation in this area would be superfluous and might, in the long run, inhibit the prosecutor's discretionary authority not to prosecute in particular cases by unduly involving the Courts in the initial decision to defer prosecution or in the decision to reinstate the prosecution when the defendant does not respond to supervision.

My immediate predecessor in this office, working with the Drug Abuse Control Commission of the State of New York, established a program for the deferred prosecution of narcotic addicts who had committed non-violent federal crimes as a result of their addiction. This program called TASC (Treatment Alternative to Street Crime) was coordinated by Theodore E. Jackson, a professional parole officer employed by New York's Drug Abuse Control Commission and was an unqualified success. In part, its success as compared to other addict rehabilitation efforts, can be attributed to the fact that the federal courts have fewer crimes committed by narcotics addicts, and therefore, fewer addicts to supervise, but the primary reason is the more intense supervision provided by Mr. Jackson and his staff. In the past two years, more than 100 defendants successfully participated in the program. Because of a lack of funding, the Drug Abuse Control Commission was not able to continue the program after June 30, 1975. However, the Probation Office of this Court, under Mr. Connolly and his very capable Deputy Chief, Morris Kuznesof, was able to continue the program and it is presently functioning with members of that staff in a fashion similar to the adult Brooklyn Plan.

One result of our deferred prosecution program is that this office obtains perhaps 150 fewer convictions each year. Another result is that the Court is not burdened with 150 additional cases. The real result, however, is that 150 men and women who commit federal offenses each year receive supervision and treatment which may prevent them from committing crimes in the future and may make them productive members of our community.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF MICHIGAN,
PRETRIAL SERVICES AGENCY,
Detroit, Mich., June 27, 1977.

Mr. JOHN CONYERS,
Congressman, U.S. Congress, Rayburn House Office Building,
Washington, D.C.
(Attention Ms. Maureen Conley).

DEAR CONGRESSMAN CONYERS: Recently I received a call from your staff concerning Pretrial Diversion under the Speedy Trial Act. As a result, I indicated I would put together a brief report describing our experience with the Diversion Program.

First of all, Pretrial Diversion, sometimes known as Deferred Prosecution, has been traditionally handled by the United States Probation Department. Since the United States Pretrial Services Agency in the Eastern District of Michigan is a Board of Trustees operation, we agreed to experimentally handle Diversion for a period of time as a part of our operation. Consequently, we took a referral on our first Diversion case on June 29, 1976. At about the time of our first case we provided the caveat to both the United States Attorney's Office and the Judicial Officers that we could only continue to take Pretrial Diversion cases if we had sufficient staff to meet the demand. We made this clear since we felt that the principal mandate of the Speedy Trial Act was for the United States Pretrial Services Agency to investigate and supervise in the area of bond release.

It took a few months to firm up our procedure and I note that we had a total of 33 Pretrial Diversion Referrals during 1976. Our format was to take a written referral from the United States Attorney's Office so that we would be alerted to the case. Thereafter, we would cooperate with the United States Attorney's Office in getting a consent form signed before a Judicial Officer so that we could initiate a Pretrial Diversion Report for the United States Attorney's Office. The consent form served two purposes. First, since it was signed both by the defendant and the defendant's attorney, we were able to release the confidential information to the United States Attorney's Office.

Secondly, when the consent form was signed in the presence of a Judicial Officer and by the Judicial Officer, the Court became aware of the fact that the case was being considered for Diversion under the Speedy Trial Act. Thereafter, we would prepare a Pretrial Diversion Report for the United States Attorney's Office within 15 working days. Thereafter, the United States Attorney's Office would

make a decision as to whether or not they wished to divert the case and would notify all the interested parties. In the event of Diversion, the United States Attorney's Office would prepare an agreement form for all interested parties to sign including the Judicial Officer and a representative from the United States Pretrial Services Agency. Thereafter, the United States Pretrial Services Agency would assume supervision of the case for up to one year. The maximum of one year was agreed upon as a result of the Department of Justice guidelines in respect to Pretrial Diversion.

By the beginning of 1977, the United States Attorney's Office was more familiar with our program and initiated heavier referrals. Consequently, I note that we received a total of 83 referrals by May 6, 1977 when we received our last referral. As I mentioned on the telephone, we made arrangements to transfer the Pretrial Diversion Program back to the United States Probation Department during April of 1977. This was done on the basis of the large increase in the volume of referrals without any adjustment in the size of our staff, Again. this was understandable in view of the fact that we are a pilot program with a primary mission of handling bond matters.

Now, reflecting back, we are able to observe that we processed a total of 116 Pretrial Diversion Referrals in a period of about 10 months. Since 83 of these referrals came in a period of about four months, we projected that the United States Attorney's Office could make significant use of Pretrial Diversion with the advent of better communication and better screening of cases at the initial stages. In addition, it is my firm opinion that given sufficient staff, the United States Pretrial Services Agency is in a more fortuitous position to manage a Diversion Program than other arms of the Court. I say this because the United States Pretrial Services Office is privy to information about the offense and the defendant's background shortly after the defendant has been initiated into the Criminal Justice process.

Although our last case of Diversion was received on May 6, 1977, my Agency has agreed to supervise all Diversion cases that were actually processed by my Agency. Consequently, we presently have 78 Diversion cases under active supervision of the United States Pretrial Services Agency.

I am hopeful that the above information about Pretrial Diversion will assist you in your evaluation of the subject matter. If I can be of any further assistance, please contact me at your convenience.

Sincerely yours,

ARTHUR R. GOUSSY,
Chief Pretrial Services Officer.

U.S. DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
PRETRIAL SERVICES AGENCY,
June 28, 1977.

Mr. JOHN E. HORNBERGER,
Pretrial Services Specialist, Pretrial Services Branch, Administrative Office of the U.S. Courts, Washington, D.C.

DEAR JOHN: This is in reply to our telephone conversation of June 28, in which you requested information concerning our Pretrial Diversion Program. I can truthfully state that the program of deferred prosecution was in effect in this office when I joined the staff 21 years ago. As you know, on July 1, 1974, the Department of Justice initiated a Federal Adult Diversion Demonstration Project in which this district took part, and is now referred to as the Pretrial Diversion Program.

Although certain aspects of the program differ from district to district, in the Northern District of Illinois, the United States Attorney has appointed a coordinator and all cases referred by assistant U.S. attorneys first are presented to the coordinator, and if they meet an eligibility criteria, a decision is then made by the coordinator and the United States Attorney. In most cases, the United States Attorney requests that the U.S. Probation Service conduct an investigation into the background of the individual. In this district, it was agreed that in all cases where services are to be provided, they are to be provided by the U.S. Probation Office.

Upon determining eligibility of the defendant for pretrial diversion, the United States Attorney refers the case through the coordinator to the U.S. Probation Service for a recommendation of potential services and suitability of supervision for the defendant. As part of the background investigation, the Probation Office requests notification of any prior record from the F.B.I. Identification Division records. Services are tailored to the individual's needs and include employment,

counseling, education, job training, psychiatric help, etc. Many districts have successfully required restitution or forms of community services as part of the rehabilitation program. Chicago is one of these districts.

The program of supervision and services which is recommended is outlined in the Pretrial Diversion agreement agreed upon by all parties and administered by the Probation Service, which reports to the U.S. Attorney quarterly on the divertees progress.

Bruce Armour was the first Pretrial Diversion Coordinator and later he was followed by Tom Wooten, also a Bureau of Prisons staff member. Tom Wooten was assigned to another position with the Bureau of Prisons in Memphis, Tennessee in March 1977, and because it did not appear that the position of Pretrial Diversion Coordinator would be filled by the Department of Justice upon Tom's departure, it became apparent that the continuity of service would be broken if the coordinator was not appointed immediately. At that time, I proposed to the Honorable Samuel K. Skinner, United States Attorney for the Northern District of Illinois, that we mutually consider a way of continuing pretrial diversion without an interruption and that a United States probation officer be appointed as a Pretrial Diversion Coordinator. Mr. Skinner agreed with this plan and I so appointed Arthur D. Ward as the Coordinator. Mr. Skinner's Office agreed that they would provide the secretary and the office space for the coordinator without any increased expense and that Federal Probation, as indicated, would provide U.S. probation officer Ward as the coordinator.

Mr. Ward completes at the end of every month a monthly progress report for the U.S. Pretrial Diversion Program. Since the coordinator was established in the Northern District of Illinois, this particular form has been used. I am sending a copy of this form to you which indicates that it is a summary of the events taking place in the month of May 1977 as reported by U.S. Probation Officer Ward. This particular report will give you some idea of the volume and extent of the Pretrial Diversion Program in this District. The item that indicates total number of cases referred to date (472) refers to the number of cases that the coordinator has interviewed since July 1974; 342 reflects the number of cases handled by this office.

I note in our April statistical report for the Administrative Office that we show that we carried 175 pretrial diversion cases during the month of April. This is the latest available figure that I have. I trust that this information will be of value to you and I regret the haste in which I had to prepare this report. I hope it will meet your needs.

Sincerely yours,

WILLIAM S. PILCHER,
Chief Probation Officer and Chief Pretrial Services Officer.

MONTHLY PROGRESS REPORT

U.S. PRETRIAL DIVERSION PROGRAM

The U.S. Attorney for the Northern/Illinois district for the month of May, 1977.

A. Candidate intake processing information for the month:

1. Number of cases referred for PTD	13
2. Number of cases pending interview	11
3. Number of candidates interviewed	13
4. Number of failures to appear	0
5. Number of cases referred to USPO for PIR's	12
6. Number of cases determined unsuitable by USA	0
7. Number of cases pending agreement signing	19
8. Number of PTD agreements executed	16
9. Number of DOJ report forms submitted	15
10. Number of cases referred to USPO for supervision	16
11. Number of special (non-USPO) supervision cases	0
12. Average number of days from referral to United States to referral to PTD	186
13. Average number of days from referral to PTD to screening interview	18
14. Average number of days from screening interview to contract execution:	
PIR by USPO (14 cases)	139
NO PIR (0 cases)	0
15. Number of cases terminated:	
Successful	0
Unsuccessful	8

B. Program status:	
1. Total cases referred to date	472
2. Number of cases contracted into program	342
3. Number of cases considered unsuitable	72
4. Number of cases in various stages of processing	43
5. Number of cases terminated:	
Successful	160
Unsuccessful	6
C. PTD referrals by major offense categories:	
For report period:	
Postlaws:	
Thefts	3
Other	1
Bank theft	1
Fraud	6
Counterfeit	0
Forgery	2
Narcotics	0
Other	0
Total	13
Total to date:	
Postlaws (thefts and other)	211
Bank thefts	65
Fraud	52
Counterfeit	9
Forgery	38
Narcotics	14
Other	83
Total	472

U.S. DISTRICT COURT,
WESTERN DISTRICT OF MISSOURI PROBATION OFFICE,
Kansas City, Mo., June 29, 1977.

Re pretrial diversion.

Mr. JOHN E. HORNBERGER,
Administrative Office of the U.S. Courts,
Probation Division, Washington, D.C.

DEAR MR. HORNBERGER: In accordance with your request of June 28, 1977, via telephone, I am herein outlining in brief the Pretrial Diversion Program currently being implemented in the Western District of Missouri. As an item of possible interest I am also enclosing a copy of my letter to Wayne P. Jackson of March 20, 1976, wherein I comment on the role of the Probation Office in the pretrial diversion process as opposed to participation by one of the five Board of Trustees implemented Pretrial Services Agencies.

The enclosed policy statement prepared by this writer on December 11, 1975, outlines our participation in the Pretrial Diversion Program as it is administered in the Western District of Missouri. This policy statement meets with the approval of the United States Attorney for this district. The preliminary report is labeled as such and follows the format of the selective presentence report as outlined in Division of Probation Publication No. 104. It was originally envisioned that the preliminary report would be routinely returned to the Probation Office following final decision by the Office of the District Attorney, but this has not proven to be the case. Therefore, since the Office of the District Attorney generally retains the preliminary report, we prepare a separate presentence report should the alleged offender later become a defendant before this Court.

Before initiating a preliminary report investigation, we routinely obtain from each alleged offender a signed consent form. For that purpose we have developed the enclosed form entitled "Approval to Institute a Background Investigation Before Conviction or Plea of Guilty."

While there are no specific guidelines on the subject, the period of pretrial diversion supervision generally required by the Office of the District Attorney is 12 months. Similarly, there is no printed agreement form currently in use by the Office of the District Attorney. The individual Assistant Attorney prefers instead to tailor the pretrial diversion agreement to the circumstances of the individual case. The enclosed sample agreement is, however, essentially the form most generally employed.

As noted in section II (a) (5) of the policy statement, persons enrolled under the Pretrial Diversion Program by the Office of the District Attorney are statistically entered on our caseload as "deferred prosecution" subjects and are routinely assigned to any field officer for that supervision afforded all active cases charged to this agency. As of May 31, 1977, this office was supervising 64 pretrial diversion subjects for the Office of the District Attorney. Over the past 12 months we have supervised an average of 68 cases per month. Over the same period of time we prepared 26 preliminary reports.

Termination of supervision is effected as outlined in section II (a) (6) of the policy statement. In each case a duly-executed PTD Form J–2/75 is submitted to the Office of the District Attorney as notification of discharge (copy enclosed).

This office has traditionally enjoyed a most compatible working relationship with the District Attorney and his staff in all areas of mutual concern. The Pretrial Diversion Program is no exception. There is, however, one problem area of great concern, which deals with enforcement of the conditions of the pretrial diversion agreement. Although a rare occurrence, there have been instances wherein the Probation Office has sincerely felt that the agreement has been broken by the participant, who has demonstrated a complete lack of cooperation and an unwillingness to conform. When, on those rare occasions, that matter was brought to the attention of the Assistant Attorney involved, termination of the agreement was declined reportedly because of an absence of sufficient evidence to justify prosecution and obtain a conviction. It then became necessary for this office to formally notify the Office of the District Attorney that we would no longer attempt supervision and were instead unilaterally withdrawing from the agreement. This would tend to illustrate the potential problem that could be encountered, should the Office of the District Attorney utilize pretrial diversion as an alternative to prosecution for those otherwise ineligible defendants whose offenses would not be prosecutable in open Court because of insufficient evidence against them.

I trust that the foregoing, with attachments, is that information requested. If further information or explanation is desired, please advise.

Very truly yours,

B. G. Drown,
Chief U.S. Probation Officer.

U.S. District Court,
Northern District of Georgia,
Atlanta, Ga., June 28, 1977.

Mr. John E. Hornberger,
Administrative Office of U.S. Courts,
Probation Division,
Washington, D.C.

Dear Mr. Hornberger: On June 1, 1976, investigation and supervision of the Pretrial Diversion Program in this district was transferred from the U.S. Probation Office to PSA. At that time, 33 cases were received for supervision. After June 1, another 11 cases, which had already been investigated by a USPO, were received for supervision.

Since June 1, 1976, Atlanta PSA has conducted 52 Pretrial Diversion investigations. Of this number, 40 were accepted for supervision, 7 denied entrance into the program, and 5 are still open at this writing. Another 2 cases have been transferred to our district for a total of 86 cases received for supervision. Twenty-two defendants were under PSA supervision before being accepted into the PTD program. To date, only one case has been referred back to the AUSA for prosecution because of violation.

The U.S. Attorney in our district has designated an assistant to handle Pretrial Diversion matters. If a case meets the Justice Department guidelines, the AUSA handling the case refers it to the AUSA specialist, who, in turn, accepts an application (see attached) from the defendant, and refers it to PSA for investigation. When the application is received by PSA, it is assigned to a PSO according to geographical territories, and an investigation is completed within ten calendar days. A memo report of the results of the investigation and recommendation for or against Pretrial Diversion is prepared for the AUSA specialist. If the investigation report recommendation is for diversion, the AUSA specialist will execute an agreement with the defendant placing him under supervision for a period not to exceed twelve months (see attached). If the report recommends denial of diversion, prosecution is resumed.

If further information is needed, please let me know.

Sincerely,

Daniel D. Rector,
Supervising Pretrial Services Officer.

Enclosures.

APPLICATION FOR PRETRIAL DIVERSION PROGRAM

U.S. *v.* _____
Court Docket No. _____
U.S. Attorney's File No. _____

I hereby make application for status as a participant in the pretrial diversion program and request that the U.S. Attorney temporarily delay any further criminal proceedings against me in order to permit consideration of this application. I understand that the final decision to commence criminal proceedings or to defer prosecution in my case rests entirely with the U.S. Attorney.

I authorize the U.S. Probation Office to conduct an investigation and submit to the U.S. Attorney a recommendation for determining suitability for this program. I understand that any information given or disclosed by me to the U.S. Probation Office in connection with this investigation will be kept confidential.

_____
(Signature)

_____
(Date)

Street address: _____

City: _____ State: _____ Zip: _____

Home telephone: _____

Place of employment: _____

Address: _____ City: _____

Work telephone: _____

U.S. of America *v.*

_____ _____
(Name) (File No.)

_____ _____
(Street address) (Telephone no.)

_____
(City and State)

AGREEMENT FOR PRETRIAL DIVERSION

It appearing that you are reported to have committed an offense against the United States on or about _____ in violation of Title ____, United States Code, Section(s) _____ in that you did:

Upon your accepting responsibility for your behavior and by your signature on this agreement,[1] it appearing, after an investigation of the offense, and your background, that the interest of the United States and your own interest and the interest of justice will be served by the following procedure; Therefore;

On the authority of the Attorney General of the United States by John W. Stokes, Jr., United States Attorney, for the Northern District of Georgia, prosecution in this District for this offense shall be deferred for the period of _____ months from this date, provided you abide by the following conditions and the requirements of the program set out below.

Should you violate the conditions of this supervision, the United States Attorney may revoke or modify any conditions of this pretrial diversion program or change the period of supervision which shall in no case exceed twelve months. The United States Attorney may release you from supervision at any time. The United States Attorney may at any time within the period of your supervision initiate prosecution for this offense should you violate the conditions of this supervision and will furnish you with notice specifying the conditions of your program which you have violated.

If, upon completion of your period of supervision, a pretrial diversion report is received to the effect that you have complied with all the rules, regulations and conditions above mentioned, no prosecution for the offense set out on page 1 of this Agreement will be instituted in this District, and the United States Attorney will seek to dismiss the underlying indictment or information.

Neither this agreement nor any other document filed with the United States Attorney as a result of your participation in the Pretrial Diversion Program will

[1] Any statements made by you in this Agreement will not be admissible on the issue of guilt in any subsequent proceeding.

be used against you except for impeachment purposes, in connection with any prosecution for the above described offense.

Conditions of pretrial diversion

(1) You shall not violate any law (federal, state and local). You shall immediately contact your pretrial diversion supervisor if arrested and/or questioned by any law enforcement officer.

(2) You shall attend school or work regularly at a lawful occupation or otherwise comply with the terms of the special program described below. In the absence of a special program, when out of work or unable to attend school, you shall notify your program supervisor at once. You shall consult him prior to job or school change.

(3) You shall continue to live in this judicial district. If you intend to move out of the district, you shall inform your supervisor so that the appropriate transfer of program responsibility can be made.

(4) You shall follow the program and conditions described below in (7).

(5) You shall report to your program supervisor as directed in (7) and keep him informed of your whereabouts.

(6) You shall strive to achieve the desired goals of the program.

(7) Special conditions of program.

Description:

I assert and certify that I am aware of the fact that the Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. I also am aware that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the Court may dismiss an indictment, information, or complaint for unnecessary delay in presenting a charge to the Grand Jury, filing an information or in bringing a defendant to trial. I hereby request that the United States Attorney for the Northern District of Georgia defer any prosecution of me for violation of Title _____, United States Code, Section(s) _____ for the period of _____ months, and to induce him to defer such prosecution I agree and consent that any delay from the date of this Agreement to the date of the initiation of the prosecution, as provided for in the terms expressed herein, shall be deemed to be a necessary delay at my request and I waive any defense to such prosecution on the ground that such delay operated to deny my 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 or to bar the prosecution by reason of the running of the statute of limitations for a period of _____ months which is the period of this Agreement.

I hereby state that the above has been read and explained to me. I understand the conditions of my pretrial diversion and agree that I will comply with them

(Name of divertee)	(Date)
(Defense Attorney)	(Date)

(If not represented by Defense Attorney, see attached Waiver of Counsel)

(Assistant U.S. Attorney)	(Date)
(U.S. Probation Officer)	(Date)

U.S. DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK,
Brooklyn, N.Y., June 28, 1977.

Mr. JOHN HORNBERGER,
Pretrial Services Branch,
Administrative Office of the U.S. Courts,
Washington, D.C.

DEAR MR. HORNBERGER: I am writing in response to your inquiry concerning the involvement of the Pretrial Services Agency for the Eastern District of New York in any pretrial diversion programs that may be operating in this district.

At the present time, pretrial diversion, or deferred prosecution as it is called in this district, is being run by the United States Attorney's Office in cooperation with the United States Probation Office. From April through October 1976, this agency coordinated a diversion experiment on behalf of the Department of Justice.

As you are probably aware, the unique feature of the experiment was that all of the cases were randomly selected for diversion. The purpose of this procedure was to compare the differences in dispositions that should occur between those cases that were diverted and those that were prosecuted. It should be pointed out that during this experiment period, P.S.A. served only as coordinator for the project, that is, we did not screen, investigate, or counsel defendants. Instead. our function was to set up appointments oversee documentation and collect data. At the present time that data is being analyzed by the Department of Justice, As to the question of potential P.S.A. involvement in diversion, it is my opinion that pretrial services agencies are the logical operators of such programs. I make this statement for the following reasons:

1. Pretrial Service Agencies have an opportunity to interview and investigate defendants early in the criminal justice process and because much of the information used to determine bail eligibility is in many ways pertinent to the diversion decision. Because of this, the Pretrial Services Agencies can take an active role in screening and recommending diversion candidates. At the present time Probation departments are not taking this active screening role because they must wait until the U.S. Attorney sends them potential diversion cases. The advantage in P.S.A. performing this role can be seen in the District of Maryland where diversion cases increased five-fold in the first year that P.S.A. took over the function from Probation.

2. Pretrial Service Agency staff is trained in dealing with accused defendants and the difficulties in observing the presumption of innocence. Many respected. commentators have pointed out the importance of respecting the legally innocent status of diverted defendants and for that reason, Pretrial Services Officers, because of their training and experience, would be most suitable to deal with them.

I hope this letter is sufficiently responsive to your inquiry. If I may be of any further assistance, please do not hesitate to contact me.

Very truly yours,

DANIEL B. RYAN,
Chief Pretrial Services Officer.

U.S. DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA,
Los Angeles, Calif., June 29, 1977.

Re Deferred prosecution.

Mr. JOHN E. HORNBERGER,
Administrative Office of the U.S. Courts,
Washington D.C.

DEAR JOHN: We have 81 deferred prosecution cases in our district. For the 12 month period from April, 1976, through May, 1977. we received a total of 92 deferred prosecution investigations. This is an average of 7.7 cases per month.

The normal procedure is for the AUSA to contact our office and ask for an investigation. We then conduct a selected presentence-type investigation and prepare a full selective presentence report which is submitted to the AUSA on a predetermined date. We usually take the same time for a deferred prosecution investigation as we do for a presentence investigation.

At the present time we do not try to initiate deferred prosecutions through our Pretrial Services program, although this would be quite feasible.

Our Santa Barbara branch office handles minors at Vandenberg Air Force Base. This is separate and apart from our regular procedure. These referrals come from the base itself, and office looks over each case prior to deciding whether a referral should be made for deferred prosecution. Our effort in this area is to not involve minors in any sort of legal process unless absolutely necessary.

Sincerely,

ROBERT M. LATTA,
Chief U.S. Probation Officer.

U.S. DISTRICT COURT,
DISTRICT OF MARYLAND,
Baltimore, Md., June 30, 1977.

MR. JOHN E. HORNBERGER,
Pretrial Services Branch,
Washington, D.C.

DEAR MR. HORNBERGER: In response to your telephonic request of June 28, 1977, please be advised that since our office assumed responsibility for pretrial diversion on January 1, 1977, we have recevied 39 cases for supervision. We note that during calendar year 1976, there were just 17 such cases received for supervision by the U.S. Probation Office.

For your information, cases in our district may be diverted either before or after there has been a criminal filing. In all cases, the Assistant U.S. Attorney assigned the case makes the diversion decision; however, if there has been a filing and the case has been assigned to a judicial officer, the judicial officer may exercise right of approval on the Assistant U.S. Attorney's decision. There have been no instances to date where a judicial officer has vetoed the Assistant U.S. Attorney's use of the diversion procedure.

Following is a brief discussion as to the means by which potential diversion cases are identified and ultimately placed in the diversion program. Initially, cases interviewed by Pretrial Services are screened after preliminary investigation to determine if a defendant is potentially suitable for entry into the diversion program. Those cases which in our opinion are worthy of further consideration are brought to the attention of the Assistant U.S. Attorney in the case, who may or may not request PSA to complete an in-depth investigation and recommendation. To date, we have been requested to complete 25 such investigations, five of which are pending at this writing. Upon submitting our recommendation to the Assistant U.S. Attorney, he then makes a decision as to whether or not the case will be diverted. If the decision is to divert the case, an agreement is drawn and executed by the Assistant U.S. Attorney, the divertee, defense counsel, and the Pretrial Services Officer.

It is to be noted that there are some cases diverted by the magistrates in misdemeanor cases, particularly the magistrate in Hyattsville, without benefit of a formal investigation. In such instances, the magistrate no doubt utilizes information contained in our Summary Report to assist him in reaching a decision that is culminated by the issuance of a diversion order signed by the magistrate, the divertee, and the Pretrial Services Officer.

I trust that the above information will be of some assistance to you. If I may be of further assistance, please let me know.

Sincerely yours,

MORRIS T. STREET, Jr.,
Chief, Pretrial Services Officer.

P.S.—I am in receipt of the proposed legislation on "Federal Criminal Diversion Act of 1977" which I have reviewed. I view the proposal very favorably in general. I do have serious reservations about the inclusion of Section 5(b) which I am prepared to discuss with you, if you desire.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF PENNSYLVANIA,
Philadelphia, Pa., July 5, 1977.

Mr. JOHN R. HORNBERGER,
Administrative Office of the U.S. Courts,
Washington, D.C.

DEAR MR. HORNBERGER: Reference is made to your recent request to Chief U.S. Probation Officer Gooch and our telephone conversation of July 1, 1977, regarding the Deferred Prosecution Program for the Eastern District of Pennsylvania.

Enclosed are the guidelines as promulgated and operationalized by the Board of Judges in 1975 and which are substantially correct to this date.

There has been an increased emphasis placed on this type of sentencing diversion by our Court and the U.S. Attorney's Office during the past year. According to our records, there have been a total of 227 defendants placed in the program, 122 of which have successfully completed the period of supervision with the criminal complaint having been dismissed. Presently there are 105 such cases being supervised by the Probation Office, as compared to 58 cases in May of 1976 and 51 cases in July of 1975. To my knowledge, there has been only one program failure of the total 227 cases.

If additional information is needed, please do not hesitate to contact me.

Very truly yours,

H. RICHARD GOOCH,
Chief, U.S. Probation Officer.
ALLEN M. SIEGEL,
Supervising U.S. Probation Officer.

U.S. DISTRICT COURT,
NORTHERN DISTRICT OF TEXAS,
Dallas, Tex., June 28, 1977.

Re pretrial diversion.

Mr. JOHN E. HORNBERGER,
Administrative Office, U.S. Courts, Washington, D.C.

DEAR JOHN: Currently diversion in the Northern District of Texas is being handled by the U.S. Probation Officers who work with the assistant U.S. attorneys on these cases.

Philosophically I think diversion should ideally be handled by Pretrial Services officers as it appears consistent that they are offenders without convictions. Due to our smallish Pretrial staff, however, we elected to keep diversion a USPO function.

As to numbers of pretrial diversion cases under supervision in this district:

In 1975—14 cases referred by USA.
In 1976—40 cases referred by USA.
In 1977—33 cases referred by USA through May, 1977.

Hoping that this will assist you.

Sincerely,

ROGER C. CARROLL,
Chief, U.S. Probation Officer.

Senator DECONCINI. We would perhaps indulge upon your kindness and generosity and pass another draft out for your comments if you are inclined to assist us once again.

Mr. WILLETTS. We certainly would be happy to. We appreciate the opportunity to be here. We think it is a crucial piece of legislation for the criminal justice system and we would like to assist in any way we can.

Senator DECONCINI. Thank you.

Our next witness is Judge Irwin Brownstein from the New York State Supreme Court.

Thank you. We appreciate you taking your valuable time. We know of your long-term commitment to this project and this concept, so we welcome hearing from you.

STATEMENT OF IRWIN BROWNSTEIN, NEW YORK STATE SUPREME COURT

Judge BROWNSTEIN. Senator, I am honored by your invitation.

The consideration of the bill comes at a crucial time because of the difficulty encountered by diversion programs around the country. This is principally due to funding problems. Large cities, as you well know, Senator, are facing economic difficulties. The first programs to suffer by it are generally those in the criminal justice system. Generally they are those that do not have vast public support. The lay population is interested in prosecution more than they are in diversion. So these programs really suffer.

Senator DECONCINI. Let me interrupt you there. I am very aware of just that problem which these programs face. Do you have any suggestions of being able to involve the prosecutor more where they will take a greater positive step? Some prosecutors like Mr. Neely and Mr. Leonard, and other prosecutors who have been involved in these projects, feel strong about them. If they were cut, they would fight for them perhaps as strong as they would for the narcotics unit, or organized crime unit, or what have you.

But there are other prosecutors who do not feel that way. They are not that keen on it. Certainly when the project is outside the prosecutor completely, as we are proposing here, the prosecutor does not feel any attachment to it.

Do you have any suggestions on that? Maybe you will address that in your remarks. I would welcome your observations there.

Judge BROWNSTEIN. The only suggestion that I can give to you which has worked is to get the community involved. The way you do that is through the advisory board concept. We formed an advisory board for the National Association of the Pretrial Services Agency, which you addressed recently at our last conference.

The advisory board consists of people in the process, judges, prosecutors, defense counsels. It also involves people who are not in the process. I think the key is right there.

We have people—Robin Farkas, the executive vice president of Alexander's Department Store, has become very much involved in the process, and has been very supportive of it nationally.

Mr. Goodman from El Paso, Tex., who is a life insurance agent, but one who is involved in the community serves on the board.

Aside from people who are in the process, there are outstanding community leaders who, in their home community, can create great impact. When they are involved in a project, then the people who ordinarily would not give attention to it, will listen. That is all that a diversion or release program needs to have. It is an opportunity to present the truth that is going on now.

When we have that opportunity, we are successful in gathering community support for diversion and release as well.

The problem that we are faced with—and that is when the advisory board becomes important—is funding. LEAA has done a magnificent job in giving money to people who want to start up programs. At the end of a 3-year period for those programs who have had great community involvement through the advisory board, they do not have a real problem getting county, city, or State money. They are institutionalized. They exist.

For programs which have buried their heads in the sand and think that Federal money is forever forthcoming, they find themselves in great difficulty and out of business.

We cannot afford to have programs going out of business. They need not only good public relations, but they need public relations coming from a program with integrity.

The only way to really give a program integrity, aside from the fact that it will be successful—and, of course, you do not want it too successful because then there is no risk taking when the program is too successful—is to have people in the community involved to give it the integrity which country legislators need to act on to give money to.

So, I know that it is difficult. I agree with Mr. Willetts that you can get an advisory board together and one that functions.

But with the leadership of the chief judge of the district, who has great community impact—he is a man of great stature, he is generally involved in other activities outside of the courthouse—he can reach out and bring to the program the kind of integrity it needs.

On a local level, we involve everybody we can get our hands on to see to it that these programs do not fail.

Senator DECONCINI. I take it you are talking about your advisory board that you obviously have. Does this advisory board help come up with resources in addition to the political clout to get refunding, jobs, and that sort of thing?

Judge BROWNSTEIN. Yes. We are involved in getting matching money for the grant that we have for the resource center. It will not be done by the people who are involved in the process. Robin Farkas, as I mentioned, will help: Rick Tropp, whose background

includes being a White House assistant; Leonard Goodman, from El Paso; Bob Goodentok from the Gillett Co. in Boston, will use their resources—being the victims of fund raising—to get back out into the community.

The fund raising process, incidentally, is a good way to get people interested in the program. We are not religious. We are involved in a process that you need great effort to attract community support for.

It is only the examples of the horror stories that we can bring to people in release and diversion that attracts people. They are very, very supportive.

Our programs in New York State are in desperate straits today, but if it were not for the local community people, they would be out of business. In Westchester County, New York State, we had a large meeting. Mr. Booden, who is the D.C. Bail Agency Director and Chairman of our Board of Trustees, spoke at a meeting with me. We were instrumental, to some extent, with the local people in getting the county to say that they would go along with the money. They lifted a previous ban. I could not understand it, but the ban was not funding with county money anything that had been funded with Federal money.

The corporation counsel finally rendered an opinion that it was illegal. They are raising the money now. It is a fine program.

I want to get to another program in Rochester, N.Y., which I think should be the model for what we are doing today. There is a philosophical problem that I have with the legislation. I am pleased it is being considered because it gives us hope and leadership. It tells the people in our country that we are interested in diversion. It is something we should do because Congress is interested.

But there is a philosophical problem that I have with it. That is that we are considering only diversion.

What we need to be involved in is this. This is the ideal and the ultimate goal that we need a program for every Federal district designed pretty much along the lines of the Rochester model. It is institutional now and funded by the county treasurer. It is the Monroe County Bar Association Pretrial Services Model.

We begin there with the most important decision to be made by a court which is the release decision. They handled last year 3,500 interviews and attained release for people. But as a part of that process, the pretrial services officer, who is trained and who has that gut instinct for what he is doing in addition to using a point system for release or any other system, at that point makes a decision as to whether to refer the defendant to the diversion union. That is all in house. The pretrial services agency means release and diversion.

There are many other things which you can classify as pretrial services, like mediation, arbitration of disputes, juvenile diversion, and there are many things you can get involved in. But what we are involved in, in Rochester, is a simple process of interviewing every person who is arrested, providing information, which is verified, concerning his likelihood of flight and risk of coming back.

Based on that decision, they decide whether to release him or not.

After that decision is made on release, a second decision is made which is whether or not based on the record of the defendant and the nature of the offense and the community's response to the nature of the offense, that is, whether he should be referred to the diversion

unit where the secondary screening process takes place. With the consent of the prosecutor a recommendation is made to the court with respect to diversion.

Legislation that we have now deals only with diversion, or so it seems.

Senator DECONCINI. You are talking about this legislation?

Judge BROWNSTEIN. Yes.

But it really does not because that is made at the time of the fixed bail. You are certainly not going to divert someone who is going to be detained pending trial. So you must first make the decision whether he is going to be released. The second decision is whether he will be diverted.

There are many more cases of those who should be released and prosecuted than there are of cases of those who should be released and diverted.

That is why I was interested in what Guy Willetts said about the 10 demonstration projects. They are doing the work in the Federal district court. They are participating in the decisionmaking process as to whether somebody should be detained or someone should be released. Or whether they should be released with conditions. You could be released with supervision or released with the use of resource agencies.

So, we are getting into the conglomerate decision making process which really involves No. 1, should he get out? Will he run if he is out? Will he return to court?

No. 2, we can release him. He is a risk but he will be less of a risk if we afford him resources in the community and supervise him. Maybe there will be limited supervision. Supervision means anything from call in once a week, to him being in a drug program or are habilitation program, or for vocational training, or to the local church for counseling. There can be 20 conditions attached which is heavy-duty supervision.

You really are into a diversion process even if you are only dealing with release because the ultimate determination as to sentence depends on how well he does under supervision. Statistically if a man is out, then he is likely to stay out when he is sentenced. If he is incarcerated. then he is more likely to stay incarcerated with respect to sentence.

So you are diverting, at least to a probation concept when you release someone and give him supervision and report to the judge that he is doing very well and you would like to see him stay out under probation.

That is why release becomes so important. That is because of what happens to the defendant at the bottom line, that is, whether he had to go to jail or be on probation.

Diversion is an extension of that supervised release, but the goal is to divert from prosecution. The goal is to release the defendant from the stigma of a criminal conviction. So, if we are going to get into that, it seems to me that the model ought to be the pretrial services officer screens and recommends to the court that the man be released and at the same time has enough education, training, and courage to go along the line and say to the judge:

I think also that when we release this man we ought to have our diversion unit take a look at him to see whether or not there are things which we can do to prevent him from going to jail and prevent him from being prosecuted. We think

we can make this man not an outstanding citizen, because that is not our goal, but a person who can live well in the community, or live in the community well enough not to bother anybody else.

The goal in criminal justice, Senator—at least I see it that way and I am a cynic, and it may not seem that way, but I am a cynic in criminal justice—but I do not have as a goal imposing a sentence to turn a defendant who is accused of a crime into an outstanding member of society.

Frankly, while I would like to see him get a job, that is not even my goal there. My goal is to insure that whatever sentence I impose will have the effect of having him not coming back to my court. If he wants to be a slovenly, depressed, lazy person, then that is OK with me, providing he does not do anything to anybody else.

We are engaged in occupational therapy. We do that with supervisory release. We do it with diversion. We do it with probation. We do it with bail, parole, arbitration, and any kind of technique. The goal of all of that, in my judgment, is to reduce the number of predictable offenses for that offender. I think we do it rather well. I think our system, in spite of what our critics say about us, is one that works. We have hard-core criminals, and we deal rather effectively with them. It may take two or three convictions to get around to doing something about it, but we get there. We take our time about it, hoping that we can——

Senator DeConcini. If I understand what you are suggesting, then if pretrial release review only makes the determination of whether or not they think someone should be referred to diversion, that is, they do not make an inclusion——

Judge Brownstein. There is another unit which is part of the model. That unit is trained to collect community resources to make available to the person who is diverted. They are trained as well to make the judgment as to whether this personality is going to do well in our diversion program. We do not mind taking risks, but we do not want a 90-percent recidivism rate. That person who is likely to get into trouble again should not be diverted. He should be prosecuted.

Senator DeConcini. How do you reconcile the attitude of the prosecutor who may feel that he would like to have some initial input as to whether or not somebody is diverted and not have a pretrial supervisor or coordinator or counselor making that initial judgment?

There is a real problem that I have witnessed myself as a prosecutor toward the pretrial programs. Not that they are not good, because they are, but they are often at odds with what the prosecutor feels is in the best interest of justice, partly because of lack of education and enough knowledge, but also because sometimes the pretrial people cannot substantiate enough evidence for a judge to really be on safe grounds. I see some problem there of getting the prosecutor to agree to that. We will develop that a little later in these hearings.

Do you have any thoughts on how to overcome the prosecutor resisting that?

Judge Brownstein. You overcome the objections by having the prosecutor participate in the initial decisionmaking. There is a problem with that. The problem has been dealt with in New Jersey and in New York at the appellate court level. The problem is created, not by the prosecutor, but by judicial abuse. Obviously if there is not a

shoving down the throat of the prosecutor of this kind of decision, you will not have a problem with it.

There are two things to do. In the initial stage of development of the program, you can allow the prosecutor very substantial input into that decisionmaking until he gains a substantial amount of confidence in the pretrial services agency. Then he will not participate. But I found in New York that he will lean back and say, "You fellows have proved to me that you are doing a good job. You are sane. You are not irrational or crazy. I am going to rely on your judgments and your recommendations."

The second problem arises where in spite of that there is a dispute between the agency and the prosecutor.

In New York State in the second department of our appellate division, which covers about 10 counties, including Brooklyn, Queens, and Nassau Counties, a judge made a determination on a recommendation of the diversion agency to adjourn the case for 1 year. The prosecutor was very upset. I might have been also in that particular case. It was a reaching decision. I think it was reaching out. The prosecutor took an appeal to the appellate division. That was our next highest court. The court of appeals in New York State is the highest.

The appellate division chastised the trail court judge and said, "Well, you should not be making a unilateral decision. You should spend more time consulting with the prosecutor and dealing with him on problems of this nature."

However, the right to adjourn a case, for whatever purpose, including the process of diversion, is with the trial judge, the court said. They affirmed the decision of the trial judge.

In New Jersey where they have institutionalized diversion under court rule—and I think you will hear from Gordon Zaloom on Friday—he has played a major role in developing that court rule and implementing the program—you will find that the same thing has occurred except in much more general language. The court in New Jersey, under the leadership of Chief Judge Hughes has said that there will be a diversion program and the prosecutor will have participation, but the sole responsibility for the ultimate decision to divert has to be with the court.

I bring you now to the next point which is that it has to be so to make the legislation work. It is true that we have thousands of different judges and thousands of different personalities, but the Federal bench, I think, is more consistent in its attitudes than the bench in many States where we are elected. I am elected, but I am elected to a 14 year term which makes us rather comfortable for at least 12 of those years when we have to start being more political in our determinations.

That is not so with the Federal district court. They are a bench with great confidence. The public has confidence in them. The prosecutors do also. The truth of it is that most U.S. attorneys and Federal chief judges get along very well. They have to get along in administration in setting court calendars and determining how many parts there will be of the court. Frequently they decide who will be assigned to the prosecution in those parts. They pick the bright and capable assistant U.S. attorneys who will work with these judges. They get along very well.

I know that the complaint of the prosecutors will be that is their option to prosecute and it should be their option not to prosecute. But you know I can foresee, especially this year, many prosecutors who would have less to do with diversion, seeking reappointment to their terms, than they ordinarily would. I understand that. I absolutely understand it. I think it is all right. That is why I think they should have some participation in it.

But the ultimate responsibility and the ultimate decisionmaking has to be by that judge. There is a give and take. There is really no great problem.

The one case that I told you about is the only case in New York State. We have a lot of diversion programs. We do not have those problems. But if I needed to render a decision today as to whether I would have the judge making the final decision or the prosecutor, then I would have to say that it would be the court. We have our mistakes on the bench also, but overall I think we do very well.

I think the thing to do at this point in developing a program for criminal justice in the country would be this. The ideal would be to establish a pretrial services agency in every Federal district. That is ideal. I have every confidence that it does work. I have every confidence that it will work. It will work in every district in the country.

The ideal plan would be to not wait for the report of the 10 demonstration districts, but to get into the Federal district courts. I really do not care so much whether it is a trustee district or a probation operated pretrial services agency. There is something about being pretrial services that distinguishes you from being probation even if you are a probation officer. There is no doubt about it. You deal more with the presumption of innocence than you do with the concept of guilt, even if you are a probation officer. You know we have great problems with that in release and in diversion.

I would like to see, as a part of that pretrial services agency, in every district, a diversion unit because that is the ideal way to set this thing up.

I recognize that this is reality times, so that is only a dream we have.

As an alternative to that, I would like to see the bill amended to provide 10 demonstration/diversion projects so we can prove that it works and to create a diversion unit in each of the 10 demonstration districts.

Senator DECONCINI. Are you talking about 10 demonstration release, pretrial release with diversion units within them?

Judge BROWNSTEIN. Yes. I talked with Guy Willetts this morning about the Detroit operation. It works beautifully. But there is not enough staff to run a good diversion unit. I think if they were given the money and the staff and the training that they need to operate that district, then it could probably be a model for the country, just as the Rochester project in New York is a model for the State.

In New York State right now we are dealing with the controversy between parole and probation and whether parole or probation should be sliced in half. Some of the proposals are to take the presentence units of the probation department and put it in with pretrial services and put the whole shooting match under the court, taking supervision probation services and combining it with parole and have them do their supervision thing.

I testified before the Probation Commission, and I said that I frankly did not care which design they have, provided they institutionalize pretrial services. Of course, it makes sense to have presentence units with the pretrial services because they are dealing with preadjudication services. All of those services are directed toward the judge. He has to make that determination.

He has to decide whether to prosecute or not; sentence or not sentence; and on sentence, probation, or incarceration.

Once the man is committed to incarceration or to supervision on this probation, then it is a whole different service that is being provided. But again I really do not care how it comes off, providing you recognize that, as you have already recognized, and by your work before becoming a U.S. Senator and by your testimony and statements at our Conference, then you are committed to the concept. It is a good concept. I hate to use the phrase because it is always misinterpreted, but is is "justice and it is inexpensive, but is not cheap justice." It is good, inexpensive justice.

Release and diversion are this.

We did a study in response to a report which really murdered diversion. It is called the Fishman report. It was done in New York at the cost of $900,000. I could have told them for $1.75 what they wanted o know.

[Laughter.]

Judge BROWNSTEIN. The response we got from the Fishman report was: (*a*) You have to have preventive detention of everyone because we do not know who the recidivists are; (*b*) diversion creates crime, as demonstrated by the fact that there was a 39-percent recidivism rate of those diverted.

So, we took the study and we got in touch with Frank Zimmering of Chicago, who is brilliant and knows diversion better than anyone in the country except maybe Dan Freed at Yale. We had the help of a man, Joel Giotti, who died last year. He was chairman of our parole board, but before that ran a diversion agency.

He said to me:

> Judge, if you want to look at this right away, then you take that 39 percent failure rate and look at the other end of it. It is a 61 percent success rate, which is incredible. It is great. It is inexpensive. It ran about $700 a client as opposed to $15,000 a year incarceration.

We know that the recidivism rate after incarceration runs about 75 percent. So there is no difficulty with the concept. Dan Freed at Yale, one day at Princeton, was having fun with everybody involved in diversion and was telling them that their programs were failures. They are failures in direct proportion to their success. The higher the success rate, the less you are doing. You are not taking the risks you should be taking.

In New York City, we do not have diversion for felony cases, that is to say, postindictment. A man is indicted. He is never diverted. In Nassau County they have only felony diversion programs. It is a mish-mash. Only institutionalization can straighten it out. That is why I commend your bill.

Senator DECONCINI. Given your example, is the Nassau County more successful?

Judge BROWNSTEIN. Yes.

Senator DECONCINI. Or, its effect on the total justice system?

Judge BROWNSTEIN. Yes. It is "Operations Crossroads." They divert a large number of cases. They have a very small recidivism rate. They have an excellent program of what we would call rehabilitation. They involve the community. They involve the family of the offender. They involve the offender in the community.

Senator DECONCINI. Does it involve restitution?

Judge BROWNSTEIN. Yes.

Restitution is something that in New York we do not pay a lot of attention to. It is the fault of the court. It is absolutely the fault of the judges. In an assault case, we rarely require the defendant to pay back money to cover the cost of medical care and loss of earnings to a victim. As a substitute for that, we have a victim compensation program which really does not work very well. You have to be indigent to get the benefits of it. This is kind of discriminatory.

Senator DECONCINI. Sure.

Judge BROWNSTEIN. The assault committed does not check out——

Senator DECONCINI. What about property losses, like a stolen automobile?

Judge BROWNSTEIN. We do not have a lot of restitutuion. Interestingly enough, that is where a prosecutor can be very helpful or instrumental in getting restitution part of the probation order. I would have to say that is the fault of the court and to some extent the probation department, which is so overwhelmed with work.

Senator DECONCINI. Do you think that is a necessary or good ingredient; that is, to attempt to have some restitution provision required?

Judge BROWNSTEIN. Yes; I do. The problem with putting it into a diversion model is this. There is a problem. The problem is that the ideal diversion model should not require an acknowledgment of guilt. I know it is in the bill. It really should not be there. It becomes coercive. Coercive rehabilitation does not work. Coercive punishment does. That is to say, we accomplish our public vengence need. That is not illegitimate. That is a valid need that the public has.

There is a program, for example, that I was talking about with Mr. McPike, which is the narcotics diversion program in the Federal district, which requires a plea of guilt before you divert it. This is in Congress. If you are going to plead guilty, you do not need diversion. You have acknowledged guilt. But then you are given diversion and after a period of supervision, the plea is withdrawn.

Senator DECONCINI. If there is any validity to the argument that the person acknowledging guilt may not be pleading guilt, but saying, "Yes, I did it," then you get away from the rationalization that many offenders like to fall upon. I think any human being does once they are in trouble or comes across adverse times and they say, "Well, I had family problems. My father beat me," or, "Somebody in my family drank too much," or, "It really was not my fault. I did this because of other reasons."

When you have to admit that you did steal an automobile and you did embezzle and you did rob the person, then they say they want to correct their ways. Obviously he is willing to correct his ways. He will follow some type of program of averting prosecution and possibly going to prison.

But he is not kidding the probation officer or the court or the prosecutor by saying that he did it.

Do you believe that conceptionally that is really not the best for the individual or for the system?

Judge BROWNSTEIN. For the person who is guilty, yes, but you will have a substantial number of people in diversion who are not.

Senator DECONCINI. That is a good point.

Judge BROWNSTEIN. They will want diversion because of other reasons. To begin with, a defendant who is not guilty but seeks diversion is a person who will generally find himself in the circumstances of getting arrested. He may be hanging out with four of the worst guys on the block. Four of them may be guilty of the crime for which five of them are arrested. Does he have a problem? Yes; he has a problem. He is hanging out with bad people.

That is enough of a reason to receive some supervision or some benefits of community resources for someone who is not guilty but who will take advantage of vocational training programs, psychological counseling, or what have you, and they may be of great benefit to him although he did not do anything wrong.

For the offender who has committed a crime, sure, it is of benefit for him to face us to the fact that he ought not to rationalize.

But in dealing with diversion, is it really essential for us to have someone to confess? I had people who had pleaded before me of very heinous crimes, like assault, robbery, rape, and kidnap, even murder. They pleaded guilty to manslaughter. They make a full statement before me before I will accept a plea of inculpation and who go to the probation department and who are interviewed. I get the report back and there it is. "The defendant says that he is not guilty. However, he has taken the plea on the advice of his attorney."

He will carry that rationalization right to the prison and right to the parole officer and proclaim his innocence in spite of the fact that he said before me, "Yes; I had a gun and I went into the candy store and I shot the proprietor and took the money."

This is in spite—you might have a bank robbery where there are moving pictures that went on, and not withstanding that, an attempt to rationalize and in an attempt to get leniency in the probation officer's recommendation, he will deny the offense. I deal with it a different way. I read that part of the report to the defendant and direct him to take his plea back because he has not done anything. At that point he says, "Well, I did not understand what the probation officer was asking me."

It is universal. I have had it happen 500 times. It is universal. I understand it. I understand that forcing a person to acknowledge guilt is a tough thing for him to do and for the person who is forcing him to do that.

Senator DECONCINI. You do not think it is a prerequisite or really that important to the success of a true diversion; is that right?

Judge BROWNSTEIN. I do not think so because I think in the course of a good diversion program in some kind of encounter, either with the diversion officer or in some program, then he is ultimately going to have to face up to the fact that he committed an offense or was in a circumstance akin to committing an offense and they ought to do something about his life.

That is a decision he has to make for himself. Otherwise, it will not work.

I want to repeat again, Senator, while I have taken great issue with the legislation, that I like it very much.

Senator DECONCINI. Let me ask you a question. On the 1-year maximum period, this bill establishes a 1-year maximum period of diversion. Evaluation of the Manhattan court employment program showed only 14 percent of eligible defendants entered the program. Do you think that 1-year maximum might discourage persons charged with minor offenses from choosing diversion?

Judge BROWNSTEIN. I think a 1-year maximum is something that we have to have for those who require that kind of supervision for that length of time. But I do not think that you will find in the Manhattan court employment project that all of the persons diverted went that long in the program. Some of them, incidentally, did not want to leave the program. They wanted to stay because it is a society for them. Joel Giotti, before he left court employment, had begun a college branch of Brooklyn College in Manhattan at their office and were running classes. A lot of people did not want to leave.

They, for the first time, had encountered people who had the desire to be with them.

Senator DECONCINI. Do you think 1 year, even for felony offenses, is sufficient?

Judge BROWNSTEIN. I think so because you are generally dealing with first offenders. You are involving his family, which is essential. It is absolutely essential.

Senator DECONCINI. Do you think there is some basis if you cannot get to that individual within a year the program is obviously not being too successful?

Judge BROWNSTEIN. If you cannot get to him within a year, then you probably will never get to him.

Senator DECONCINI. I mean, get to him in terms of changing his attitude and approach toward society and himself.

Judge BROWNSTEIN. I would be inclined, frankly, to do it with court permission extended another 6 months because the drug treatment programs have been able to figure out that you need a lot longer than a year. I am talking about drugs as the problem. Phoenix House and Daytop Village in New York and Odessey House—frequently they do not begin reentry until 18 months after being in residence.

Senator DECONCINI. If drug offenses were included here, then you would want it discretionary to extend it beyond a year?

Judge BROWNSTEIN. Yes; I think it is essential to have drug offenses included. I would hate to see them excluded because they probably will really benefit more than any other offender from the diversion.

Senator DECONCINI. We get into greater costs, obviously, with drug counselors.

Judge BROWNSTEIN. Yes.

Senator DECONCINI. I agree that they should be included, but the cost does concern me in getting the legislation passed.

Judge BROWNSTEIN. We are already paying for it, Senator. The agencies are right out there. LEAA and Labor have spent enormous sums of money to create these programs. We ought to be using them. If need be, we should fund them even more. The community should be picking that money up now, whether it is voluntary or by taxes.

Those programs are essential and needed. Some of them are struggling to get enrollments. There is a lot of head-hunting going on in some of the local courts. It used to be in New York, before pretrial services were created and came into the courtroom, when a defendant would stand up and there would be five different programs struggling to get the guy, he would shop around, "What have you got to offer me?" They would struggle to get him.

We do not have that going on too much anymore.

The resources are there. We already have paid for the resources and we should not be afraid to use them. A good diversion program, a really excellent diversion program, is one which does not have its own resources, but relies upon the community resources.

Senator DECONCINI. I agree.

Judge BROWNSTEIN. You become too institutional. You become incestuous, almost, as to your existence.

Senator DECONCINI. This goes back to your original point about the advisory board and having a wide sector of the community involved.

Judge BROWNSTEIN. I have the director of the programs and the college deans and the director of the rehabilitation programs and high school principals and the man who owns the supermarket and who is the victim of a lot of the crimes. As a matter of fact, we are doing two things in New York which I think are important.

The first is that we are designing a program of education for the judges. Do not leave that out. This is with respect to release and history of bail and what bail does and what it means. We need to educate the judges and the country as to what effect it has upon the courts and what resources are available.

The second thing we are designing in New York is in connection with merchants, such as Alexander's. It is a merchant association in New York. They are already operating a diversion program, which they are not aware they are operating. They do not arrest shoplifters who are first offenders. They keep their own records, which I think is probably questionable as to the legality, but they keep their own records of those who are arrested.

They make them sign a confession, which is what we are talking about. They take the goods back. They take the photograph. Then they excuse them.

They then keep a record of who the man is. The next time he is arrested, they check with the central file and he is not diverted. Well, they may divert him if it is not too important.

What I would like to see in that case—and I have talked with some of the people about it in New York and talked about possible funding—is a legitimate up front diversion program. If you arrest someone, do not let him go. You are encouraging him to come back. It is pretty easy to walk into a store and get busted and walk out and get arrested under a different name in another shop and another name in another shop.

But you would have contact with that offender. You would have contact with his family. You do not have to prosecute him criminally because most of them are 14 or 15 or 16 or 17 years old. Most of the goods taken are stereo albums. That is mostly what is taken and the next is clothes. But you could have contact with the family. You could

have contact with the community which has to deal with him. We are talking about in New York City $15 million a year. It is incredible. It is enormous. We could pay for a lot of diversion and release programs with what is stolen. We are paying for it. The public is paying for it. That is put in the profit column.

Senator DECONCINI. Let me ask you one more question. We discussed previously about the requirement of the victim agreeing and signing an agreement or some affidavit. What are your views on involving the victim in terms of concurrence or acquiescence?

Judge BROWNSTEIN. If it were mandated, it would cripple the program. You could not accomplish diversion. Let us take the neighbor dispute. A man takes a garbage can and has really had it with his neighbor. He heaves it across onto the lawn and breaks some kind of a lawn ornament which is worth $200. The proper way to handle that would be with the mediation aspect of pretrial services, but assuming you do not have it, you have the man in court who is holding a job. He is married. He owns his own home. He has five kids. He is responsible. He has never been in trouble. He is 48 years old. He just lost his temper.

You are not going to prosecute this man. It is silly. But let us assume it is Federal jurisdiction one way or the other and so you will have to if the neighbor says he wants him to go to jail. The neighbor may say he wants a pound of flesh and he wants restitution. I want him out of the house. I want him moved. He will never consent.

Then, of course, let us take the department stores, assuming there is Federal jurisdiction. The department store owner may never consent. He is really mad at the guy. "That kid has been in the store 18 times and I only got him once but I know the other times he cleaned me out." He will not consent.

Moreover, you are dealing with somebody who is not really a victim.

Senator DECONCINI. Do you think discretion is worthwhile having it there, that is, that the attempt be made but not be mandatory?

Judge BROWNSTEIN. Yes, I think in a large number of cases you can bring people together, but I would not mandate or require it as a precondition. It would be impossible to do.

I think if it were discretionary at the option at someone in the building, like a pretrial services officer, who might understand it is a good thing for the community to bring the people together, then I think he could use it in appropriate cases and accomplish a great deal, both for the victim as well as for the defendant. I think you can abort many disputes that way.

It is, in a sense, mediation.

Senator DECONCINI. Right.

Judge BROWNSTEIN. Then there is subsequent diversion.

Senator DECONCINI. In the programs that you have been involved in, do they have hearings to try to determine why the person failed if, in fact, they have failed in the program?

Judge BROWNSTEIN. No, it is generally done on paper. There is a report rendered to terminate diversion and resume prosecution. The prosecutor, of course, does not have great objections to it.

Senator DECONCINI. Do you see any due process problem in waiving a speedy trial by not having a hearing or some determination other than on paper?

Judge BROWNSTEIN. No, there is as much advantage to a delay of prosecution to the defendant. The prosecutors are not overly happy about it. They have to find witnesses who maybe are 10 months away from the crime and they do not know where they are. They have to try to bring them in. There is disadvantage and advantage to both sides.

The advantage to the prosecutor, at least in that 10 months he has an opportunity of getting this thing dismissed. The advantage to the defendant in the face of not having a speedy trial is that he has had an opportunity to be diverted.

If he blew it, then that is his own problem. He has to deal with it.

Senator DECONCINI. Judge Bronwstein, we thank you very much. We appreciate your coming. We will undoubtedly be in touch with you again.

If you need any help here while you are here, please feel free to go to my office or to the committee office.

Judge BROWNSTEIN. Thank you.

Senator DECONCINI. Our next witness is Stephen D. Neely, Pima County attorney, and also we have Robert Leonard, district attorney, Flint, Mich.

Mr. Neely, we will have you testify first. We would like to hear about the Pima County program. It was taken from the one that Mr. Leonard started some time ago. We would appreciate that.

We have your prepared statement which we can put in the record. You may highlight it.

[Material to be supplied follows:]

OFFICE OF THE PIMA COUNTY ATTORNEY,
TUCSON, ARIZ., *July 8, 1977.*

Re Pima County Adult Diversion

To: U.S. Senate Judiciary Committee

From: Stephen D. Neely, Pima County Attorney

The Adult Diversion Project (A.D.P.) in the Pima County Attorney's Office is designed to screen first-time, non-violent offenders out of the criminal justice system.

Specific standards for screening are in writing. A defendant who appears to meet the standards is referred to the Intake Section of A.D.P. for a thorough background investigation. If found acceptable, the defendant is removed from active prosecution and placed under the direction of A.D.P. counselors, who are separate from the Intake Section. The counselors design a program for the individual defendant to follow under general supervision by the counseling staff. The time period is flexible, but does not normally exceed one year. Restitution is nearly always required where appropriate.

If the defendant completes the program satisfactorily, charges are dismissed. If the defendant engages in antisocial (usually criminal) conduct during the program, defendant is terminated and prosecution is commenced.

Victim consent is required prior to defendant's acceptance into A.D.P. Defendants who maintain their claim of not guilty are not accepted to A.D.P.

COMMENTS ON FEDERAL DIVERSION—THIRD DRAFT OF ACT

1. It is extremely important that screening (intake) and counselling functions be maintained separately. This is not clear from the Act. Perhaps it can be clarified by regulation, but it is basic to our project.

2. The theory behind diversion efforts is that some defendants are criminal only because of a single criminal violation. Likelihood of repetition is low. Therefore, it is more appropriate to speak of "redirction" than of "rehabilitation". "Rehabilitation" is for probation departments. It is too ambitious for a diversion project. This may seem like semantic nit-picking, but concepts are derived from the verbiage of enabling legislation. (Section 2)

3. Violent offenders should not be included in such a program regardless of the extent of injury to the victim. Drug offenders and drug-related offenses ought also to be specifically excluded. (Section 3[1])
4. Restitution should be mandatory. (Section 3[2])
5. Federal law may be to the contrary, but it is generally undesirable to render a participant in diversion immune from the consequences of statements made during diversion. Limitations must exist on the use of such statements, but exceptions should be stated. (Section 6[b])
6. Circumstance may make it necessary to use regular probation officers, but it is generally undesirable to do so. Diversion should not be equated with probation to this extent.

STATEMENT OF STEPHEN D. NEELY, PIMA COUNTY ATTORNEY, PIMA COUNTY, ARIZ.

Mr. NEELY. I think probably the first thing I should say is that one of the most interesting things I have heard this morning is the fact that I had an opportunity to hear about other programs and the distinct philosophical differences between the way our program is administered and the programs I have heard described.

I will briefly highlight our program and then make some observations that I made about the draft of the act. Hopefully that will stimulate some questions.

Our project basically is geared toward nonviolent first-time offenders in Pima County. I suppose that probably the most notable distinction between our program and the ones we have heard about this morning is that it is considerably more restrictive.

Essentially our standards are in writing. The question of whether or not a person charged with an offense initially meets those standards is decided by a prosecutor.

Once a decision is made, then the individual is referred to the intake section of the diversion program which is a function of the Pima County attorney's office. There is an extremely thorough background study done on the individual that determines past police contacts, as well as whether or not there have been any other criminal violations.

If the individual is found acceptable—and only about 40 percent of the people reviewed are found acceptable—then the individual is removed from active prosecution and placed under the supervision of the counseling section of that diversion project, which is a distinct and separate entity in the sense that intake and counseling are two separate functions.

The counselors then design a program for the individual defendant to follow under the general supervision of the staff and normally the time schedule is flexible, but the maximum is generally considered to be a year.

One of the questions that has come up here today repeatedly is the question of restitution. We very nearly always require restitution with offenses requiring property.

If the person has been diverted and completes the program satisfactorily, then the charges are dismissed outright. If the defendant, however, during the course of the program, engages in antisocial conduct—they usually require that conduct be criminal—then the individual will be terminated and the prosecution would be commenced as though diversion had never occurred.

We do require victim consent, and we generally will not accept defendants who maintain a continuing claim that they are not guilty of the offense with which they are charged.

With respect to the diversion bill I have read, I think there are a couple of things I would like to note. Then I will turn off and turn it over to Mr. Leonard unless you would care to ask me questions.

I think it is very important that it be specified somewhere in the bill that the intake function and the counseling function be maintained separately. This is an area on which I think there is probably some disagreement, but I think that screening is the essential ingredient that makes the diversion project successful, depending on what the standard for success is.

Our standard is generally lack of recidivism. I did not note that to be particularly clear from the bill. It may be that I missed something, but I think that is one thing that should perhaps be included, which is the clarification of the intake and the counseling function.

Maybe this is where the philosophical departure begins. We do not really refer to our diversion project as a rehabilitative project in the sense of active rehabilitation. The screening function for adult diversion in Pima County is such that we take people who, but for the commission of the individual criminal act with which they have been charged, probably ought not to be properly considered criminals. They are generally people who step across the line once. The potential for them stepping across the line again is very low.

Consequently, we like to think of our activities in that regard as more of a redirection rather than actual rehabilitation. This may seem like semantics, but I do not think it really is when you get to the nitty-gritty. I think essentially rehabilitation is more of a probation-type concept. We hope that our screening process is thorough enough that it does not require active rehabilitation of people who get involved.

We do not—and again I have a philosophical departure from the previous witnesses—allow violent offenders in the project, nor do we allow people who are drug offenders or drug-related offenders in the project.

We require restitution, as I said before.

I have one other comment I would like to make with respect particularly to section 6(b) of the act which is something that has been touched briefly on this morning, which deals with those statements made by the offenders during the course of diversion.

I think it is probably important at one point or another that if if you are going to have that kind of exclusion, that is, that any statement made by the individuals during the course of the diversion project cannot be used, then I think that should be clarified.

The only extent to which statements made by a person who has been diverted in Pima County are used is if the individual subsequently gets out of the diversion project and goes to trial and makes statements that are inconsistent with statements that he has made during the course of the diversion project. It is very important to keep the project from becoming viewed by the divertee as a snitch project, but it is equally important that perjury not be condoned or encouraged.

The last thing I would say is in conjunction with section 9(1)(b) which allows Federal diversion projects to call upon the Federal probation officers. With all due deference to the comment made by Judge Brownstein, with respect to people who are involved in pretrial diversion, as compared to people who are involved in posttrial probation, I am not altogether convinced that people who function in the probation officer's status do make the distinction necessary between pretrial diversion and posttrial probation.

I think by and large the goals of the two projects are considerably different, at least under the theory that we use. I think it might very well be a mistake to have this project call upon the resources of the Federal probation department.

I have a number of comments that I would like to make which have been stimulated by some of the comments I have heard, but I would rather defer to Mr. Leonard and let him deliver whatever he cares to. Then perhaps you would like to question us both.

Senator DeConcini. Mr. Neely, we thank you.

Let me ask you if you would care to submit to us any written observations based on the testimony you have heard this morning; we would welcome them.

Mr. Neely. Fine.

Senator DeConcini. So ordered.

Regarding the program that you have in Pima County, I am aware that it does not take any drug offenders except minor marihuana possessors, but based on your experience with the program, do you think there is any justification in trying to expand such a program, or would you recommend enlarging the scope, including crimes that might include some drug offenders?

Mr. Neely. Our program right now takes in about 10 percent of the total felony offenders. I do not think for a minute that the program cannot be expanded to include a larger percentage of the felony offenders who come through Pima County. But I would be very reluctant to include people who were involved in drugs or drug-related offenses for a number of resaons.

I think one of those basically gets down to the redirection and rehabilitation question. I think when you are talking about drug offenders—and I am talking about people generally who are physically addicted—you are talking about a pretty substantial rehabilitative effort.

I do not think, quite frankly, that is a proper subject for pretrial diversion.

With respect to those people who are involved in marihuana offenses, I do not think, quite frankly, that those people need either rehabilitation or redirection. I think that dealing with marihuana offenses largely has become a question of retribution. I am not even sure who is imposing the retribution, whether it is for the sake of the public or the sake of the legislatures. I do not feel that drug-related offenses have any real business being in a diversion project, either because of the difficulty of dealing with the offender or because there is no real need to deal with them.

Senator DeConcini. What is your feeling toward expansion of the program toward violent crimes, where there is physical violence involved?

Mr. NEELY. It would require reorientation of our concept of diversion. I think it is important to understand also, in this case, and I know you understand, but for the benefit of others who would be privy to the testimony here, diversion in Arizona is a nonstatutory function. It is quite possible that it might even be viewed by some people without proper criteria, at least, as an abdication of statutory duty of the prosecutor in absence of legislation which says that this is all right to do.

For that reason, I think we have perhaps been conservative compared to some of the other diversion projects. I would like to think, however, that the conservatism that we have shown has been the basic reason why our success rate has been so high and it has been extremely high.

I quite frankly think that there is a legitimate reason to distinguish between violent and nonviolent offenders, largely because violent crimes usually are predicated on emotion and the predictability of repetitive conduct is considerably lower than it might be in the case of many nonviolent offenses. Nonviolent offenders, I think, have many reasons for the commission of those crimes. I think it is much easier for an adult diversion project to define the reason behind nonviolent offenses at the offset of the diversion and perhaps to deal with those reasons far more reasonably than they could deal with the emotions that are usually incidental to violent offenses.

Senator DECONCINI. Let us go to Mr. Leonard. I would like to address a question to both of you. I realize you are both prosecutors. I realize that you have the need to be ceratin that the defendant's rights are always offered to them and met. The legislation provides that the defendant must waive statute of limitations and speedy trial on the advice of counsel to be eligible for the program.

Is it your opinion that the nature of diversion requires any further waiver or warnings to the defendants constitutionally?

Mr. NEELY. Not to the extent that they would not be covered by a pretty specific description of the diversion project and its goals and its consequences of failing to meet those goals; no.

I think that generally the biggest problem that you have in dealing with diversion, assuming you do not require an acknowledgement of guilt, which we do, is the speedy trial problem.

By the way, just to add to that, again with all deference to Judge Brownstein's opinion, I think an acknowledgement of guilt is extremely important, not for the purpose of the record or for the purpose of using it against the individual, but it is my belief—and will always be my belief—that individuals who maintain their innocence have the right to have that litigated in the courtroom and not to have anything held out to them as incentive to give up that right.

Senator DECONCINI. Does the defendant have a right to judicial determination of probable cause to charge him with the crime before he chooses diversion, or is the fact that the defendant has counsel when electing diversion sufficient constitutionally?

Mr. NEELY. A defendant has the right to waive his determination of probable cause at any time. I would assume that if he has the right to counsel and has been adequately advised of his rights, he can do that. That is not a problem we are faced with generally, because our screening process usually carries on past the probable cause

stage, largely because of the way we handle it. Our individuals usually have a finding of probable cause within a week of the time of their arrest in Pima County. Our diversion project is not tied in with pretrial release.

As a consequence, the determination of probable cause is generally made before an individual is accepted into the diversion project anyway.

Again, if the prosecutor, in my opinion, has reason to believe the probable cause is not there, then that is pretty much the same as trying to divert somebody who maintains his innocence.

Senator DECONCINI. I can draw from that you are very cognizant of nonabuse by the prosecutor of this particular project, that is, that you make every strain and effort that you do not divert cases that you cannot prosecute.

Mr. NEELY. That is one of the primary goals of the project which is to deal with offenders, not people who have been wrongly charged and consequently—I am very much committed to prosecutor participation in these projects because I do not think you have prosecutor support without it. I think without prosecutor support, you do not have a very good project.

Senator DECONCINI. What is the recidivism rate in the Pima County project right now?

Mr. NEELY. The project is not that old. It is very difficult to measure on the basis of the short time that we have been involved. I think Mr. Leonard could give you better figures on that than I can, but our recidivism rate, from people who have successfully terminated the project, I would say roughly it is in the area of 10 percent. But then you have to understand also that we generally terminate about 14 percent of the people who go through. I do not consider this to be necessarily the result of a successful counseling program. I consider it to be a result of careful screening.

Senator DECONCINI. Mr. Neely, we thank you very much for your testimony this morning and for taking the time to come all the way from Arizona to testify.

Mr. Leonard, we welcome you. We welcome your remarks. You are one of the real founders of diversion. You are known prominently throughout the United States for your promotion of this program when, in fact, it was very difficult.

I remember being a prosecutor with you in my early days when I first heard of diversion. Many eyebrows were raised by prosecutors when Bob Leonard would come forward and promote diversion some 4 or 5 years ago. He had a record to stand on.

So, we are particularly grateful for your coming from Flint, Mich., and we welcome hearing from you.

STATEMENT OF ROBERT LEONARD, DISTRICT ATTORNEY, FLINT, MICH.

Mr. LEONARD. Thank you very much, Senator.

I certainly first want to express my appreciation for being invited to speak on diversion. I also want to thank you because it is a privilege for me to be here before you as a former colleague and with Mr. Neely also.

We talk about diversion. People have trouble conceptualizing what that really means in the criminal justice system. Really what it means is that we are trying to formalize something that has been done for years and years since the beginning of the criminal jutice system.

Certain individuals are given particular consideration when they commit certain types of offenses. It usually depends a lot on the philosophy of the prosecutor as to what he thinks about certain types of cases and what his policies are and what his philosophies are.

What we have tried to do with diversion is to formalize it so that everybody who fell into a certain category would be treated the same. That is, at least, how I got involved in diversion.

I can recall back 13 years ago when we started it of sitting in my office and realizing that young people—and it was primarily young people at the time when we were talking about nonviolent offenses—were coming before our office. Many in the same circumstances were being treated differently, depending on whether or not he was a good athlete in school or a good student. You had the principal and the coach coming to speak for him, or if he attended church regularly, you might have the priest or minister coming in. That was influence. I think it probably should have influenced us in making those decisions.

My concern was that I am sure that were individuals who did not attend church, who were poor students or poor athletes and who should have been given the same consideration. So, as a result of that, we formalized the diversion concept in that we set up certain standards that everybody, that is, that would apply to everybody who came before the office under similar circumstances.

For example, we used a very broad criteria in the sense of saying that if a person committed a nonviolent first offense, and if he had no previous antisocial activity that would indicate our inability to deal with him or her, as the case may be, then we would divert that individual.

Since that time, it has become much more formalized. Of course, at the beginning, we could not visualize all of the problems that would result in diversion. For example, we were talking about an adult felony diversion program. I think you have to look at all of the concepts of diversion. We are talking about pretrial diversion, precharged diversion, posttrial diversion. Where does the diversion program sit in the system?

As Mr. Neely indicated, we feel very strongly about the precharged diversion concept or the early disposition with diversion. I like the precharge because it gets right at an individual as soon as he or she has been apprehended. In most cases he or she has just violated or committed a particular crime.

There are other types of diversion programs. I notice that some of the witnesses spoke to this. New Jersey has an unique type of diversion. Other States have other types of diversion.

There is the aftercharge. There is the afterarraignment. There is afterconviction. All of these can be classified as diversion. If you do something other than what you normally do in disposing of criminal cases, like the prosecution, and the sentencing and what have you, then all of this is under diversion.

Maybe an oversimplistic analysis of diversion might be this, but what we have really done, in effect, is that we have taken some of the

probabtion program from the back of the system and put it on the front of the system. We have done it for many reasons.

I sat forth many of those reasons in my 11-page prepared statement that I have given to you.

Senator DECONCINI. We will put that statement in the record in total. We thank you for the comprehensiveness of it.

[The prepared statement of Robert F. Leonard; prosecuting attorney; Flint, Mich., follows:]

Mr. Chairman and members of the committee, since previous occasions of our testimony, in 1973, before the Senate Sub-Committee on Federal Penitentiaries and the House Select Committee on Crime, I have had the opportunity, as a representative of the National District Attorneys Association, to study many of the problems confronting the criminal justice system throughout the country. With the Committee's indulgence, I would like to summarize some of the more obvious and significant problems I have observed, place diversion within this perspective, and then offer my opinion of the strengths and weaknesses of the Federal Diversion Act of 1977 as a partial solution to these problems.

Constantly increasing crime rates exceed the rate of population growth in many parts of the country. Particularly is this true in the inner cities where population migration to suburban and rural areas has resulted in a marked increase in crime in those formerly, so-called "safe" areas. Geographical containment of crime is no longer possible, with the consequence that law enforcement is spread precariously thin. In Michigan, the State Police now patrol expressways within the City of Detroit with manpower reassigned from other already understaffed areas of the State. Many police jurisdictions annually report increased apprehension rates, and whether this results in real or phantom increase in actual crimes committed is irrelevant. The fact remains that the criminal justice system must bear an increasingly heavy load from police to prisons.

For the fiscal year 1977–78, the Michigan Legislature has proposed a budget of $122 million for the Corrections Department, up 44 percent from this year. This spiraling of the Corrections budget is mainly aimed at coping with the State's critical prison overcrowding. Stiffer laws with harsher penalties are being contemplated or enacted everywhere. Michigan has recently adopted a two year mandatory sentence, without good-time parole, for those offenders convicted of the use of a weapon in the commission of a felony. Incarceration for some offenders will always be necessary for the protection of society, but punishment, per se. is not indiscriminately and invariably a deterrent to crime. I do not believe that it is and empirical research evidence does not support it, however, more prisons seem to be an increasingly resorted to solution for an ever larger segment of the convicted criminal population.

Even if bigger and better prisons provide safer human storage facilities, they will have no impact upon overcrowded jail facilities. There the commingling of hardened and incorrigible violent criminal sociopaths with non-violent, often young and misguided offenders, will continue. And if these latter offenders have not yet received an education in crime, they will learn the 3–R's of crime in jail before they leave. To comply with state regulations and court rulings on jail populations we have sometimes had to resort to the wholesale, unsupervised bonding of dangerous offenders, resulting in a drastic increase of new crimes committed while on bond.

To ameliorate hopelessly clogged criminal dockets, we have sometimes had to resort to "assembly line processing of accused persons with justice neither to the innocent nor the guilty. Major automobile manufacturers can recall and repair ten thousand cars with assembly line defects. The assembly line defects of the criminal justice system return as recidivists but few can be repaired. Major recidivism studies of recent years indicate that we do a better job of scrapping our criminal junk than we do of salvaging it.

Lengthy delays between the time an offender commits a criminal act and the ultimate time when he is required to accept responsibility for his act against society, only insure that the offender will learn no corrective lesson at all from his punishment because he will have long since forgotten, or learned to rationalize away, his prior conduct and thus cannot understand the meaning or accept the reason for his penalty.

To reduce time delays and overburdening costs we have sometimes had to resort to automatic plea bargaining—a rationalized abuse of an acknowledged nec-

essary evil in which prosecutor and courts have been increasingly forced to engage because of excessive volume and exhorbitant costs—costs which the public would not support—which would be required to try every case to conclusion. Where automatic plea bargaining occurs we are paying a stiff price for the loss in quality control of justice.

As a prosecutor from Michigan I am, obviously, accustomed to thinking of our system in assembly line anologies. In other parts of the country I have heard our higher criminal courts referred to as a "market place," and our lower courts as a "zoo" or "demolition derby." The point, however disrespectfully or humorously made, is well taken. In some jurisdictions, large and small, our system is a near disaster area and local patchwork monies and efforts will not prevent public disrespect for the law and the deteroriation of credibility in our courts and justice system.

Recognition of this increasingly pervasive condition underlies the efforts of the National District Attorneys Association to mount coordinated efforts to attack these problems on many fronts. Among possible alternatives and solutions I have discussed with local, state, and U.S. attorneys and judges, are: multi-jurisdictional task forces on economic and organized crime, prosecutor coordinated or directed consumer protection bureaus, the decriminalization of a number of statutory criminal offenses without victims which might better be handled through new and alternative forms of social sanction and regulation. Control of the dissemination of pornography, for example, has been effectively dealt with through zoning and licensing ordinances and regulations.

Other possible alternatives or solutions which have been applied to criminal justice problems include the development of community rape crisis centers for more humane treatment of victims and more effective prosecution of sexually assaultive predators, crime prevention programming for the elderly, and specialized law enforcement training for the control and prosecution of drug traffic.

A principal effort to remediate some of the institutionalized defects and abuses of the criminal justice system, which I have already alluded to, and to rehabilitate some of the abusers of societal laws, has been the promulgation of the concept of diversion embodied in the Federal Criminal Diversion Act of 1977.

This concept gained wide criminal justice attention with the publication in 1967 of "The Challenge of Crime in A Free Society," a summary statement of the findings and recommendations of the President's Commission on Law Enforcement and Administration of Justice.

Our own efforts in this regard anticipated by two years the findings and recommendations of the President's Crime Commission with the creation, in 1965, of the Genesee County Citizens Probation Authority.

The Citizen Probation Authority is a model diversionary program of deferred pre-charge probation which has successfully served as a unique and innovative partial solution to the aforementioned defects in the operation of the traditional criminal justice system, as well as to the most fundamental problem which confronts all of us—the ever-increasing rise of crime throughout the United States.

By selectively diverting certain non-violent and non-habitual felony offenders to voluntary programs of pre-charge probation before any formal criminal warrant is issued or any formal criminal charges are lodged against them, many of those accused persons who would otherwise fall into the "assembly-line" system in the courts are effectively diverted, thereby operating to help un-clog and diminish the criminal caseload dockets of our courts so that the more serious crimes can be more effectively dealt with, such as violent assault, murder, consumer fraud, public corruption, and organized crime. Such selective diversion has been an important factor contributing to Genesee County's being traditionally the leading local jurisdiction in Michigan in maintaining up-to-date court dockets.

Second, by diverting such selected offenders at this initial stage, they are effectively kept out of the jails, and thus kept from hardened, violent, and sociopathic criminals who could influence them in a life and pattern of serious and repeated future criminal conduct.

Third, by expeditiously diverting such offenders to a voluntary program of probation in this pre-charge context, where they must immediately acknowledge their responsibility for their prior law-breaking actions, such offenders will not have time to forget or rationalize their conduct and will be much more likely to internalize the "lesson" that violation of the laws of society entails immediate and unrewarding consequences, and further, that society demands that the offender account for and accept the responsibility for his conduct and refrain from similar behavior in the future.

Fourth, by so diverting such offenders they avoid the indelible stigma of "criminal" which would not only operate to penalize them in many collateral social contexts throughout their future lives, but would, moreover, stand in their minds as a self-fulfilling and internalized perception, and which might further encourage them to act out their social roles as "criminals," and effectively discourage them from rehabilitating themselves in the future.

Fifth, by so diverting such offenders from the criminal justice system into such programs, the presently over-burdened caseloads and expenses of post-conviction probation can both be significantly reduced, while at the same time society loses nothing in the way of protection by the mere per se shifting of selected offenders from one form of probationary supervision (i.e., post-conviction) to another form of the same (i.e., pre-charge probation).

Sixth, by so diverting such offenders from the criminal justice system and thereby reducing the overwhelming caseloads and dockets of our criminal courts, the often criticized "plea-bargaining" system is reduced proportionally, since these offenders will, in most cases, never have to be brought to the formal criminal prosecution stage.

Consequently, many of the remaining formally prosecuted cases will thus be freed from the real pressures of too scarce manpower, time, and resources which presently compel "plea-negotiation," and will instead proceed to trial and conclusion on the original more serious and justified charge as placed by the prosecution.

Seventh, and perhaps most important, the studies and evidence which have been made and compiled in relation to the Genesee County model of deferred pre-prosecution probation indicate that such diversionary programs as the C.P.A. offer one of the potentially most hopeful and optimistic new solutions and approaches towards the treatment of offenders through a system of preventive rehabilitation, as contrasted to the standard and traditional criminal justice system's wholly post facto attempts to rehabilitate offenders. As our recent history and much empirical evidence have demonstrated, traditional methods per se have proven to be dismally ineffective in the stemming of the ever-increasing national growth rate of crime.

Aside from the fundamental concept of preventive rehabilitation which underlies all diversionary programs of pre-charge probation, another major supporting concept is that of community involvement in the solution of the problem of crime. The deferred prosecution program in Genesee County has been designed to bring together direct official and community action in positive ways to accused lawbreakers immediately after arrest. The program's thrust has been a cooperative effort between the criminal justice system and those community resources which are in a better position to create behavior modification. The successful diversion of selected offenders from the standard criminal warrant process and criminal justice system is based to a great extent upon the continuing existence of many diversified and viable alternative community-based methods of treatment and support for the offender: vocational training and education, job placement and financial aid, psychological and medical care, peer-group therapy and counseling, marriage and family counseling, learning disability tutoring, and so on. For example, in Genesee County, certain selected youthful drug offenders are diverted from formal criminal prosecution, and, in lieu thereof, voluntarily attend community-based drug problem treatment centers and so-called "drop-in" centers, where they are counseled by, and relate to previously trained members of their own more influential per group in relation to solving their own drug problems.

The end result of both of these concepts is a criminal justice system that provides options to a prosecutor which are both realistic and controllable, and which also directly effect lower recidivism rates.

Diversion, specifically pre-charge diversion, hasn't solved all of the criminal justice problems in Genesee County, nor have the hundreds of other similar programs throughout the country, but it has a public record of better than ten years of researched and demonstrated success in partially remediating those problems, and it has brought a new confidence—a confidence in the criminal justice system that justice, blind in its impartiality, is at the same time open in its vision of the needs of the offender and victim alike. The diversion option, with its benefits to the prosecutor, the courts, and the taxpaying public, as well as to the offender, has become a true and meaningful definition of individualized justice. The concerns of diversion proponents and critics alike, are that diversion remain informal and free of the largely bureaucratic administrative processes of

criminal justice yet cognizant of and compliant with the inherent rights of the individual and our system of due process underlying all principles and practices of American justice. With proper representation by counsel, with publicly promulgated diversion policies and procedures, with maintaining as free and voluntary participation as is possible in any aspect of criminal processing, with informed and intelligent waiver of specific rights, diversion represents a realistic, effective, alternative response to traditional prosecution. For whatever the reasons, it is a fact that the Genesee County program has experienced no legal complaints or litigation in its 13 years of existence and numbered among its chief supporters are the members of the Genesee County Bar Association and the judiciary.

The Federal Criminal Diversion Act of 1977 is strong in its embodiment of proven principles of diversion: flexibility within necessary guidelines in the determination of eligible participants, recognition of the legitimate distinction between "lawbreaker" and "criminal" in its selection and treatment of offenders, provision for guarantee of confidentiality, and a realistic recognition of the need for adequate funding, to name a few.

The principal weaknesses in the Federal Act, in my opinion, derive from a similar inherent defect in state court diversion programs which commingle Executive and Judicial authority in the diversion process. The authority to determine eligibility of participants resides solely with the U.S. Attorney, Sec. 3(1). An eligible individual is defined as one "who is recommended for participation in a Federal criminal diversion program by the attorney for the Government . . ." According to the Act, the U.S. attorney's decision to recommend (or not recommend) diversion is not constrained beyond a finding of eligibility, although it might be presumed, and perhaps should be stated, that such recommendation would also be made upon a determination that the individual may benefit by release and that such release is not contrary to the public interest, the same constraints imposed upon the committing officer: Sec. 5(a).

After the U.S. attorney makes a diversion recommendation, the committing officer (magistrate or judge) makes the diversion decision if it is believed the individual may benefit by release, and if release is not contrary to the public interest, but only if "all" complainants/victims consent in writing to that release. In my opinion, this is not only an unwarranted and questionably unconstitutional delegation of authority, but would guarantee an uneven and unequal administration of justice: different complainants presented with the same set of facts will decide differently. In effect, neither the U.S. attorney nor the committing officer will make the final diversion decision, but the public whose opinion may be more narrowly and punitively self-serving than broadly and humanely in true public interest.

If "all persons injured by the act or acts" (not all-but-one, nor even the majority, but "all") have the ultimate diversion decisionmaking authority, would it not be as logical and consistent to invest an "all persons injured "the final authority as to whether an individual has successfully completed the program and should have charges dismissed, or has not successfully complete the program and should have prosecution commenced? (Wouldn't the same logic carry over to approval of plea bargins of prosecutors and sentences of the courts?) Clearly, no formal intervention of aggrieved parties, beyond their traditional role in criminal processing, is feasible or desirable.

Seemingly inconsistent with the authority of the committing officer to divert, although actually a discretionary judgement limited by consent of the agrieved parties, the committing officer has no discretion in making the decision for successful completion and dismaissal of charges, or the re-institution of prosecution.

In the instance of successful completion and dismissal of charges, Sec. 7(c), the Act states that "the committing officer shall dismiss . . ." if the administrative head of the program "certifies" successful completion, and "the attorney for the Government concurs." The committing Officers' role is, therefore, purely pro forma.

Again, in the decision to re-institute prosecution, Sec. 7(b), the committing officer's role is pro forma, as, "the committing officer . . . shall terminate such release, and the pending criminal prosecution shall be resumed . . ." If the attorney for the Government recommends termination of program participation. Here the U.S. attorney's decision is expressly constrained for reason of failure of the individual to fulfill program obligations, or, if "public interest so requires."

Quite apart from the obvious problems of flow of proper authority in this process, is the questionably unconstitutional omission of any right of the individual, having once been found eligible for diversion, now being subjected to prosecution, to have a hearing on the substantive facts of his failure to fulfill his program obliga-

tions, or any showing of the U.S. attorney that prosecution is required in the public interest, As written, the Act does not contemplate a "revocation" hearing.

In the pre-charge context of Genesee County's program, only two or three such hearings are necessary each year. Utillizing a third party hearing officer and in the presence of counsel and program participant, any factual disputes are mediated before the case is returned to our office subject to our further decision to charge or not charge. In this context, the prosecutor's discretion remains inviolate, as intended.

A lesser, but still important, defect in the Act is an oversight, perhaps, in the definition of "eligible individual," Sec. 3(1), which does not exclude the habitual criminal from participation. It is suggested that the phrase "which has not been part of a continuing pattern of serious criminal behavior" be inserted following the phrase "any person who is charged with a non-violent offense . . ."

The length of participation in the program, Sec. 7(a) should be worded to make it a mandatory requirement, that is, an affirmative responsibility of the administrative head and the committing officer to make a decision for successful completion of the program within the 12 month time period, or absent that decision, the 12 month completion become automatic.

Beyond these suggestions, our principal and over-all concern is that this committee give all consideration to the greater feasibility and demonstrated success of pre-charge diversion as a function of the discretionary authority of the U.S. attorney, who, in any event, according to the Act, has sole responsibility and authority for determining eligibility and initiating the recommendation for diversion. Since the committing officer's role has been reduced to a *pro forma* function, and since the proper flow and exercise of authority must inevitably be complicated by commingling the Executive and Judicial functions, it remains our conviction that the most economic and efficacious diversion model is that conducted in the pre-charge context. That is not to imply that we cannot or do not support the present Act. It is laudatory in all that it does embody for the good of the criminal justice system. Diversion is the issue. I have actively endorsed and supported this concept throughout the country for the past 13 years. I endorse and support your good efforts now. Thank you.

Mr. LEONARD. I will not presume to read it, but I list those reasons in there. I think there are many good reasons for diversion. I think we have to look at what kind of a diversion program you are trying to create. Is it a precharge? If it is a precharge, then I would be somewhat reluctant to encourage magistrates or judges being involved in the disposition of whether or not a person is diverted or not. That is a discretionary function of the prosecutor.

If it is aftercharge, then I think the magistrate in the court should be involved in the sense that then it is a court matter as well as a prosecution matter. I have a feeling that is more of what you are intending to do with this bill than the precharge which is fine, because the Federal system, of course, is different than the State system. I recognize that.

I think you have to be ready for people to challenge you if you have a felony diversion program, then why do you not have a misdemeanor program or a juvenile diversion porgram and so on?

All of these different types of concepts are referring to people. Why should we distinguish the felon from the misdemeanant or the adult from the juvenile? Maybe we should start thinking about developing diversion programs in these areas also. If diversion helps an adult, then it has to help a child. If it will help a felon, then it will help a misdemeanant.

So, you have to look at the overall aspect of the program. But, you know, I would really like, after speaking about this program for 17 years, to point this out to you. I will discuss a few concerns of mine with the bill that may have been touched on already, but very quickly I will at the end of my testimony.

But I would like to talk with you about some of the problems that are inherent in diversion and how you have to deal with them. I want to talk about some of the criticisms of diversion and how you must deal with them.

Mr. Neely talked about one that I think is very evident in some programs. You have to make certain that the diversion program does not become a dumping ground for bad cases. I know that this exists in some areas. If you have a bad case, then you dump it into diversion. That can destroy the program. It can destroy the morale of the people working in the program, and it can destroy the support you may have in the Bar Association, in the courts, and in the public's mind.

So, the prosecutor must be aware that this is a program that must maintain its integrity. The only cases that go in there are cases that would have been proveable in court, in the mind of the prosecutor, at least. You cannot be 100 percent sure, but at least there would have been a case that he would have gone to court with otherwise.

I think the real thrust of diversion, of course, in the minds of some people is that it is coercive, that is, the person is given the opportunity to take diversion or some people say, jump in the river. He does not have much of an alternative. He takes prosecution or he takes diversion.

Their concern is not for the guilty person whose constitutional rights have not been violated, but their concern, those people who find fault with diversion—and I feel they are legitimate concerns—is that you may find an innocent person who will opt for diversion rather than take a chance of going through the criminal justice system and being prosecuted and convicted.

Or, you may find people who have constitutional rights that may have been violated, such as search and seizure, legal confessions, or admissions, and who will waive these rights rather than take the chance and go into the criminal justice system.

Senator DECONCINI. Let me ask you a question. Do you see any advantage to a statement on the record by the U.S. attorney indicating that the case could be successfully prosecuted to avoid the image or that destructive ability within the diversion program?

Mr. LEONARD. Well, I think you can always do that, but I think if they had to do it, they would do it either way, because it is a matter of opinion on whether you have a case. I think to blunt the criticism—and I say again that legitimate criticism is there—of the critics is that you have to have something more than that. For example, in the area of constitutional rights, if a person's rights have been violated, then it seems to me that the option that the prosecutor has, if, in fact they have been violated, is simply that he must dismiss the case. Here, it seems to me that the same option is there on diversion. If a person's constitutional rights have been violated, he or she should not be submitted to diversion. The case should be dismissed.

Otherwise you may encourage police authorities to say:

Well, we will divert this case and we will not be encouraged to avoid violation of constitutional rights.

So, I think there ought to be some way of litigating an issue of constitutional rights, if someone makes legitimate claim of that, before the issue of diversion is decided.

One way possibly is this. In your program, since the magistrate is involved, then that magistrate should probably make that decision.

In our case, we have a little bit more difficult time because one of the advantages of diversion, of course, is to avoid the criminal record and publicity and all the notoriety of being put in the criminal justice system. If we are going to litigate the constitutional rights, then we have to charge somebody.

What we have been doing now is to have an agreement between the defendant or defense counsel to bring in an impartial third party to make that decision. We agree to be bound by that decision, if we decide to do that.

If the person insists on going into the courts to have that decision made and does want to be charged and discharged, and subsequently fails inthe argument of the constitutional issue, then he or she is not preempted from coming back into the diversion program. He can opt for that and after that we will accept him or her or the program.

So, we try to be as fair as possible with the program.

I might say that in 13 years, in over 6,500 people who have been diverted over that period of time, we have never had one attack by any member of the Bar Association, or anybody, on the diversion program as being unfair or unreasonable in their approach.

You ask about the issue of speedy trial. Frankly, I think you have problems with any waivers, even though some courts may agree if a person waives and 9 months later they are charged, the very nature of diversion being coercive in nature could give you problems later on in trying to sustain that waiver on the argument, "Look, I did not have much choice. Either I waived them or I did not get diversion."

I think there have been some constitutional questions involved there. I think you ought to be aware of that.

They may be upheld. Some courts may say, "Look, you had the option and you waived, You did not have to waive if you did not want to. Therefore, we will accept it."

I think another factor that you have to be looking out for is this. When an individual is considered for diversion, even though you advise that person of his or her constitutional rights, can they make a meaningful and effective legal decision as to whether or not their rights have been violated, or if they wish to waive other rights?

What we have done is to begin working with our court-appointed attorneys in Flint, Mich., to set up a procedure whereby at least once a week those people who have been, or are being considered for diversion, have had an opportunity to meet with the defense counsel to discuss whether or not they wish to be diverted or whether or not they have any constitutional rights that have been violated or whether or not they have committed any kind of a crime known to Michigan law.

I think that is important. I think that is a concern that many of the opponents have with diversion going to the course of nature. We feel they have opportunity for defense counsel and if the counsel makes the recommendation, then certainly that kind of an argument would not be sustained, in my opinion.

Another feature that people have problems with is this: When you are going to terminate someone from diversion, it seems to me that you have to set up some kind of a due process procedure. I do not

think you can just arbitrarily terminate somebody because you have a feeling that they are not fulfilling the program or that the individual has done certain things which, in your opinion, is justification for taking them off the program.

Senator DeConcini. Before whom should that be in your opinion?

Mr. Leonard. We sit down usually with the individual and insist on the person having counsel. They then will sit with our director of the program and discuss with him why we are terminating the individual.

If they are not satisfied, we then will ask for an impartial person to come in and arbitrate the matter again. Both of us agree to be bound by the arbitrator's decision.

Senator DeConcini. Mr. Neely, does the Pima County program do anything along that line in dealing with termination?

Mr. Neely. Senator, we have a written procedure which is used which we hope meets due process standards for the termination. It is generally an informal type of proceeding. It is not conducted before a judicial officer.

Senator DeConcini. Is it conducted by someone outside the diversion program?

Mr. Neely. Generally it is informal to the extent that it involves a representative from the diversion, the defendant, and the defendant's counsel. We work on the basic theory that if the defense counsel concludes, as a result of discussions at the proceedings, that somehow his client's rights have been violated, then he will litigate. But it has not happened so far.

Senator DeConcini. Thank you.

Excuse me, Mr. Leonard.

Mr. Leonard. I have just a few other things. I might mention——

Senator DeConcini. Excuse me, again. Let me go back to the hearing. Have you had very many?

Mr. Leonard. Very infrequent. Maybe we have had one or two a year. We may have a number of meetings with the defense attorney and the director of the program. It has worked out there.

Senator DeConcini. Just a couple a year?

Mr. Leonard. Most years we have had none. But one or two a year at the most.

Senator DeConcini. Thank you.

Mr. Leonard. It is not a substantial problem, but I think you have to have it built into your program so the critics of the program can be met. I do not intend to malign the critics. They have raised very legitimate issues that have concerned me. We have tried to deal with them in the structuring of our program.

As for restitution, I might say that we try to encourage restitution and we try to make it usually a part of the program for that particular individual who has been diverted.

But there are occasions when individuals cannot make restitution. They may be very poor. They may be well-intentioned and want to go on the program and they may be a good person for the program. I think you have to be flexible in the restitution area.

I can remember one of our first cases where we had seven or eight young men in high school, all very fine young people who had never been in trouble before, but who had gotten involved in stealing cars

over a period of time. They were stripping them and selling them. It was about a 2-month period. They must have stolen 8 or 10 cars. It is a very serious offense. We gave it some serious thought as to whether we should divert them or not.

But, clearly they were individuals who should be diverted based on the criteria, so we did. Some of them could make restitution and some of them could not. We made the distinction between those who could and those who could not. We accepted them all for the program. They all successfully completed it. That was 10 or 12 years ago. Many of them went on to college and completed school. So we feel very strongly that you have to have flexibility in the area of restitution.

We also have a drug diversion program, a separate drug and narcotics diversion program. That has a lot to do again with the philosophy of the prosecutor. In Mr. Neely's area, down near the border, I am sure there is a much more serious problem, which is much more acute than we do have in Flint, Mich., although it is a heavy industrial community and we do have problems there.

But, again, my philosophy is that the prosecution of drug users and possessers or narcotic users and possessers really ought not to be a criminal matter. It ought to be some kind of a medical problem and it should be dealt with on that basis because I do not think the courts or the prisons have done much good with it.

At the same time, those who are selling and peddling drugs and narcotics should be prosecuted. That is a law enforcement program.

So, what we try to do is to divert, at least initially, those people who have been arrested for use and possession of narcotics and get them into rehabilitation programs. Obviously, if they have not succeeded in those programs, then they will be prosecuted. Some of the heroin users and the other drug users are real serious problems in the community unless you are dealing with their problems.

Of course, the success rate in those programs is something like 40 or 50 percent, while in diversion programs, it is 93 or 95 percent. I am talking about the nonviolent diversion programs.

Another matter that I would like to raise with you is this. I think Judge Brownstein mentioned this. This regards those individuals who must agree to termination of the program. I would very much oppose the idea that all of the complainants agree to the termination of the program—not the termination of the program, but going into the program of the individual. Frankly, if you are going to be consistent, they ought to have the same say in the termination, but I do not think they should have any say other than advisory. I think it is dangerous. I think you have the equal protection problem, frankly.

Let us suppose you have nine complainants in a case. Eight of the nine agree. The ninth will not. Let us suppose you have some shoplifters or something like that. Those stores can be very hard-nosed to deal with. Their concern is substantially different than I think a prosecutor or a court's concern.

Senator DECONCINI. In Flint, Mich., do you attempt to get acquiescence?

Mr. LEONARD. We attempt to do that. Probably in 99 percent of the cases we get it, even when we have those people who initially oppose. If you talk with them and explain what you are trying to do, then they generally will agree.

But in 1 percent of the cases, you may have the people disagree or refusing.

Senator DeConcini. So it is left to the prosecutor?

Mr. Leonard. Yes, it is left ultimately to the prosecutor. If we decide to divert because we think it is in the best interest of the community, or the law may require it on the basis of equal protection where you may have three or four defendants. They say, "well, we do not mind those two, but this guy we do not like. He gave us a hard time." Or you have most complainants agreeing, but one or two not agreeing. You cannot divert.

I think you have a serious protection problem. But I think they ought to be advised. I think the provision can say that they can make some kind of a form to be filled out where they can express their opinion. Their opinion may carry weight with the prosecutor or the magistrate, as the case may be. I think they should be given that opportunity.

Mr. Neely. Excuse me, Senator. I wonder if I might comment on that?

Senator DeConcini. Certainly.

Mr. Neely. Generally, in our program, we require the permission of the victim and do make an attempt to approach. We always reserve the right to go ahead with it, even if the victim refuses to agree with us.

But I think from the standpoint of a project like this, that the initial contact with the victim is extremely important in promoting community support for this kind of a program. I think if you have an individual, for example, who has been the victim of a burglary or the victim of an embezzlement, or an auto theft, and the individual finds out through the newspapers or through other sources that essentially the person who wronged him or her has been removed from the criminal justice process, and that individual was never informed or consulted or asked his opinion, then generally there could be a real bad taste in the person's mouth who has been victimized as a result of that.

So, in each and every case we do make that contact and seek the opinion, and generally the consent of the individual, who has been victimized, athough we do reserve the right to go ahead with it, even though they do not consent.

But, from the point of view of community understanding, it is absolutely essential.

Senator DeConcini. Have you had to exercise that discretion?

Mr. Neely. Once, that I am aware of. I think in several hundred cases we have gone ahead one time over the objection of an individual. I think it is very rare, as Mr. Leonard pointed out, that a person who has been approached properly and explained the entire set of circumstances and what you are going to do will say, "Well, I do not care. I want my pound of flesh." It does not happen that often.

Senator DeConcini. Thank you.

Mr. Leonard. I have a few other comments, Senator.

With regard to the issue of cost of the bill, one of the reasons we are able to keep the costs down in our diversion program is that we have not set up independent resources to deal with our problems. We have used the community resources that are already available. There are all kinds of them in every community.

I would suspect that there are numerous Federal resources available in all the communities that this program would be placed into effect in. I would suspect that these communities, or these resources, would certainly relish the opportunity to serve the courts. We have found that what has happened in the past is that the courts and the prosecutors and the police have always had a kind of calloused and standoffish attitude to community resources. They used to always take the position that, "Look, once it gets to the courts, obviously the community resources have failed."

Then they think it is their problem to deal with, and they will deal with it in the way they have dealt with it over the last 100 years. They put them in prison or they put them on probation.

The results have been terrible. So, I think now we are looking to these community resources to help us even after. Maybe in many cases they have not had a chance, however.

I think one of the things we must look at when we talk about certain offenders in these programs is that we do not overreact to the need to solve certain individual's problems, because that individual's problems may not need to be solved in a community resource or by rehabilitation. Many of these young people who get involved in the commission of these crimes—keep in mind that when you talk about nonviolent offenses, you are talking about younger people under 25 years of age—many of them commit these crimes because of situations they find themselves in, not because they have a drinking or drug problem, or that they are thieves or anything like that. They may be pretty law-abiding citizens and they just happen to get caught. Maybe many of us committed those when we were young, but we did not get caught.

So, sometimes many of these people do not need much rehabilitation. Maybe they are 99 percent rehabilitated at the time they are apprehended.

So, we have to be careful that we do not overreact to the problem and create more problems with this youngster or this person than he or she have before they were apprehended.

I think that has a lot to do with the director and the attitude of the district attorney and the magistrate involved as to how they deal with this individual's problems.

I have one other matter with regard to this bill. This has to do with the provision concerning who is the eligible individual.

An " 'eligible individual' means any person who is charged with a nonviolent offense against the United States, or a violent offense where no substantial physical injury to the victim occurs * * *"

Then you add with regard to violent offenses that the person has not been part of a continuing pattern of violent behavior. I think you need that kind of a proviso in the nonviolent area to give some leeway to the prosecutor because I think you run into some legal problems where the individual comes in and says, "I have committed a nonviolent offense." The police come in and say, "Look, this guy has been committing non-violent offenses for 5 years and we have just caught him."

I think that provision gives you a little bit of flexibility in exercising your discretion and not taking that person on the program. I would urge you to add in there that this has not been a part of a continuing pattern of nonviolent behavior or anti-social behavior which might be a better term.

That is all I have to say other than I commend you for beginning the hearings on this bill and the introduction of the bill and hopefully this time will prove fruitful and we will have a Federal criminal justice diversion plan.

Senator DECONCINI. Thank you.

Mr. Leonard, you are president-elect of the National District Attorney's Association?

Mr. LEONARD. Yes.

Senator DECONCINI. I have quoted them correctly as supporting the concept of diversion: is that right?

Mr. LEONARD. Yes. I would say that is a fair statement.

Senator DECONCINI. Let me just ask a couple of questions regarding your observations.

It is suggested in an article in the University of Michigan's Journal of Law Reform, that time spent in an unsuccessful diversion program be subtracted from the sentence on conviction to equalize the choice between diversion and prosecution. Do you favor such a provision?

Mr. LEONARD. Yes, I think it is only fair.

Senator DECONCINI. Do you think a year's maximum time is sufficient?

Mr. LEONARD. Yes, we have found 1 year is fine. We are dealing with nonviolent offenders. This bill does include the possibility of violent offenders being involved in the program. But with nonviolent offenders, clearly 1 year is sufficient. In fact, we terminate many cases even before the 1 year. We might terminate in 6 months or 3 months or 1 month, if we think that the circumstances warrant it. If you are just going through the motions and if the person does not need any further treatment or successfully completed the program, then we do not continue him on.

With regard to violent offenders, I have no position with regard to violent offenders with regard to certain circumstances. I have felt for a long time that I would like to include them in our program. The reason we did not initially—for the reason I am sure you did not when you inaugurated the program and why Mr. Neely has not expanded to it—is because we operate a little differently than the Federal district attorney. We are political entities. We are political animals, I should say. That is probably a bad term, but we live by the politics. I started out with the idea that I wanted the public to support the program. I think they could more easily support a nonviolent program than a violent individual in the program. I think the program now has a stature that we could include violent offenders if we get the funding for the additional counselors for the program. We have not been able to do that because, as you know, every community has some financial problems.

But I think if you can do it, it would be worthwhile. But in all these cases, as Mr. Neely suggests, there ought to be a firm criteria. It can be very broad, but there ought to be some kind of criteria on which ones you will and will not accept because I think the district attorney can get into some problems on the equal protection area if there is no criteria.

Senator DECONCINI. Maybe you might be able to help me and members of the staff in resolving this question. The bill is drawn to have the participation of the court and to have a separate agency, different from yours and Mr. Neely's and some very successful State and local diversion programs.

One of the reasons, of course, is that the Federal district attorney does not run for office. There is some problem of being assured that the program would continue in every district, assuming that is how the bill passes, or if it were successful after the pilot projects.

Do you think there is some validity to that or do you think the risks should be taken and attempts made to keep it within the prosecutors and have a precharge diversion similar to what you have?

Mr. LEONARD. I think we favor the precharge. You get at the problem right away. You do not penetrate the criminal justice system, which is one of the positive aspects of the program. You do not open files, and you do not start off with a person going to jail and having to appear in court and everything else. You take him right out of the system. You begin working with him right away when they are more suceptible.

Senator DECONCINI. That is one of the key successes of your diversion, is it not?

Mr. LEONARD. Yes; I think it is. But, again, I think if you can do that quickly and have the magistrate involved, and therefore you get more support for the program because of that, then I would not say we would have a diversion program just because of that.

But, we have been very successful with that. We urge prosecutors to develop those kinds of programs because with State district attorneys they have a great deal more flexibility in how they would develop a diversion program.

There are a few areas, like in New Jersey, where the courts have issued court rules limiting the prosecutor's right on diversion. But generally speaking, that is not the practice in the country.

Senator DECONCINI. That is one of the things that disturbs me about the concept on the Federal level, that is, trying to implement it in the proper place that will give the most success. Some of the criticism is that we are just opening up another branch of rehabilitation or another part of the congested system that a lot of people will have to be referred to. They wonder if we are really improving the system. It is a question that I certainly do not have the answer for.

Mr. NEELY. Senator, would not the continuity of a project such as this actually be more assured in the case of an official who was appointed and had a higher authority to whom they were responsible than an individual who is elected?

For example, when you left the Pima County attorney's office, if somebody had been elected who did not support the diversion project, they could, of course, have abandoned it almost immediately.

Senator DECONCINI. Except the answer to that is this. In the sense of a campaign, you are questioned about it. The press questions you if you are, as a candidate, and will you, as an elected official, maintain

this good project whether it is diversion or consumer fraud or drug program or what.

So, you are put more on the spot from the standpoint of being elected, "By gosh, if I am elected to this office, I will keep the diversion program" or what have you.

When you are appointed to the job you may come in and you may feel, or be more apt to misuse it than you are when you are elected. The public expects it of you.

Mr. NEELY. I think this again may go back very much to the substance of the legislation. I think if the prosecutor's role in the Federal diversion project is clearly defined to a point at which the Justice Department supports the project wholeheartedly, then the chances of its success are going to be increased dramatically.

Senator DECONCINI. I think you are right.

Mr. LEONARD. Let me allude to your question you rhetorically pose regarding whether or not we are developing something new in the criminal justice system in terms of more bureaucracy. I think there is no question that you would be.

The real question is: Does it make it better?

I have to believe that from my experience it makes it much better.

One of the things, of course, that we are trying to do is to avoid this person going into the criminal justice system and avoiding the criminal record which we have been able to do. We have been able to do in it about 6,500 cases, as I said, in the last 13 years. This is a fact that I think you ought to consider for your bill.

If one of your objectives is to avoid the humanistic effort to avoid the criminal record for this person, then there ought to be some provision in there that requires the return of the criminal record, either by court order or otherwise.

We happen to have a statute in Michigan that requires if a person is not convicted of a crime that the individual can petition the court and the court can order that the records be returned. Some people say, "How can you force the records to be returned from the State police or the FBI?" Somehow it is done because we periodically checked to find out if, in fact, the police department shows no record for the individual.

Senator DECONCINI. What about the FBI?

Mr. LEONARD. If the FBI has a record on an individual, then they may keep it quiet and we do not know about it, but when we check we ask for a full check on the person. They do not know we are checking—or, they have no idea why we are checking.

Senator DECONCINI. If you ask for the rap sheet, you will get it from the FBI, even though you may have a court order telling you——

Mr. LEONARD. But we will not get it from a local level. That, of course, is the value of why we have the precharge, if possible, so we can avoid the printing and mugging of a person. But I think there ought to be a provision in here, at least to eliminate from the local and State level the record. If you ask the State or the local level for a police check, at least in our jurisdiction, they have not had them. They show clear. That is something you might consider for this bill.

That obviously makes the system better. If we are trying to eliminate the criminal record, then it makes the system better.

Also, you avoid the penetration. You avoid the cost of an individual penetrating the system.

Some people say, "Are we not creating expense over here with diversion?" You may very well be doing that, but there are other factors to consider. If you can utilize already existing community resources, which are already in place, and if they are not in place, you may have to create them, but there is another factor involved, which is the disposition of the criminal cases you feel should be tried, the so-called criminal as Mr. Neely mentioned.

We distinguish somewhat the criminal and the lawbreaker. When you have been in the business as long as you were, and Mr. Neely and myself, you can pretty well tell who the people are who are going to be troublemakers in the community in the future or who will create problems for you.

What we do is this. We feel that the people who should be tried are the violent offenders, the rapers, the robbers, the-murderers, the drug pushers, the public corrupted fraud people and so on, and organized crime and so on.

But with these other individuals out of the system, you can deal with those problems. Those are the kinds of problems I think the courts want to deal with. That makes the system better. We do not have to continually build more courthouses or add more judges and prosecutors to try individuals who probably will never commit another crime. Most of these people would be placed on probation anyway and will not commit other crimes.

What we have done is to avoid putting them in the system altogether.

Senator DECONCINI. Mr. Leonard, we thank you very much for your excellent presentation. We commend you once again for your leadership in this area.

Mr. Neely, we appreciate your presence also.

I would like to have placed in the record a letter from John Hornberger to this subcommittee providing further information on this proposed legislation.

In addition, I would also like to have a portion of the Congressional Record of June 30, 1977 placed in the record, dealing with S. 1819.

[Material follows:]

[From the Congressional Record (Senate), June 30, 1977]

BY MR. DECONCINI (FOR HIMSELF, MR. ABOUREZK, MR. KENNEDY, AND MR. THURMOND)

S. 1819. A bill to reduce the cost of operating the Federal criminal justice system, reduce the criminal caseload of the Federal courts, and establish alternatives to criminal prosecution for certain persons charged with nonviolent and, in selected instances, violent offenses against the United States, and for other purposes; to the Committee on the Judiciary.

Mr. DECONCINI. Mr. President, together with my distinguished colleagues from the Judiciary Committee, Senators Abourezk, Kennedy, and Thurmond, I am introducing the Federal Criminal Diversion Act of 1977.

The purpose of this legislation is two-fold. By establishing a diversion program at the Federal level, the criminal caseload backlog will be relieved and the overall functioning of our Federal courts will be rendered more efficient. At the same time, however, the purpose is also clearly humanitarian. Diversion is a viable

alternative to traditional prosecution and incarceration which has proved its effectiveness in reducing recidivism in most of the local jurisdictions where it has been adopted. Unlike parole, diversion establishes a specific plan of service, education, employment and psychological counseling prior to any action being taken on the charges filed. If the individual successfully completes the program, the charges against him are dropped and no criminal record remains.

My personal experience with criminal diversion during my tenure as Pima County Prosecutor has been uniformly positive. Both the community and the offenders responded very favorably, and the recidivism rate we experienced was negligible. It had the additional benefit of freeing the time of prosecutors to pursue serious offenders, thereby increasing the effectiveness of the prosecutor's office.

In recent years the effort to keep our country's judicial machinery running smoothly has been an ever increasing challenge. A tremendous case backlog has developed in the Federal court system. This backlog has mushroomed over the past decade to a point where in many courts—both at the district and appellate level—cases have been docketed for several years without a hearing. According to the 1976 annual report of the Director of the Administrative Office of U.S. Courts, in the past year the district courts have had an 11-percent rise in civil filings and a 17-percent rise in cases pending. The same pattern is also true for our appellate courts. There are no indications that this trend will reverse. Diversion will aid in clearing the backlog of criminal cases, thereby enabling prosecutors and judges to concentrate the full resources of their offices on more serious cases and, in addition, aid our courts in their effort to obtain current dockets in both criminal and civil cases.

Diversion is the voluntary use of supervision much like probation, for an individual who has been charged with a crime but has not yet been tried or convicted. It is designed to divert eligible persons who are accused of violating the criminal laws of the United States from the trial process.

As proposed in the Federal Criminal Diversion Act, diversion would work in the following manner:

First. At the time of arrest, or soon after, individuals would be screened to determine if they might benefit from diversion, an intensive program of supervision. Prior to these interviews, individuals with patterns of repeated criminal violations or assaultive and violent behavior would have been dropped from consideration.

Second. When a defendant has been found who would fit the program criteria, and treatment resources are available for him, the U.S. attorney would be asked if he would agree to a diversion period. If the U.S. attorney does not agree, the prosecution would continue in normal fashion.

If the U.S. attorney does agree, the individual would be asked if he would voluntarily participate in the program, which would include waving the statute of limitations and his right to speedy trial for a period of time. Defense counsel would play an important role here. The individual would agree to a plan for himself, which would include supervision, as well as such goals as learning a job skill, getting a job, attending school or college, and so forth. However, no defendant will be released to a diversion program until all persons injured by the offense for which he is charged have filed an agreement in writing with the administrative head of the diversion program in the district in which the case is pending.

Third. The U.S. attorney's recommendation and the individual's plan and voluntary agreement would then be presented to the committing officer of the U.S. court at the time of the bail hearing, or later. If agreed to, the criminal prosecution would be held in abeyance while the individual pursues his program.

Fourth. The individual's plan may be selected from the following types of diversion programs: Medical, educational, vocational, social and psychological services, corrective and preventive guidance, training, counseling, residence in a halfway house or other suitable place, rehabilitative services designed to protect the public and benefit the individual, restitution to victims of the offense charged, and/or uncompensated service to the community in which the offense occurred or to a community in the district in which the charge is pending.

Fifth. If the individual who has been diverted fails to live up to his agreement, or if he gets into further trouble or appears headed toward trouble, he may be immediately terminated from the program by the judge or magistrate in the case, at the recommendation of the U.S. attorney. In this case, the full criminal prosecution starts up again where it left off. The individual may also withdraw at any time, and prosecution would be resumed.

Sixth. If an individual lives up to his agreement, and if he is demonstrating a lawful lifestyle, the diversion period can be continued, up to a maximum of 1 year. If the individual successfully completes his obligations, he can have the charges against him dismissed. However, the U.S. attorney retains the power to resume prosecution upon a judicial finding that the individual has failed diversion.

The statistics of crime in America are inescapable. Crime has increased, and most crime is committed by recidivists—repeaters who are starting their second, third, or fourth trip through the criminal justice system. These statistics dictate that we seek new and effective ways of dealing with the people who commit crimes. Existing diversion programs throughout the country have proven themselves to be an effective tool in dealing with certain criminal defendants, and increasing the liklihood that they will return to a lawful life instead of a criminal life.

One of the purposes of this legislation is to put into the hands of prosecutors, judges and correctional officers in the Federal system an additional tool that will:

First Reduce the backlog of criminal cases in our courts;

Second. Decrease future court related costs and increase public safety by improving the chances that certain criminal defendants can be turned away from future crimes; and

Third. Reduce the expense to the taxpayers by providing rehabilitation services as job training and employment at a lower cost than incarceration.

In 1972 and 1973 the Senate conducted hearings on the subject of diversion. From these hearings and from reports on the results of diversion programs already in existence, I have reworked the original legislation and have introduced this bill, which I believe is a necessary major new direction for the Federal justice system.

The concept of diversion legislation has long been supported by the American Bar Association, the National District Attorneys Association, the Chamber of Commerce of the United States, the Judicial Conference of the United States and major national and Presidential commissions on crime and corrections.

In 1967, the President's Commission on Law Enforcement and Administration of Justice said that:

"Prosecutors deal with many offenders who clearly need some kind of treatment or supervision, but for whom the full force of criminal sanctions is excessive; yet they usually lack alternatives other than charging or dismissing. In most localities programs are scarce or altogether lacking; and in many places where they exist, there are no regular procedures for the court, prosecutors, and defense counsel to take advantage of them.

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended objectives for State and criminal justice agencies. The Enforcement Assistance Administration Standards and Goals project of the Law in the Department of Justice recommended that diversion be available at every step of the criminal justice process—through law enforcement agencies and courts, as well as correctional agencies.

The Standards and Goals report included the following statement about diversion:

"Each local jurisdiction, in cooperation with related State agencies, should develop and implement by 1975 formally organized programs of diversion that can be applied in the criminal justice process from the time an illegal act occurs to adjudication".

Mr. Chairman, the Department of Justice's recommended goal for Federal diversion programs was 1975. It is already 1977 and we are still without a Federal program. This legislation is designed to rectify that situation and to ease the overburdening of our courts. I urge my colleagues to give the Federal Criminal Diversion Act of 1977 their careful consideration and am hopeful that it can be enacted during this Congress.

I ask unanimous consent, Mr. President, to print in the Record at this point the annual report of the Pima County attorney's adult diversion project. I also ask unanimous consent to include the text of the bill.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 1819

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That this Act may be cited as the "Federal Criminal Diversion Act of 1977".

SEC. 2. Congress hereby finds and declares that the interest of operating the Federal criminal justice system efficiently, protecting society, and rehabilitating

individuals charges with violating criminal laws can be served by creating innovative alternatives to prosecution; that such alternative will reduce the criminal caseload of the Federal courts, and provide more effective and humane rehabilitation programs for eligible persons; that such diversion can be accomplished in appropriate cases without listing the general deterent effect of the criminal justice system

SEC. 3. As used in this Act, the term—

(1) "eligible individual" means any person who is charged with a non-violent offense against the United States, or a violent offense where no substantial physical injury to the victim occurs committed under circumstances such that it is reasonably foreseeable that the individual will not continue to commit violent offenses and where the violent act has been part of a continuing pattern of violent behavior, and who is recommended for participation in a Federal criminal diversion program by the attorney for the Government in the district in which the charge is pending.

(2) "Federal criminal diversion program" may include but is not limited to, medical, educational, vocational, social and phychological services, corrective and preventative guidance, training, counseling, provision for residence in a halfway house or other suitable place, and other rehabilitative services designed to protect the public and benefit the individual, restitution to victims of the offense or offenses charged, and uncompensated service to the community in which the offense charged occurred or to a community in the district in which the charge is pending;

(3) "plan" includes those elements of the program which an eligible individual needs to assure that he will lead a lawful lifestyle;

(4) "committing officer" means any judge or magistrate in any case in which he has potential trial jurisdiction or in any case which has been assigned to him by the court for such purposes; and

(5) "administrative head" means a person designated by the Attorney General as chief administrator of a program of community supervision and services, except that each such designation shall be made with the concurrence of the Chief Judge of the United States District Court having jurisdiction over the district within which such person so designated shall serve.

SEC. 4. The administrative head of each Federal criminal diversion program shall to the extent possible, interview each person charged with a criminal offense against the United States within the district whom he believes may be eligible for diversion in accordance with this Act and suitable for such program and, upon further verification by such head that the person may be eligible, shall assist such person in preparing a preliminary plan for his release to a program of community supervision and services.

SEC. 5. (a) The committing officer may release an eligible individual to a Federal criminal diversion program if he believes that such individual may benefit by release to such a program and the committing officer determines that such release is not contrary to the public interest. Such release may be ordered at the time for the setting of bail, or at any time hereafter. In no case, however, shall any such individual be so released unless, prior thereto, he has voluntarily agreed to such programs and he has knowingly and intelligently waived, in the presence of the committing officer and with the advice of counsel, unless counsel is knowingly and intelligently waived, any applicable statute of limitations and his right to speedy trial for the period of his diversion.

(b) In no case, however, shall a person charged with a criminal offense against the United States be released for diversion until all persons injured by the act or acts charged as offenses have filed an agreement in writing with the administrative head that the person charged may be so released.

SEC. 6. (a) The administrative head of a Federal diversion program shall report on the progress of the individual in carrying out his plan to the attorney for the Government and the committing officer at such times and in such manner as such attorney deems appropriate.

(b) In any case in which an individual charged with an offense is diverted to a program pursuant to this Act and such diversion is terminated and prosecution resumed in connection with such offense, no statements made or other information given by the defendant in connection with determination of his eligibility for such program, no statements made by the defendant while participating in such program no information contained in any such report made with respect thereto, and no statement or other information concerning his participation in such program shall be admissible on the issue of guilt of such individual in any judicial proceeding involving such offense.

SEC. 7. (a) In any case involving an eligible individual who is released to a Federal criminal diversion program under this Act, the criminal charged against such individual shall be continued without final disposition for a twelve-month period following such release, unless, prior thereto, such release is terminated pursuant to subsection (b) of this section, or such charge against such individual is dropped within such twelve-month period. Such charge so continued shall, upon expiration of such twelve-month period, be dismissed by the committing officer.

(b) The committing officer, at any time within such twelve-month period referred to in subsection (a) of this section, shall terminate such release, and the pending criminal proceeding shall be resumed, if the attorney for the Government finds such individual is not fulfilling his obligations under the plan applicable to him, or the public interest so requires.

(c) If the administrative head certifies to the committing officer at any time during the period of diversion that the individual has fulfilled his obligations and successfully completed the program, and if the attorney for the Government concurs, the committing officer shall dismiss the charge against such individual.

SEC. 8. (a) The chief judge of each district is authorized, in his discretion, to appoint an advisory committee for each Federal criminal diversion program within his district. Any such committee so appointed shall be composed of the chief judge, as Chairman, the United States attorney for the district, and such other judges or individuals with such district as the chief judge shall appoint, including individuals representing social services or other agencies to which persons released to a Federal criminal diversion program may be referred under this Act.

(b) It shall be the function of each such committee so appointed to plan for the implementation for any Federal criminal diversion program for the district, and to review, on a regular basis, the administration and progress of such program. The committee shall report at such times and in such manner as the chief judge may prescribe.

(c) Members of a committee shall not be compensated as such, but may be reimbursed for reasonable expenses incurred by them in carrying out their duties as members of the committee.

SEC. 9. In carrying out the provisions of this Act, the Attorney General shall—

(1) be authorized to—

(A) employ and fix the compensation of such persons as he determines necessary to carry out the purposes of this Act;

(B) utilize, on a cost reimbursable basis, the services of such United States Probation Officers and other employees of the Judicial branch of the Government other than judges or magistrates, as he determines necessary to carry out the purposes of this Act;

(C) employ and fix the compensation of, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, such persons as he determines necessary to carry out the purposes of this Act;

(D) acquire such facilities, services, and materials as he determines necessary to carry out the purposes of this Act; and

(E) enter into contracts or other agreements, without regard to advertising requirements, for the acquisition of such personnel, facilities, services, and materials which he determines necessary to carry out the purposes of this Act.

(2) consult with the Judicial Conference in the issuance of any regulations or policy statements with respect to the administration of any Federal criminal diversion program;

(3) conduct research and prepare reports for the President, the Congress, and the Judicial Conference showing the progress of all Federal criminal diversion programs in fulfilling the purposes set forth in this Act;

(4) certify to the appropriate chief judge of the United States district court as to whether or not adequate facilities and personnel are available to fulfill a Federal criminal diversion program, upon recommendation of the advisory committee for such district;

(5) be authorized to provide technical assistance to any agency of a state or political subdivision thereof, or to any non-profit-organization, to assist in providing programs of community supervision and services to individuals charged with offenses against the laws of any state or political subdivision thereof;

(6) provide for the audit of any funds expended under the provisions of this Act;

(7) be authorized to accept voluntary and uncompensated services;
(8) be authorized to provide additional services to persons against whom charges have been dismissed under this Act, upon assurance of good behavior and if such services are not otherwise available; and
(9) be authorized to promote the cooperation of all agencies which provide education, training, counseling, legal, employment or other social services under any Act of Congress, to assure that eligible individuals released to Federal criminal diversion programs can benefit to the extent possible.

SEC. 10. For the purpose of carrying out the provisions of this Act there is authorized to be appropriated for the fiscal year ending June 30, 1978, the sum of $3,500,000, and for fiscal years 1979, 1980, and 1981, $3,500,000 each year.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., July 7, 1977.

Mr. TIMOTHY K. MCPIKE,
Deputy Counsel, Subcommittee on Improvements in Judicial Machinery, U.S. Senate, Committee on the Judiciary, Washington, D.C.

DEAR MR. MCPIKE: Thank you for permitting us to review this proposed legislation. Some comments by Mr. Donald L. Chamlee, Assistant Chief of Probation, are enclosed.

We also call your attention to H.R. 5792 which is presently pending.

We have included a copy of Public Law 93-619 and refer you to Title II which describes our pretrial services project. The accompanying material was received from districts involved in it.

A quick check on the use of deferred prosecution nationwide during the past 3 years reveals a continually significant increase as follows:

	Number
Cases received (fiscal year):	
1976	1,711
1975	1,143
1974	977
Cases under supervision as of June 30, 1976 (fiscal year):	
1976	1,763
1975	1,259
1974	1,063

We hope this has been of some help. We are looking forward to seeing you on Monday, July 11.

Sincerely,

JOHN E. HORNBERBER,
Pretrial Services Specialist.

Senator DECONCINI. At this time, the subcommittee will stand in recess until Friday next at 9:30.

[Whereupon, at 12:15 p.m., the subcommittee stood in recess.]

THE FEDERAL CRIMINAL DIVERSION ACT OF 1977

FRIDAY, JULY 15, 1977

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 8:50 a.m. in room 2228, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Present: Senator DeConcini.

Staff present: Romano Romani, staff director; Robert Feidler, counsel; Timothy McPike, deputy counsel; and Kathryn Coulter, chief clerk.

Senator DECONCINI. Good morning.

This is a continuation of the hearings by the Judicial Machinery Subcommittee of the Judiciary Committee.

Today is the second day of hearings on S. 1819, the Federal Criminal Diversion Act.

These hearings will be followed by further hearings in September to be scheduled at a later date.

Today's witnesses will be Mrs. Madeleine Crohn, director of the National Pretrial Services Resource Center. Mrs. Crohn has been involved in the pretrial diversion field, first as a member of the New York court employment project and then as director of the resource center, for over 7 years.

A further witness will be Gordon Zaloom, an attorney now in private practice who has been involved in diversion in New Jersey for many years and was instrumental in the adoption of the court rules on diversion by the New Jersey Supreme Court.

We are very pleased to have Harry Connick, district attorney for the Orleans Parish in New Orleans, La. Mr. Connick has instituted a very successful program on the county level under his prosecutorial discretion without judicial or legislative involvement.

Debbie Jacquin, director of the Pima County adult diversion project, who was scheduled to testify today, was unable to attend due to family illness and will be rescheduled for September.

Mrs. Crohn, would you please come forward and testify. We are very pleased to have you and thank you again for your involvement and your interest in this subject matter.

We will put your statement in the record in full if you care to summarize it, or bring whatever you would like to our attention.

Mrs. CROHN. Thank you. That's just what I was going to do.

[The prepared statement of Madeleine Crohn follows:]

Mr. Chairman and members of the Subcommittee, I wish to thank you for inviting me to testify on the Federal Criminal Diversion Act of 1977 (S. 1819). Before I review the Bill in detail, allow me to make a case for diversion.

1. The Issues

This ageless concept, rediscovered and much touted in the sixties, has legitimately come under attack. One of the more devastating indictments was made by Professor Daniel Freed in his 1974 testimony on S. 798 and H.R. 9007 which also proposed to enact diversion at the federal level.

In his wisdom, Professor Freed foresaw that many of the problems and questions of diversion would not be resolved or answered for several years. Three years later, we are indeed still pondering some of these same issues. Does diversion affect recidivism? Does it give the prosecutor too much control? What is the best method to deliver services? Does diversion reduce the court's caseload, thus allowing the criminal justice system to concentrate on the more serious cases? Doesn't diversion lead to yet another form of "stigma", paralleling some of the shortcomings of the juvenile justice system?

But in these three years, we also have learned much. Diversion like the tongue in the Aesopian fable can be the best thing or can be the worst thing. First of all, one must decide what diversion is supposed to accomplish and how it should be defined. Immediately we are faced with a multiplicity of definitions and purposes.

This Bill, fortunately, adopts one of the more classic definitions of diversion, i.e.: as an alternative, at the pretrial stage, offered to defendants on a voluntary basis, after the defendants have been charged, and which can lead to a dismissal of charges through participation in services. Many other models of diversion exist and, indeed, do have their legitimate purpose if set within guidelines. But we have learned that the term diversion has been applied to vastly different concepts and some evaluations have compared totally different approaches. No wonder the findings are often vague and contradictory! To wit, the proliferation of Standards applicable to diversion and adopted by the American Bar Association, the National Legal Aid and Defenders Association, the National District Attorneys Association, the National Association of Pretrial Services Agencies, to mention just a few.

We also discovered that over enthusiastic claims have deeply hurt the diversion concept. Imagine the proposed task: to reduce crime and help the courts and protect the community and successfully reintegrate an often indigent, disenfranchised segment of the population into a "productive lifestyle." In other words, a panacea . . . To be measured against such a vast undertaking is a setup for failure on some if not all counts. I submit to you that depending on their orientation, diversion programs have sometimes impacted on one or the other parts of that task. But, I further submit that diversion's real purpose lies elsewhere, as I will develop in a few moments.

We have also learned something else. The diversion concept was implemented at a time when belief in the need for research and evaluation was also at its peak. As a result, the diversion filed is one which has accumulated more data and undergone more scrutiny than almost any other area of the criminal justice system.

"Because diversion is new, and in some jursidictions still suspect, the costs of a diversion activity are scrutinized more closely than many traditional criminal justice activities." [1]

When one wishes to compare the relative merits of the diversion alternative with the more traditional approaches, little information on the rest of the system allows for such analyses. Yet as confirmed by Stuart Adams in his summary of findings completed in 1975.[2] Indeed some studies suggest that defendants who went through the diversion process regress less often than defendants who didn't' Other studies indicate that defendants do better while in the diversion process, although it is unclear whether such effects remain after program completion. The problem, however, is that most of the studies have been, "at least moderately crude in design and execution so that the careful reader comes away from the evaluative reports feeling some lack of credibility in practically all the reports." [3]

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[1] A. Watkins, "Cost-Analysis of Correctional Standards-Pre-trial Diversion," (National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, V. 2, October 1975, p. 60).

[2] Evaluative Research in Corrections: a Practical Guide, Stuart Adams, PhD—March 1975. U.S. Dept. of Justice (NILE, LEAA), p. 63.

[3] Evaluative Research in Corrections: a Practical Guide, Stuart Adams, PhD—March 1975. U.S. Dept. of Justice (NILE, LEAA), p. 63.

This leads to the following assessment: diversion seems to work in some cases, although it is currently impossible to determine to what extent or to verify it accurately vis a vis other parts of the system. On the other hand, no study has yet proven, one way or the other, that diversion fails or that it does not meet some of its claims.

"* * * the quasi experimental and experimental studies were in general agreement that pretrial diversion programs reduced recidivism rates among successful participants, improved the job status of the participants and produced benefits in excess of project costs."

We erred in thinking or leading anyone to think that diversion could be a panacea. And we erred in condemning diversion simply because the definitive study discrediting diversion has not yet, if ever, been produced. This is not to suggest that research and evaluation of specific programs should not be undertaken. Quite the contrary. Some highly relevant studies are presently under way. The Vera study of the Court Employment Project and the study of juvenile diversion programs recently funded by the Office of Juvenile Justice and Delinquency Prevention follow some of the stricter research methodologies and their results should be eagerly awaited. However, another word of caution is in order: if diversion programs are based on unrealistic claims, or deal with the wrong cases (for instance, cases which fall in the "overreach" category), should the findings negate the diversion concept as a whole?

2. Possible Benefits and Their Parameters

I think not. Diversion has its place *within* the criminal justice system, a limited one, cautious one, but a definite one.

A. PURPOSE

Let us think back, for a moment, about this system or non system as some have called it . . . Let us not forget that:

"Except possibly for political prisoners in totalitarian states, no other country in the world metes out such harsh punishment to its offenders. On January 1, 1976, the United States had an imprisonment rate of 215 per 100,000 population, the highest in the world, and still rising. The length of sentence for an offender in the American criminal justice system is several times longer than that of his counterpart anywhere else in the world." [4]

This is in a country where we are led to believe that a soft, rehabilitative approach is predominant and has failed to stop crime. Let us remember also that, for every study which purports to find that the possibility of sentencing or imprisonment has a deterrent effect, one can find another study which negates those findings. Thus the public, legitimately scared by the more visible aspects of crime, finds a new panacea—"punishment", "dealing more harshly with criminals". It would be an understatement to say that we cannot forget how limited this "solution" has been over the years.

Against this backdrop, the basic and fundamental philosophy behind the diversion concept should be remembered:

It is an agreement by representatives of the public that when a crime has allegedly been committed, the apprehended indiviudal will not be punished but that society will, instead, take the gamble of providing the individual with better tools to survive in the hope that in the process this person will be less prone to commit crimes.

In my mind, diversion is as simple and unambiguous as that. It is a matter of fundamental choice.

I think it must also be made explicit that it is not the purpose of diversion to redress some of the inequities of the system, although this may occur as a by-product. Diversion may be more relevant to the lower socio-economic groups because they constitute the greatest number of arrestees, are more frequently sentenced, and are the most easily cycled into the "revolving door of crime." But, the diversion option should not exclude more affluent individuals represented by private counsel who may benefit from the absence of a record or from an opportunity to stop the cycle of criminal involvement.

If we do not opt for diversion, what do we have? Unless it is a bad arrest or unless the charge would be quickly thrown out by an overburdened court (in either case the diversion option should not even be considered) the individual will

[4] Eugene Dolehal, as reproduced by the Criminal Justice Newsletter, Col. 7, Vol. 18, 9/13/76.

possibly be tried, generally take a plea, be placed on probation or otherwise sentenced. Does society benefit? Don't we know that the individual coming out of prison will have a very hard time re-integrating into society? And don't we know that the person placed on probation generally continues to be disenfranchized, receives relatively little support and mainly tries to "beat the system"?

Instead, doesn't it make sense to deliver individual attention and good services to people who would have otherwise been prosecuted and who know it? In this way the messages of opportunity as opposed to punishment are not confused. Is it not common sense to ask where motivation has a better chance to develop? Is it within a system where the individual, perhaps with justification, feels s(he) has been shortchanged or one where s(he) is told, "The opportunity is yours and we will help"?

Will this approach succeed in all cases? Obviously not. Should it be applied to everyone? Of course not. This is where the interaction of good research and societal standards comes into play.

B. RECIDIVISM

Will diversion reduce crime? We can be cautiously optimistic that it will. Will it "significantly" impact on crime? Probably not. *But I submit that many other factors contribute to crime which are beyond the jurisdiction of the courts or of the alternatives.* Further, I would also suggest that these alternatives will *not* increase crime.

C. COSTS

This leads to another concern expressed about diversion. What will the cost be? The Watkins study mentioned above and which I would like to refer the subcommittee to, stresses the difficulty in obtaining definitive cost benefit answers. We know, however, that the ways in which the diversion concept is applied will affect the cost element.

One needs little research to understand that diversion with services will be more costly than the traditional approach to case disposition if it is used in those cases that would otherwise be quickly expedited by the court through an outright dismissal or through conditions less restrictive than those of diversion.

On the other hand, findings from the Atlanta diversion program [5] for instance exemplify that savings do occur if the majority of diverted individuals would have otherwise gone to trial or been convicted. Diversion costs then favorably compare with the costs of multiple hearings, presentence memoranda and investigation, representation, and sentencing. It stands to reason that the cost benefit aspect of diversion is even more appealing if (1) the diversion program has the flexibility to approach each defendant in an individualized manner and to provide no fewer but *no more* services than those needed by the defendant, and (2) as long as the period of enrollment in the program is equal to or shorter than the sentencing that would have been received had the individual been convicted of the alleged crime.

In view of the above, the applicability of diversion appears even more favorable in Federal than in local courts, since the ratio of prosecutable cases leading to conviction seems proportionately higher in the Federal system.

D. COURT CASELOAD

Can the diversion process significantly unburden the courts? Yes, there is some relief for the court when the diversion alternative requires less of the court's attention than would normal processing. But there again, a word of caution is in order. We have learned that diversion disregarding the defendant's rights can be easily challenged. After all, the defendant has been arrested and charged, but is still presumed innocent. Whether, in reality, the majority of those defendants actually committed some crime is constitutionally irrelevant. The following questions must then be raised. How arbitrary, controlling or involuntary can the diversion option be? And what is the possible stigma for a defendant that "fails" to take advantage of the systems offer of "a second chance"?

Because due process and equal protection under the law are vested with the judiciary, court review of the critical points of enrollment, dismissal recommendation, and termination appears necessary to safeguard defendant's rights. Therefore, it is only in those cases where deep involvement in the court system is probable and where several court appearances would have been necessary that the test is met. In these cases diversion will save some time for the court. This will

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[5] A. Watkins, cited supra, p. 20.

not be true when the diverted cases would have otherwise been expeditiously handled by the court.

Another aspect should also temper this expectation of unburdening the courts. Unless the number of cases appropriately diverted reaches significant proportions, the court calendar will not be visibly affected.

These perspectives on the appropriate application of diversion guide my review of the proposed Bill. I think that this Bill should be highly commended because of its careful consideration of the various issues which have been raised by the diversion concept. However the Bill in its present form is still vulnerable in ways which could affect the Bill's valid and expressed purpose.

Let me preface my remarks on the Bill by indicating that a more thorough analysis of the key issues can be found in the Performance Standards and Goals which are presently being developed under a grant awarded by the Law Enforcement Assistance Administration to the National Association of Pretrial Services Agencies. I have participated in the development of these Standards for almost a year. I have attached the Standards in their present draft form to my testimony for your information. The Standards are scheduled to be completed and published by the end of the summer. The position which I advocate also stems from seven years of experience as a program administrator with the Court Employment Project in New York City, a diversion program which operates in the local criminal courts.

What, in my mind, makes the Standards of particular value, is that they analyze and comment on the diversion-related standards developed by other organizations. Furthermore, they incorporate the results of a careful review by over 350 participants at a recent national conference on pretrial services. These participants included pretrial administrators from all over the country as well as judges, district attorneys, defense counsel, and other representatives of law enforcement. In their final stage of development these Standards will be submitted for the third time to selected individuals representing each facet of the criminal justice system. These Standards constitute a solid philosophical and practical base for diversion. Our intention is also to continue to update them as new findings or developments occur. And it is my strong belief that most of the principles outlined in the Standards can and should apply to diversion in the Federal system.

1. General Review of the Bill

In keeping with these Standards, I support the definition of diversion as conceptualized in the Bill. It clearly defines the diversion option and distinguishes it from other alternatives offered post-arrest and precharge, following a plea of guilt or at sentencing.

The Bill is also careful to—

Characterize the diversion option as voluntary;

Avoid the labeling of divertees through implications of automatic guilt (i.e., by using the language "eligible individual" as opposed to "offender", "alleged crime" as opposed to "crime," etc.); and

Protect the confidentiality of information resulting from the interaction between program and divertee.

In its attention to the above, the Bill avoids many of the attacks that have been levelled against diversion programs by civil libertarians.

The Bill also does a commendable job in suggesting a flexible approach to the delivery of services and to program implementation. These are aspects of diversion that appropriately should be assessed in each jurisdiction.

Another noteworthy section limits maximum program participation and allows for individualized program duration. This, unfortunately, is too rare in local programs.

And finally, the Bill attempts to carefully balance the most difficult separation of power between the prosecution and the judiciary as it relates to diversion.

These areas encompass some of the more important issues which need to be addressed by the diversion concept. However, some need to be stressed further while others need to be modified.

2. Suggested Changes

A. PURPOSE

I would start with the expressed purpose of the Bill and suggest that a reduction in the cost of operating the Federal criminal justice system, and in the criminal caseload of the Federal court, while probably by-products of diversion, should be

considered exactly as such: by-products, not the essential objective. In addition to referring you to my comments above, I would like to stress that the "success" or "failure" of diversion within the Federal system should not be judged through those indices. The purpose of diversion lies elsewhere.

By that same token, the Bill should not raise unrealistic expectations of a significant reduction in recidivism for diverted defendants. A more realistic and, nevertheless, justifiable approach is to consider whether diverted defendants commit less or no more crime through an approach which is less or no more costly than the traditional system.

Research is of particular importance in this area. If the alternative is no more costly and no more "crime inducing" than the other approaches, the diversion option should be no less desirable than any other.

B. TERMINOLOGY

In its present form, or in subsequent rewritings, the Bill should take into consideration some additional or changed definitions and terminology:

Diversion programs should not "rehabilitate". Webster defines rehabilitation as "restoring to one's former state." Which former state? I propose that the terms "rehabilitation", "treatment" (are the divertees sick?) and "behavioral modification" are misused and should be abandoned.

Their careless use in diversion terminology has negative implications for the divertee and offers another form of stigma, a stigma not that different, in the long run, from that of more traditional processing. Remember the parallel experience with juvenile offenders.

In reality, diversion programs by the very nature of their short term approach can only deliver services and support the divertee in the use of those services. The terms "service plan" and "service delivery" appear more appropriate to the concept under review.

"Successful termination" and "unsuccessful termination" should also be clarified. We know by experience that "failure" to complete the diversion program sometimes adversely affects the defendant remanded to court, even when agreement with the court specifies that no such prejudice to the case will result.

I submit that programs have and will continue to be responsible for or "guilty" of the defendant's "failure" as frequently as is the defendant. Although there is no easy solution to this issue, the problem should be not re-enforced by negative terminology. Allow me to suggest instead:

"Program completion" to indicate that the service contract has been fulfilled and dismissal of the charges is recommended/granted.

"Non-completion of the program" either because the divertee requested that the case be remanded to the court process or as a result of a decision by the program, prosecutor, or judge.

Finally, "committing officer" strikes me as unfortunately reminiscent of commitments to jail or mental institutions. "Determining "officer seems more appropriate as in "to determine: to fix conclusively or authoritatively", to settle or decide by choice of alternatives or possibilities" (Webster).

C. STRUCTURE

I also wish to review some issues raised by the structure and implementation of diversion as described in the Bill:

(1) Starting with the more problematic area, i.e. division of power and responsibility between the prosecution and judiciary, I would suggest the following changes—

That guidelines be developed that spell out the types of charges and conditions attached to eligibility for diversion, leaving to each district the opportunity to further refine the guidelines;

That the guidelines once agreed upon by the prosecution and the judiciary with input from other appropriate parties (i.e., administrative head, defense counsel, etc.), enable the administrative head or his/her designee to screen cases in that jurisdiction. There are many advantages to independent screening as opposed to referral by the prosecutor: It protects the prosecutor against possible charges of overlooking or discriminating against some cases; it saves the prosecutor time; it does not negate the prosecutor's ability to object to the diversion option; and it protects the defendant and his/her counsel who might not have been aware that the diversion opportunity existed.

After the prosecutor has decided to charge the defendant and agreed to defer prosecution and until prosecution is resumed in the case, much of the administration of the diversion option closely resembles the function of the judiciary. The "committing officer" or, as I suggested above, the "determining officer" should be involved: at the time of program entry to verify that the interest of justice is preserved and to ensure the defendant's due process rights have been observed; to grant dismissal of charges when the agreed upon service plan or "contract" has been fulfilled and to verify that due process is preserved at such time when the defendant is remanded to court.

As remarked in the December 1974 Report prepared by the Subcommittee on Elimination of Inappropriate and Unnecessary Jurisdiction in New York:

"* * * if one accepts the rationale of the *On Tai Ho* decision that diversion is in essence an alternative method for disposition of the original charge, the court should be the ultimate authority in determining the final outcome of participation in the diversion program" * * * when the jurisdiction of a court has been properly involved by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility." [6]

And as further commented by the Subcommittee, "having established the diversion alternative and offered it to the defendant, basic fairness requests that the defendant be granted an opportunity to be heard and defend his conduct before he may be terminated from the program."

For these reasons, I would like to suggest that the prosecutor and defense counsel should be an integral part of decision making re: eligibility criteria and verification of adherence to stipulated conditions but that administrative head of the diversion program directly report to the Chief Judge of that district or his/her designee. The Chief Judge and his/her designee should be vested with the responsibilities described in Section 9.

As a side comment, I would also suggest that the Advisory Committee described in Section 8(a) be modeled after the Board of Trustees outlined in the Speedy Trial Act of 1974 and include the Administrative Head, Public Defender, and Chief of Probation for that district.

(2) While the spectrum of charges eligible under the Bill is commendable broad, it should be further defined by a statement similar to that included in the US Attorney General Manual (Pretrial Diversion Program, p. 3, 1/76) i.e.: ". . . may divert any individual against whom a *prosecutable* case exists" (my underline)

This proposed addition is important for the following reasons. Diversion programs have too often been accused of being a "dumping" ground for cases which could not be easily prosecuted. I reviewed earlier the costly aspect of these practices which is not to mention their legal and ethical implications. Such practices also have had an ironic by-product. When these cases are returned to court (following non-completion), prosecutors are then in the unenviable position of persuing these cases in court, a task which is by then almost impossible. As a result, they then sometimes view diversion as having hampered their ability to prosecute.

Along these concepts, eligibility guidelines should exclude cases which, in that particular jurisdiction, would receive a speedy disposition and/or less penetration in the system than the diversion option would afford, a mandate which should be spelled out in the Bill.

(3) Under the format proposed by the Bill, agreement to restitution or to perform uncompensated services should not be a condition of eligibility or participation. The diverted individual is still presumed innocent, and agreement to such a clause could be construed as admission of guilt or of moral obligation. This would adversely affect the defendant's case if remanded to the court process. Further disadvantages are operational (the diversion program then becomes a collection agency) and legal (indigent defendants may be discriminated against and/or unable to complete program obligations). Uncompensated services, on the other hand, raise the issue of possible violation of the Thirteenth Amendment (involuntary servitude).

It is true, on the other hand, that restitution or a token form of restitution may have some reformative aspects and therefore be advisable in devising service plans for divertees and in helping them to better comprehend the general circumstances of effects of their behavior. Restitution however, should be considered in

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[6] "Diversion from the Judicial Process: An Alternative to Trial and Incarceration." Prepared by the Subcommittee on Elimination of Inappropriate and Unnecessary Jurisdiction of the Departmental Committee for Court Administration of the Appellate Divisions, First & Second Dept., New York State Supreme Court, 1975, p. 93 and 94.

the context of the service plan, rather than in the ambiguous and possibly non-negotiable way reflected in the Bill.

(4) Another section of the Bill contradicts its otherwise general concept of presumption of innocence, i.e., in Sec 3.(1), "* * * that the individual will not continue to commit violent offenses * * *"

The word continue should be deleted, since it implies that violent offenses were committed in the past.

(5) The Bill appropriately stresses that enrollment in diversion should be voluntary and that defense counsel should help the defendant in making that choice. This is in keeping with legal precedents establishing the right of counsel at all critical stages of the criminal justice process.

Some additions are suggested, however, to further re-enforce the non-coercive (subtle or otherwise) aspect of the alternative. For instance, the diversion option should be presented to the defendant after the decision of releasing the defendant has been made.

(6) For practical as well as legal reasons, Section 5 (b) requiring the agreement of the injured to the diversion, should be striken. The practical aspect of enforcing the mandate suggested appears in some situations impossible (for instance, mail thefts). Further, the criminal justice system in this country does not vest the police officer or the victim with the privilege of direct prosecution. The effect of Section 5(b) would be as described in a monograph published by the American Bar Association:

"* * * It makes the fate of an otherwise eligible defendant dependent on the unfettered exercise of the subjective discretion of individuals who never have had the constitutional authority to determine which individuals are to be charged once an arrest is made" [7]

The practice of informing the victim(s) and police officer(s) that the diversion option is being considered by the prosecution and allowing them to present additional facts or opinions which might alter the prosecution's decision is, on the other hand, appropriate.

Perhaps the legislative history rather than the Bill itself could include a review of the desirability of involving the victim in some manner.

(7) While the proposed flexibility for period of program participation with a maximum limit appears to be the best formula, additional provisions are recommended.

The length of sentence that would be imposed if the defendant was convicted of the charge should be considered when determining contractual agreements and length of participation in the diversion program. Failure to do so further reduces the possibility for diversion to be cost-effective and "widens the net" of social control over the defendant. This format is complemented by the wise provision made in the Bill (Sec. 9 (8)) i.e.: that the former divertee have access to follow up services if and when such services are not provided for in the community.

(8) It is recommended that, in addition to the prosecutor and/or diversion program remanding the defendant to the court process, the divertee also be afforded the option to choose to be remanded to the court.

And, as mentioned above, when noncompletion is initiated by others than the defendant, a hearing should be accessible to the defendant.

(9) Finally, the best guidelines or parameters for the diversion option are useless if not backed up by good service delivery.

Reminiscing for a moment, the early days of diversion were a time when naivete and ignorance were predominant and when the "dangers" of diversion were not yet formulated. Nevertheless, there was a "pioneer" spirit, for lack of a better word with which to describe the communicative enthusiasm of diversion staff members as they worked with their clients. It may have been ineffective, and I know of no research which validates this impact. The notion should, however, be entertained.

First, and foremost, diverted defendants need skilled, knowledgeable guidance counselors. But also, for diversion to make a significant impact where other social services may have failed in the past, they should be different. The one on one ratio should exist. Caseloads should be limited to a manageable size. A minimum number of meaningful contacts should be mandatory and determined by the needs of the defendants, not because the program must prove an ever more demanding cost effectiveness.

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[7] *Pretrial Intervention Legal Issues: A Guide to Policy Development* Pretrial Intervention Service Center, American Bar Association, February 1977, p. 15.

Although the theory has evolved that in some situations diversion without services may be as beneficial as diversion with support, until we know if indeed, or to whom this concept applies, we should verify that services are delivered with the utmost care.

This is why the probation department, for instance, although attractive from a cost benefit point of view, should not be charged with the responsibility of diversion. When considering the establishment of ten pilot Pretrial Services Agencies, the Senate indicated:

"Many federal judges are hesitant to permit probation officers to get ahead start' between the definitional role of the probation officer, as a representative of court administration associated with punishment and the constitutional presumption of innocence. The application of that practical difficulty here leads to the conclusion that this hesitancy, plus potential resentment that may arise on the part of the defendant to be so classified before a determination of guilt or innocence, may not only impede the probation officer in the performance of pretrial tasks, but also may defeat the purpose of such services altogether."[8]

These remarks still hold true, and the orientation of service delivery to pretrial defendant *cannot* sustain a presumption of guilt. Although many programs in the pretrial field have been assigned to the probation department, this has been done in disregard of a history which suggests that the responsibility is misplaced. I would not want my remarks to be misconstrued as a negative reflection on the probation department, which includes many capable and dedicated professionals faced with an often impossible task. But a probation officer's first responsibility is to assist the courts in dealing with convicted individuals. When priorities conflict, this primary orientation will surface.

An example can be found in the difficulty the probation department had in handling the pretrial release function in New York, a function which had to be returned to an independent agency.

Another example exists right now with the federal pretrial pilot programs. There is, approximately, a 10% differential detention rate between probation run and board run districts. Several of the probation run districts utilize the concept of total supervision in violation of the Bail Reform Act. And I would venture that findings from the General Accounting Office presently reviewing the pilot experiments will support this viewpoint.

The formalized diversion process is still too new and easily swayed to take the chance of being possibly deflected in its purpose. It required relatively unbureaucratic agencies capable of flexibility in design, staffing and methodology. Such formulas also offer the advantage of having less overhead expenses and generally end up being cheaper.

In addition, and regardless of the format adopted, guidelines applicable to a diversion program should verify that:

The creation of another layer of expensive and self-serving bureaucracy is avoided. Strict guidelines are suggested mandating that if and when local agencies exist, their services not be duplicated within the diversion program. The ability to subcontract with those agencies should be permissible to the diversion program.

No diversion program exists without a core staff coordinating the service plan and possible referrals. What differentiate diversion programs from other social services agencies (and what diversion programs too often forget) is that the diverted individual is faced with an open court case. All divertees have one thing in common, their arrest. The legal implications in the delivery of services and the nature of the target population should always be considered in the administration of diversion.

In summary, diversion at the federal level has validity under the definitions proposed in this Bill, as long as:

Careful mechanisms are set to make the alternative truly voluntary for the defendant and respectful of the defendant's rights;

Selection criteria are defined and implemented in a way which precludes overreach;

Services are offered which respect the presumption of innocence, are individualized, and not more lengthy than sentencing would be if the defendant was convicted; and

Evaluation mechanisms are set to verify the above and to test any other claims made by diversion, as long as these claims are reasonable and realistic;

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[8] Senate Report No. 93-1021, 93d Cong., 2d sess. (1974).

I would further suggest that:

(1) Pilot jurisdictions be selected to implement and test diversion at the federal level. The budget allocated in this Bill does not provide for implementation of diversion in all districts. The pilot formula would enable the legislature to verify whether the concepts should be expanded.

(2) Pilot jurisdictions include those where Pretrial Services Agencies have already been established, thus enabling those agencies to function, at a minimum, as screening departments

(3) The analysis of effectiveness of the ten Pretrial Services Agencies, being presently conducted by the General Accounting Office, be considered and guide the final draft of the Bill

(4) The necessary amount of monies be included in the budget of some, if not all, the pilot jurisdictions for in-depth research of the diversion option at the Federal level.

Too often the credibility of research has been affected because: "Evaluation tended often to be 'tacked on' with a part time consultant brought in after the start of the project to 'conduct an evaluation'." [9]

If this Bill is enacted, and if monies are appropriated, a golden opportunity exists to do "things the right way". If not, the legislature will not be in the position to make an enlightened decision when the pilot phase ends and, once again, an opportunity to assess the viability of diversion will have been missed.

The research design should incorporate the experience gained through the Vera research of the Court Employment Project in New York City and any other similar experiment, and be able to test:

(*a*) Whether diversion has the desired impact, and

(*b*) The effectiveness of different service delivery options

The experiment should include:

(1) An experimental group made up of diverted defendants, possibly subdivided between defendants receiving services and defendants diverted without services or subdivided into two experimental groups receiving different types of services.

(2) A control group chosen through assignment based on equal probabilities. While the development of a control group raises the issue of equal opportunity, it is foreseeable that the diversion programs in their pilot phase would not be able to service all eligible defendants and that the overflow could then justifiably be included in the control group.

Further, the experiment should use variables, definitions and measurements developed by professionals doing research in the diversion field. These variables should include recidivism/rearrest, employment and cost benefit measures. Follow-up on client outcomes for a suitable period after the client completes that program is necessary.

And finally, the experiement should: (1) Provide data and information a regular basis before the project is completed to enable the administrative head and other administrators of the diversion program to make appropriate programmatic changes; and (2) be conducted by a contractor with no vested interest in the outcome of the experiment.

Mr. Chairman, I wish to thank you and the other members of the Subcommittee for your time and interest.

STATEMENT OF MADELEINE CROHN, DIRECTOR, PRETRIAL SERVICES RESOURCE CENTER, WASHINGTON, D.C.

Mrs. CROHN. Thank you, Mr. Chairman.

It is a great honor to be here, and I thank you and the members of the subcommittee for inviting me to testify on the proposed Federal Criminal Diversion Act of 1977.

My written testimony was an abbreviated version of the many issues that I think should be brought up and reviewed when one considers the diversion concept.

So the summary of my summary which I would like to give I hope will not totally lose clarity.

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[9] Stuart Adams, cited supra, p. 64.

First, I would like to say that the proposed bill should be highly commended. I think that it carefully considers some of the difficult problems which have been raised by diversion. But I also think that the bill in its present form is still vulnerable in areas which could affect the bill's stated purpose.

Before making specific recommendations for changes, allow me first to suggest that the diversion concept, despite the many challenges that it has undergone over the last few years, is a valid one.

It is true that many questions are still unanswered, but I think the findings do show that diversion, in some cases, seems to work.

While it is still impossible to verify the extent to which it works and how it measures and compares with the rest of the system, I think that there is no study that has proven that diversion fails or that it does not meet some of its premises or claims.

I am thinking a little bit about the bill as I make those comments.

I think some of the original premises may be due to some unrealistic expectations and should be abandoned.

I would submit that the essential purpose of diversion is not to reduce the court's caseload, not to reduce crime, and not to reduce costs.

I think that as long as diversion does not increase costs or crime or the caseload, its real function is to offer a choice. I think its function is to give society a choice not to punish certain people who have been apprehended for a crime that allegedly was committed. I think it also offers society a choice to make the agreement that they will allow this individual to be provided better tools to survive, hoping as a result, that person will be less prone to commit crimes.

I tlink we shouldn't forget that in this country that is contrary to popular belief. Offenders are treated more harshly than almost in any other country which is not totalitarian.

We have generally found that deterrence of going through the system, while something which works, there are many studies which show that it doesn't.

I think we know that people who have gone through jail have a very hard time coming back into society, which ultimately in most situations they will have to do. People who are placed on probation very often remain disenfranchised and continue to try to beat the system or "get over."

So I would submit that, of course, not for everybody and not in every situation, there is at least a possibility to provide a situation where motivation has a better chance to develop.

Another way of putting it is: Where does motivation have a better chance? In a system where the person continues to be desinfranchised and when he tries to outsmart, or in a system where they are told this is their opportunity and we're going to help them?

As far as determining who is eligible for diversion and for that kind of alternative, again, good research on the one hand and societal standards on the other have to come into play.

It is with those kinds of concerns in mind and this kind of understanding of diversion that I would like to review this bill.

Many of the remarks which I will make are discussed in much further detail in the "Standards and Goals for Diversion," which I would respectfully urge the subcommittee to also condiser and possibly include in the record.

Those standards are being developed by the National Association of Pretrial Services Agencies under a grant from the Law Enforcement Assistance Administration. They do represent the position that I will try to advocate.

In keeping with the standards, I would support the definition of diversion as it is outlined throughout the bill. I think it very clearly separates that concept of diversion as opposed to other alternatives that occur at other points in the system.

I think the bill should also be commended for verifying that the diversion option is voluntary, that negative labeling of the defendant is avoided, and for protecting the confidentiality of information as it comes from interaction between program and defendant.

Also crucial and well reflected in the bill are flexible approach to service delivery, allowance for individualized program duration and maximum program duration, and careful balance between the separation of power between prosecutor and the judiciary.

I think those areas really touch on some of the most important issues which concern diversion.

However, I would like to make the following recommendations:

First, and in keeping with my previous remarks, I would propose that the bill avoid suggesting that its primary purpose is to reduce court costs or caseload of the Federal system or to significantly reduce crime.

More important even, I think, than the success or failure of diversion at the Federal level if it is implemented is that it should not be measured through those indices.

As long as diversion is no more costly and no more inducing of crime than the other alternatives, I think it is no less valuable.

When it comes to implementation of the concept, as outlined in the bill, I would make the following recommendations also:

The diversion program administrators report directly to the chief judge, or his or her designee in that district, and that the advisory board be modeled after the board of trustees, which is described in the Speedy Trial Act of 1974.

I would recommend that the bill include the eligibility criteria and their parameters for diversion at the Federal level, allowing the local jurisdictions to further refine those criteria; and that the criteria spell out specifically that no case can be diverted unless it is prosecutable.

This remark is also included in the U.S. Attorney's Manual on deferred prosecution.

And that the screening of cases be undertaken by the diversion program, rather than through referrals from the prosecutor's office.

I would suggest that restitution, or uncompensated services, be defined clearly as possible elements of a service plan and not as possible conditions of eligibility or participation.

I would also suggest that enrollment be considered in all cases—enrollment in the diversion program—after the release decision has been made to further enhance the voluntary aspect of participation, which is generally described throughout the bill anyway.

I would suggest that section 5(b) be stricken, since practically, I think it is unenforceable in many instances. Also, under constitutional separation of power, neither the victim nor the police officer is vested with the responsibility of charging.

I would also suggest that the defendant, as well as the prosecutor of the program, have the option to be remanded to court; and that the presumption of innocence be carried through the bill by deleting the word "continue" in section 3.

To quote the bill, at least the version I have, it says: "the individual will not continue to commit violent offenses." And I think the language suggests that previous violent crimes were, indeed, committed.

I would suggest that guidelines be incorporated in the bill which further specify the mandates under which services should be delivered. I think that is a very important point, because however good the guidelines are which set up the diversion process, unless they are backed up by good services, nothing works.

These services should be flexible and should respect the presumption of innocence.

As a result, I would first recommend that the probation department not be vested with the responsibility of the diversion program.

Mr. Chairman, I don't mean to suggest that the probation department does not have capable individuals—very capable people, who certainly are faced too often with an impossible task—but I think that the main orientation of the probation officer and his or her training and first loyalty to the court is to work with convicted individuals. When there is a conflict, I think that primary purpose comes through.

I think we have the example right now, for instance, in the 10 pilot Federal districts where 5 of them are on the board and 5 of them are probationary. And there are some differences which I think, again, reflect the probation department's orientation.

Regardless of who delivers the services, I think that the guidelines should prevent diversion programs from becoming self-serving bureaucracies and from duplicating services that already exist in local jurisdictions. But there should always be a court staff which coordinates the services at the very least and is sensitive to the legal issues.

Finally, I would recommend that the bill spell out for the proposed duration and budget that diversion be implemented in some pilot districts, preferably those where already pretrial services agencies have been set up.

Moreover, in some—if not in all pilot districts—that moneys be mandatorily allocated for research.

I think one of the problems has been that too often research was tacked on later on when it was too late and the data had not been accumulated. I would submit that the legislature, if diversion is implemented and it then tries to figure out whether to expand on it or whether to continue it, will not be able to do so unless there is good research and informed-type of information that the legislature will be able to go back to.

I think it's a golden opportunity, and I think it should not be missed.

Thank you very much.

Senator DECONCINI. Thank you.

Let me address a few questions to you.

Regarding section 5—the participation of the victim—do you see some benefits in that if it is not a mandatory requirement that the victim and the offender have some confrontation and that the victim

be included, providing that they do not have the veto on whether or not the person goes into the program?

Mrs. CROHN. Yes. In my written testimony, I am suggesting that, for a starter, possibly in the legislative history as opposed to it in the bill, the benefits of involving the victim at some level should definitely be considered.

I think the practice of telling the victim and the police officer that the defendant is being considered for diversion is definitely commendable. For starters, the victim might have some additional information that the prosecutor should consider and so might the police officer.

I think there may be some educational purposes, also, in involving the victim in the process. But when it comes to having the victim being able to veto or allow for the defendant to enter the diversion program, than I think some problems are raised.

Senator DECONCINI. What about restitution? Do you feel the same way—that if restitution can be required without absolutely mandating it, it's the best way to include that in the bill.

Mrs. CROHN. Yes.

Some programs have used it as a—I did not mention it this morning, but I have great objections to the word "rehabilitate." But I think that in discussing with the defendant or with the divertee some of the elements that contributed possibly to his behavior, there may be some positive effects in having the defendant do some token level of restitution. But I think that it is coercive when it is mandatory in order to be eligible for the program.

Senator DECONCINI. In your experience in diversion programs have you witnessed a difference in programs that are precharged diversions and post-charge diversions? Do you make a distinction?

Mrs. CROHN. I hesitate in answering because, especially working at the resource center, I really like to have comprehensive data than to have more subjective kinds of feelings based on a local jurisdiction.

I would think, however, that when the diversion occurs at the post-charge point, there may be a tendency to deal with more serious crimes. I think that diversion has a better change of working as one for cost benefit point of view from the philosophical level of overreach, and so on and so forth.

I think that diversion really should occur with people who have a deep penetration in the system. And while I think that there are prosecutor-run programs which are precharge and which very legitimately take the cases which would be prosecutable, I think there is the risk that it might be the "dumping ground" type of situation.

Senator DECONCINI. That depends a great deal on the prosecutor as to whether or not they really are committed to this or they're just using it to——

Mrs. CROHN. Most definitely. That's why I think, in reviewing it for a long time, post charge has the benefit of—especially as you are thinking of introducing it as a bill or whether it's at the cultural level—uniformity and some standards that can then negate the possible bad effects, or the dumping ground approach.

Senator DECONCINI. Are you aware, in your experience, of any—and I don't want the names; I just want the information—prosecutorial diversion programs or precharge programs that are totally discretionary with the prosecutor that, in your opinion and judgment, may have been misused?

Mrs. CROHN. I have heard of some practices which have generally led me to believe that it could be used as a dumping ground.

Senator DECONCINI. Were those Federal programs, or were they State programs, or do you know?

Mrs. CROHN. I have heard of some local programs, and I have heard of the possibility of programs at other levels being used as dumping grounds; yes.

Senator DECONCINI. You made reference to prosecutable cases. Do you have any suggestions on how you put that into our present institutions and our present system? How can you tie that down as to what are prosecutable cases that would be considered diverted?

Is the individual entitled to a judicial determination, in your opinion, as to probable cause before he can be considered for a diversion, for example?

Mrs. CROHN. Yes. This ties into a rather complex series of issues. I don't feel totally qualified in reviewing them, because many court cases or many decisions have, themselves, not been quite able to resolve them.

However, I think there is a better chance for determining whether the case probably would be prosecutable if, again, diversion occurs post charge and there is a judicial hearing to determine whether or not there is probable cause.

At that point, generally the defendant will be represented by counsel unless he or she waived that right. The prosecutor will be there.

I think there is some recent case law, for example, in New Jersey which seems to show that some fears prosecutors have had that their constitutional responsibility might be tampered with may not be unrealistic but maybe is not going to occur as much as sometimes has been feared.

I think the worst that may happen is that the judge, based on some information provided by the defense counsel, might question some of the practices. Or just that hearing may represent a conceptual check and balance. Will, in fact, the prosecutor's decision be vetoed? I think not in most situations.

At least there is that possibility which I think might help in this system.

Senator DECONCINI. Your reference—which, to begin with, is a very good one—that we need to look at this program and many things in the criminal justice system not as a saving of time and expediting court cases. But realistically, as legislators, we are faced with that real problem of having some justification for bringing on a new program. They have to show some economic benefits as well as what you underline should be the number one criteria—the individual and finding some alternative to pure punishment that obviously would not work for a divertee.

Do you feel strongly in opposition to that philosophical reality versus the practicality?

Mrs. CROHN. I think that probably part of my orientation comes from realizing, having been part of the system and also making extraordinarily naive claims when I first started in the business, that it is now one of caution.

However, I would think that there is a good chance that if the appropriate cases are diverted—the cases which would definitely involve presentence memorandums, multiple hearings, and representation—the court's time will be saved if the diversion process occurs.

What is sometimes forgotten is that if it is post charge—if the magistrate is involved at least a couple of times at entry and a dismissal or a termination hearing—the judge is not entirely removed from the process. So I think it makes sense that if a case is diverted which would take at most one hearing, and possibly two, the judge's time is not going to be saved or the court's.

On the other hand, if it's a case which would take multiple hearings and quite an investment of work on the part of prosecutor, defense counsel, clerks, and judge, then some time will be saved.

Another thing, however, is that to significantly impact on that time you have to get an enormous amount of cases diverted. Generally, we know that about 5 to 10 percent of the cases may be diverted; so the actual saving of time will not be felt significantly.

Senator DECONCINI. With regard to the standards you referred to on guidelines of what should be diverted, I order that those be placed in the record at this point.

[Material to be supplied follows:]

PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL DIVERSION—NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES

(Prepared by the NAPSA project on standards and goals for pretrial release and diversion, under a grant from the Law Enforcement Assistance Administration (Grant No. 76-DF-99-0062).)

PREFACE

The following paper, prepared as a part of the NAPSA Project on Standards and Goals for Pretrial Release and Diversion, is a preliminary draft, to be presented at the NAPSA Annual Conference (Washington, D.C., May 1977) for review and comment by the NAPSA Board of Directors and NAPSA membership. The final report of this project will be completed subsequent to that review.

The following individuals have contributed to the preliminary draft: Barbara Blash, project coordinator; Gordon Zaloom and Paul Herzich, consultants to the project; members of the Diversion Committee who reviewed and contributed to papers distributed in preparation of the draft; Bruce Beaudin, Project Director; and Madeleine Crohn, Co-Director for the Diversion Section.

Points of view expressed in this document are those of the authors and do not necessarily represent the official position or policies of either the U.S. Department of Justice or the NAPSA Board of Directors.

GOALS AND PERFORMANCE STANDARDS FOR DIVERSION

INTRODUCTION

The "diversion option" has been increasingly available throughout the country over the last ten years. As most authors point out, the concept is not new: The police officer who chooses not to arrest a delinquent youth, but rather takes him home for a talk with his parents exercises, in essence, a diversion decision. The "informal discretion of state's attorneys to decline to prosecute in the interests of justice" [1] is also "diversion in its prototypical form." [2]

Nevertheless, diversion programs embody more visible and formal procedures for these alternatives and have undergone considerable changes in this decade.

Some of the original premises, for example, "providing counseling and job development services to participants and seeking the dismissal of pending criminal

[1] State of New Jersey Administrative Office of the Courts, Proposal for State Wide Implementation of a Uniform Program of Pretrial Intervention Under New Jersey Court Rule 3 :3S (April, 1975).

[2] Ibid.

charges if a participant successfully completes the rehabilitation program," [3] are related to the original sponsorship of such programs. The Department of Labor funded pilot projects with a manpower training orientation. Meanwhile the pressures of overcrowded courts which "kept presumptively innocent defendants in jail for months or even years awaiting trial" [4] led the President's Crime Commission to recommend in 1967 that alternative programs be developed for the disposition of defendants with criminal charges against them.

Second, third, and even fourth "generations" of diversion programs developed: in large cities, in small communities, for juveniles, for adults, at different points in the criminal justice process, some leading to dismissals of charges, others to alternatives to traditional sentencing, providing more or less service, and under a variety of conditions, formats or sponsorships reflective of the community.

Faced with the multiplicity of these formats, one needs to revert to definition and clarification of the different options proposed. Because the juvenile court was created as an alternative to the criminal justice system as applied to adults, juvenile diversion is a "diversion of diversion." The guidelines proposed in this paper can or should probably apply to a large extent to these programs; yet, the specificity of the juvenile court would require a separate review. "Diversions" which are informal, untracked or unmonitored are also excluded for those very reasons (ie: that they are informal and/or unmonitored). Programs which offer alternatives to sentencing, after a guilty plea or conviction, also represent a separate group since the diversion is from the traditional approach to sentencing, not to the pre-adjudication process.

The definition used in this paper is therefore narrow, not as a negative comment on the validity of the above approaches, but rather in an attempt to separate groupings to alternatives.

Equally complex are the problems facing the programs which fall within the proposed definition. As stated previously, the original premises for diversion have undergone scrutiny over these last ten years. Some have been challenged in court (certain forms of exclusionary criteria, for instance). Others have been disputed by researchers have been questioned by program administrators or staff themselves ("Are we diverting the 'right' people?") or by the courts ("Are the diversion programs really lessening the burden on the court or creating another layer of bureaucracy?")

Reasons for continuing a diversion program or creating a new one have also become more sophisticated and more sensitive to the dangers of expanding social controls, to the rights of defendants, and to the cost benefit aspects of the programs.

As reflected in the Introduction to the Release Performance Standards, this paper represents the first step of an on-going process, and the first effort by and for diversion program administrators. Commentaries which support or clarify the proposed Standards include comparisons with standards drafted by the American Bar Association, the National Advisory Commission on Criminal Justice Standards and Goals, the National District Attorneys Association and the National Legal Aid and Defender Association. This paper steers away from taking a position on issues which the criminal justice system alone can answer: the respective roles of the prosecutor and the judge vis a vis the final decision on enrollment in a diversion program is one example. On the other hand, these proposed Standards attempt to focus on the parameters of responsibilities vested with diversion program administrators, on the philosophy of the diversion options, and on the minimum Standards for legally and efficiently implementing their mandate.

Unlike the Release Performance Standards, however, these diversion Standards apply to a discipline which is less easily measurable. The diversion option is not related to a "single event" or sequence of events, but instead alleges a variety of achievements over a period of time. Pending the definitive study which will demonstrate the validity or level of such achievements, one can only recommend that diversion programs exercise the utmost care in delivering their mandates, be sensitive to the legal issues, efficiency and ethics of their profession, and be accountable for their practices.

Whenever possible, the commentaries include suggestions for data collection and indices to help measure the diversion program performance. Practical guides, however, are useless if not reflective of new findings or new issues. These Standards

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[3] National Legal Aid and Defender Association, National Study Commission on Defense Services, National Colloqium on the Future of Defender Services, Chapter VI, "The Defense Attorney's Role in Diversion and Plea Bargaining," (1976).

[4] Joan Mullen, Dilemma of Diversion—Resource Materials on Adult Pretrial Intervention Program—Monograph, Abt Associate, Inc. Cambridge, Massachusetts (1974).

and commentaries must therefore be challenged , revised andupdated in keeping with developments of this new profession, while retaining essential principles of fairness and justice.

Definitions, Goals, Standards

DEFINITION

Programs referred to in the attached Goals and Standards are pretrial diversion programs which offer adult defendants an alternative to traditional criminal justice proceedings and which: are voluntary; occur prior to adjudication; are capable of offering services to the "divertee;" and result in a dismissal of charges if the divertee completes the program.

GOALS

Pretrial diversion programs should attempt to fullfill the following goals:

1. Provide the criminal justice system with a more flexible approach than does the traditional process in order that the system (1) may be more responsive to the needs of defendants and society and (2) may preserve its energies to effectively process cases that would be more appropriately handled through the adversary system;
2. Provide defendants with an opportunity to avoid the consequences of criminal processing, to avoid conviction and the consequences of criminal conviction;
3. Help in deterring and reducing criminal activities by offering to the defendant the necessary opportunities to affect such changes as necessary; at a minimum demonstrate whether such reduction took place; and
4. Effect their mandate, as reflected in the other three goals, in the most effective, economical or non-duplicative fashion.

STANDARDS

In order to meet these goals, the following standards should be applied:

Point of entry

1.1. Potential divertees should be selected at the earliest point after arrest and before indictment (accusation or presentment), consistent with the protection of defendants rights.

1.2. The possibility of enrolling in pretrial diversion programs should not preclude defendants from exploring and taking advantage of other strategies more favorable than the diversion option.

1.3. Defendant decision to enter a diversion program should be voluntary. For this reason and in keeping with NAPSA's Release Standards, the diversion option should, except in rare circumstances, be presented to defendants only after release of defendants has been granted.

Enrollment

2.1. Formal eligibility criteria should be established following consultation with criminal justice officials and program representatives. Criteria should exist in writing and be available and routinely disseminated to all interested parties.

2.2. These criteria should be: broad enough to include all defendants that can benefit from the diversion option, regardless of level of services needed by the defendant; and revised as often as necessary in keeping with Standard 1.2.

2.3. Enrollment in diversion programs should not be conditioned on a plea of guilt, nor on an informal admission of guilt or of moral responsibility. For the same reason, defendants who maintain their innocence should be permitted enrollment in diversion programs.

2.4. Furthermore, no conditions other than regular program requirements should be imposed by the court on the divertee.

2.5. Prior to making the decision to enter diversion programs, eligible defendants should be given the opportunity to review, with their counsel present, a copy of general diversion program requirements (including average program duration and possible outcomes.)

2.6. Diversion programs, when denying enrollment, should state in writing their reasons for denial to defendants and their counsel. Such information should remain confidential (not be admissible evidence).

2.7. Once a final decision has been made regarding enrollment/non enrollment into diversion programs, the responsibility to challenge the decision or request an explanation should be that of defendants' counsel, not of the program.

Services

3.1. Diversion programs should devise and adopt, as soon as possible after entry, realistic plans with achievable goals with the active involvement of participants.

3.2. Service plans should meet the needs of the alleged offender rather than be based on the offense; nevertheless, time spent in the program should relate to the minimum sentence imposed for the offense if the defendant were convicted.

3.3. Services should be the least restrictive possible and be administered to help the individual avoid criminal behavior.

3.4. Service plans should be revised when necessary or as new circumstances develop affecting the client. They should not, however, place new demands or further restriction on the client other than those necessary to achieve the agreed upon goal(s); and, unless specifically agreed upon by the client, more demanding goals should not be added to the service plan.

Noncompletion of program

4.1. Participants should be able to formally withdraw at any time, before the program is completed and be remanded to the court process without prejudice to them during the ordinary course of prosecution.

4.2. Diversion programs should also have the option to cease service delivery to participants who would then be remanded to the court process. However, when noncompletion of the program occurs because of the diversion programs' decision, written reasons should be available to the defendants and their counsel. This information should remain confidential (should not be admissible evidence), and noncompletion of the program should not prejudice defendants during the ordinary course of prosecution.

4.3. Programs' decision to cease service delivery should be based solely upon failure by participants to meet the requirements of the service plan.

4.4. Re-arrests or conviction on a new arrest during program participation should not automatically lead to termination from the program.

4.5. If or when participants do not complete the program, they should have avenues of review of such decision if they so choose, with counsel present. If court officials, the hearing officers should not be those who would eventually hear the case if participants were remanded to the court process.

Completion of program

5.1. Each participant should receive a dismissal of the charges for the diverted case upon completion of the program.

5.2. Diversion programs should give the court no less, but no more than the information that is essential for the court to verify that the service plan was carried out.

5.3. If the service plan was completed, and should the court refuse to grant a dismissal of the charges, defense counsels, not the programs, should be responsible for challenging or requesting information on the decision.

5.4. Diverted defendants court record should be sealed when a dismissal of charges is granted. However, the fact of previous involvement in a diversion program should be accessible to those whose decisions are required to effect a diversion decision in order to make a reasonable decision when an application is made for diversion on new charges.

Records

6.1. Information kept on each divertee by the diversion programs should exist for internal or research purposes only and should not be accessible to others than diversion programs staff or defendants and their counsel.

6.2. Because effective services require a relationship of trust between the participants and the diversion programs, no information pertaining to application/participation in diversion programs should be used in criminal proceedings against defendants.

6.3. When publishing or sharing statistical or other types of information, diversion programs should ensure that all information pertaining to active or former participants remains anonymous (i.e. give no specific identifiers).

Research and evaluation

7.1. Diversion programs should have the capacity to measure and evaluate their efforts and performance in relation to their stated purpose and goals, and in order to plan for future developments.

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7.2. Hypotheses should be realistic and tested from a qualitative as well as quantitative approach. No isolated indices should be the sole measure of success.

7.3. In order to accomplish the above two standards, the diversion programs should keep the necessary information and data, yet verify that confidentiality and protection of the participants rights have been maintained.

7.4. In adopting a particular methodology for research and evaluation, diversion programs should be cognizant of problematic models previously used, and avoid methodologies leading to false statements or misleading information.

Organizational structure

8.1. The staffing of diversion programs should be directly related to the number of clientele, to the scope of services to be provided in-house by the programs, and to the kind of defendants who are likely to be diverted in that community.

8.2. Diversion programs should include in-house no less, but no more, direct services or components than are necessary to accomplish their mandate. If or when other programs or agencies already exist in the community and are capable of fullfilling certain tasks, duplication should be avoided.

8.3. The labeling of professional versus para (non) professional staff should be discouraged. Staff should be selected on the basis of skills and experience, and, especially for those in direct contact with clients, should have sound judgement, stability and sensitivity to participants.

8.4. Staffing and advancement or promotions should follow the guidelines of affirmative action and ensure the maintenanse of good program management.

8.5. In order to uphold the above standards, diversion programs should have the commitment to provide opportunities for the staff to upgrade their skills. Diversion programs should also be commited to the implementation of the most effective managerial and service delivery techniques available.

8.6. The use of volunteers should be encouraged if or when this would enable diversion programs to carry out their mandate. Volunteers should be expected to deliver quality work in their areas of assignment.

Institutionalization

9.1. From their inception, diversion programs should consider their long range place in the criminal justice system as to continued operations and funding.

9.2. In the anticipation of possible institutionalization, or change in sponsor, diversion programs should determine whether such change would jeopardize or significantly alter the initial premises of the program. Diversion programs should take an active part and plan for the safeguarding of their integrity and purpose.

COMMENTARIES

Standard 1.1. Potential Divertees Should be Selected at the Earliest Point After Arrest and Before Indictment (Accusation or Presentment), Consistent With the Protection of Defendants Rights

By and large, local politics and community attitudes determine the specific policies and procedures adopted by a pretrial diversion program. To insist, therefore, on a single diversion program model would be unrealistic and, at the least, impede the acceptance in some communities of pretrial probrams. As a consequence, the point at which a defendant is diverted into a pretrial program should be flexible from the time following the arrest up to indictment (accusation or presentation).

Post-indictment point of entry appears, in most cases, unreasonable in views of the costs already incurred; and the rarity of situations where the prosecutor would still consider diversion at this time. Exceptions might be made, however, when an otherwise eligible defendant was unaware of the diversion option until higher case reached the indictment stage.

Pre-indictment point of entry, on the other hand, should be considered in relation to the following issues: assignment of final decision on program participation; and availability or non availability of defense counsel to the defendant.

Under the separation of the powers doctrine, it is the legislature's role to define classes of offenders and the treatment or punishment appropriate to each; the prosecutor's role to charge or not; and the judicial role to verify that the interests of justice are preserved and to decide on the acquittal/dismissal of charges and sentencing.

Thus, the decision to divert prior to formal charging "would seem to rest solely and legitimately within the [prosecutor's] properly exercised discretion." [1] As Pearlman and Jaczi point out:

"There appears no legal obstacle to development of prosecutorial diversion programs where the decision to divert is made prior to charge." [2]

Or, as the National District Attorneys' Association (hereafter NDAA) explains:

"The authority of the prosecutor to institute diversion proceedings is an incident of the prosecutor's discretional authority in screening and charging. The authority of the prosecutor to control the diversion decision prior to arraignment or indictment is well substantiated." [3]

The situation is significantly altered, however, if diversion follows the filing of formal charges, for everyone (including NDAA) seems to agree that: "Where intervention occurs after charges have formally been brought, the traditional prosecutorial function is only advisory to the judicial power of determining if prosecution is to be continued, deferred, or dismissed." [4]

In *People* v. *Tenorio*, the California Supreme Court restricts "the authority of the prosecutor to veto a court's decision to institute diversion proceedings, holding the determination made after indictment to be a judicial one and not subject to review by the prosecutor." [5] The point of program entrance, though, is not the only basis for placing a larger responsibility with the courts vis-a-vis the prosecutor: the California Supreme Court in the *People* v. *Superior Court of San Mateo County* ruled that "the statute that gave the prosecutor veto power over the decision to divert was unconstitutional because it violated separation of powers." [6] In *Gerstein* v. *Pugh*, the U.S. Supreme Court held that the Fourth Amendment requires judicial determination of probable cause "as a prerequisite to extended restraint of liberty following arrest." [7] The major objection expressed by the court is "that a prosecutor's assessment of probable cause, by itself, does not meet the requirements of the Fourth Amendment and is insufficient to justify restraint of liberty pending trial." [8] The implication of this ruling for pretrial programs seems to be that formal charging "is a constitutional requirement of any diversion procedure." [9] For if the Fourth Amendment requires a probable cause hearing, it must also mandate formal charging, since this would seem to be a prerequisite to a meaningful hearing.[10]

By contrast, the Colorado Supreme Court has ruled "that the prosecutorial consent required for diversion does not have to be given simply because the court favors diversion." [11] Dan Freed, meanwhile, sees a problem in the statutory subordination of the prosecutor's role. According to Freed: "*U.S.* v *Cox* * * * makes it fairly clear that a court ordinarily may neither compel the United States Attorney to prosecute, nor refrain from prosecuting a defendant" [12]

The issue of who exercises discretion on the basis of case law is not yet definitively resolved, although there seems to be no question that once formal charges have been filed, the prosecutor should share diversion decisions with the court. In any case, the prosecutor's role should be to prosecute unless there is reasonable evidence that a case should be dismissed, and the judiciary's to assure that at all stages the interest of justice is preserved. It is within this context that the agreement to divert should take place.

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[1] Michael R. Biel, Legal Issues and Characteristics of Pretrial Intervention Programs, Washington, D.C.: American Bar Association, National Pretrial Intervention Service Center, April, 1974.

[2] Harvey S. Perlman and Peter A. Jaszi, Legal Issues in Addict Diversion: A Technical Analysis, Washington, D.C.: Drug Abuse Council, Inc. and the American Bar Association Commission on Correctional Facilities and Services, September, 1974.

[3] National District Attorneys Association, Standards and Commentary for Prosecutors (draft), Chapter 11, 1976.

[4] Ibid.

[5] *People* v. *Tenoria*, 3 Cal. 3d 89 (1970).

[6] *People* v. *Superior Court of San Mateo County*, 11 Cal. 3d 59 (1974).

[7] *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

[8] Ibid.

[9] Pretrial Intervention Legal Issues: A Guide to Policy Development, Washington, D.C.: Pretrial Intervention Service Center, American Bar Association, February, 1977. (The original argument appears in "Pretrial Diversion from the Criminal Process: Some Constitutional Considerations," 50 Ind. L. Rev. 783 (1975) at 795.)

[10] Ibid.

[11] Ibid.

[12] National Legal Aid and Defender Association, National Colloquium on The Future of Defender Services, Chapter VI: "The Defense Attorney's Role in Diversion and Plea Bargaining," National Study Commission on Defense Services, 1976.

When pretrial diversion occurs after formal charging, "an absolute right to the assistance of counsel" [13] appears evident. The Sixth and Fourteenth Amendments guarantees this right "at or after the time judicial proceedings have been initiated against a defendant, either by way of formal charges, information, indictment, preliminary hearing or arraignment." [14] Some legal questions are raised, however, concerning the role of the defense counsel prior to formal charging. Yet, to ask a defendant to do without a counsel does arouse misgivings since he/she must waive certain basic rights in order to participate in a pretrial diversion program. Among them are: the right to a speedy trial, right to a jury trial,[15] the right to file certain pretrial motions, and, possibly, the Fifth Amendment privilege against self-incrimination should the prosecutor insist on either a guilty plea or restitution as a condition for program participation.[16] The danger is that, without counsel to explain and advise, the defendant may give up these rights without knowing exactly what is involved. In addition, the defendant needs counsel to describe the likely disposition of the case: "An individual because of ignorance or other factors may agree to participate in a diversion program, even though he does not have to because the prosecution cannot establish his guilt." [17]

Our conclusion is that the options must be fully laid out for the accused. The importance of counsel at this point is underscored by *Powell* v. *Alabama* which supports the right of counsel to advise the defendant at all critical stages of the criminal process.[18] This concept of "critical stage" has been extended to include "preliminary hearings, arraignments, and other situations in which the defendant could benefit from legal advise," [19] a qualification which appears to cover pretrial programs.[20]

Standard 1.2 The Possibility of Enrolling in Pretrial Diversion Programs Should Not Preclude Defendants From Exploring and Taking Advantage of Other Strategies More Favorable Than the Diversion Option

The defense counsel's first duty should be to verify that the "least drastic alternative be imposed" [21] on the defendant. Program participants should be "those who would otherwise have gone to jail" following conviction on the alleged charge,[22] or those who, at a minimum, would have incurred conviction of equal or greater severity than program conditions imposed if they had been diverted into a pretrial program.

Instead of asking: ". . . who should not go further down the system . . . try to decide in your program who should go to trial, who should go to prison . . . because it is only when you can articulate the affirmative that you can stop yourself from . . . taking under control those who otherwise wouldn't be under control." [23]

In this context, the NAC Standard 1.1 states: "An accused should be screened out of the criminal justice system if there is not a reasonable likelihood that the evidence admissible against him would be sufficient to obtain a conviction and sustain it on appeal." [24]

The NAC also states that: "the defendant's right to fair treatment can be protected by reliance upon the prosecutor's discretion." [25]

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[13] Joan Mullen, *Pretrial Services: An Evaluation of Policy-Related Research, ABT Associates, Inc.*, 1974 quoted in the *Legal Issues and Characteristics of Pretrial Intervention Programs.*

[14] *Pretrial Intervention Legal Issues: A Guide to Policy Development,* ibid.

[15] According to Biel, supra n.1: These rights, however, should be fully restored at such time as the defendant is returned to the regular justice system for further processing and probably trial after s(he) has been "unsuccessfully" terminated from the program.

[16] *Pretrial Intervention Legal Issues: A Guide to Policy Development,* ibid.

[17] National Advisory Commission on Criminal Justice Standards and Goals, *Courts Task Force Report,* Chapter 2: "Diversion," Washington, D.C.: Law Enforcement Assistance Administration, 1973.

[18] *Powell* v *Alabama,* 287 U.S. 45 (1932).

[19] Ibid.

[20] Perlman, ibid.

[21] American Bar Association, Comparative Analysis of the National Advisory Commission on Criminal Justice Standards and Goals with Standards for Criminal Justice of the American Bar Association, 2nd Edition, 1976 (NAC Standard 5.2).

[22] Gorelick, J. S., "Pretrial Diversion: The Threat of Expanding Social Control," Harvard Civil Rights—Civil Liberties Law Review, Winter 1974.

[23] Norval Morris, Keynote Address at the First Annual Conference, New York State Association of Pretrial Service Agencies, Albany, New York, November 16–18, 1976.

[24] American Bar Association, Comparative Analysis, ibid.

[25] National Advisory Commission on Criminal Justice Standards and Goals, Courts Task Force, Report Chapter 2: "Diversion," Washington, D.C.: Law Enforcement Assistance Administration, 1973. (NAC Standard 2.2).

However, others maintain that in the absence of formal safeguards, the prosecutor might use the diversion alternative to keep defendants in the system and to control them when the state's case is weak. These practices can lead to "diversion bargaining", a troublesome variation of plea bargaining.

Lessons can be learned from what happened in the juvenile system. The degree of supervision and control imposed on juveniles appears greater than the restraints which exist in most diversion programs for adults. Moreover, the system in recent years has increasingly extended its "control over juvenile behavioral problems".[26]

According to the National Association of Juvenile Courts, juvenile programs may be "widening the net to include youth who do not require any type of program." [27] Such defendants should be offered less restrictive alternatives than pretrial diversion programs. In this respect, diversion program administrator have a general advocacy role to remind the courts that all defendants are not necessarily in need of services, nor in need of a diversion program, and that less restrictive alternatives which can also lead to dismissal should be considered. Instead of diversion a number of minor misdemeanors and "victimless" crimes have been or should be decriminalized; [28] under certain conditions criminal conviction records should be expunged; and "the spread of policies forbidding discrimination against persons solely on the basis of an arrest record" [29] would help by removing the threat of employment discrimination against the defendant. In any case, the defense counsel is the appropriate person to see that the defendant is provided with an adequate picture of alternatives, so that diversion, when agreed to, represents a real dispositional alternative to traditional criminal processing.

Standard 1.3. Defendant Decision to Enter a Diversion Program Should be Voluntary. For this Reason and in Keeping With NAPSA's Release Standards, the Diversion Option Should, Except in Rare Circumstances, be Presented to Defendants Only After Release of Defendants Has Been Granted

The voluntariness aspect of the diversion option has been much debated. This issue in turn raises the following question: to what extent can conditions be placed on someone who, although arrested, has not been convicted and must, therefore, be presumed innocent? Withous advice of counsel a defendant is usually unable to voluntarily decide whether to enter a pretrial program, particularly as s(he) has to waive several rights in order to enroll in such program (cf Standard 1.1).

Of equal importance are explanations by the defense counsel about the length of time the defendant is likely to spend in the program versus the possible sentence if convicted, the program conditions that must be met, and, finally, possible prejudice to the defendant's case if (s)he does not meet the program's requirement. As reflected in Standard 1.2, the defense counsel serves the client in other ways, as well, by evaluating alternatives that may be less restrictive than entering a diversion program, and by analyzing the defendant's chances of being actually prosecuted and/or convicted.

Without such advice, the defendant may well be unaware of the options or hazards (s)he may face: "an individual because of ignorance or other factors may agree to participate in a diversion program, even though he does not have to because the prosecution cannot establish his guilt." [30]

Under those circumstances, any decision made by the defendant fails to meet the requirement that such decisions be "intentional, voluntary and intelligent." [31]

The defendant's decision may fall short of this requirement in other areas as well.

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[26] Joan Mullen, Pretrial Services: An Evaluation of Policy Related Research, ABT Associates, Inc., "Juvenile Diversion," 1974, Section on Reviews & Annotations.

[27] "Brought to Justice? Juveniles, the Courts, and the Law," Criminal Justice Newsletter 7, November 8, 1976.

[28] According to Gorelick, J. S., "The Threat of Expanding Social Control," between ten and twenty percent of the individuals now in diversion programs are accused of such crimes as vagrancy, misconduct, sexual misbehavior, and alcohol and minor drug charges. Such crimes usually receive no criminal sanction and therefore could be removed from the criminal statute books.

[29] American Justice Institute, Instead of Jail (draft), Pre- and Post-Trial Alternatives to Jail Incarceration, Vol. 3, Alternatives to Prosecution, Sacramento, California, September 1976.

[30] National Advisory Commission on Criminal Justice Standards and Goals, Courts Task Force Report, Chapter 2: "Diversion," Washington, D.C.: Law Enforcement Assistance Administration, 1973.

[31] Pretrial Intervention Legal Issues: A Guide to Policy Development, Washington, D.C.: Pretrial Intervention Service Center, American Bar Association, February 1977.

For example, the possibility of pretrial incarceration prior to program participation may be seen as a threat, as a form of coercion or improper inducement to join such a program. Our opinion is that in most circumstances the defendant should be released before being presented with the diversion option. This stipulation complements NAPSA's proposed Release Standards.

"All persons arrested and accused of a crime shall be presumed to be eligible for release on personal recognizance while awaiting trial unless, after a hearing, a judicial officer determines that more restrictive conditions of release are required to assure the appearance of the defendant in court." (Standard I a)

According to the Release Standards, defendants should be detained only ". . . if no combination of conditions of release will assure the defendant's appearance at court, the judicial officer shall order the defendant detained."

As mentioned in the proposed goals for diversion, the purpose of the diversion option is not to assure appearance at trial, but, rather, to invalidate the need for such trial.

Nevertheless, the diversion option might be approved the judicial officer even though the defendant might not have received release. Such defendant, if otherwise eligible, should not be denied the diversion option. Under these circumstances, the diversion program then assumes the responsibility of third party custodian, a task which should be limited to the rarest circumstances, in keeping with the proposed Release Standards.

Voluntariness is also at issue in programs that condition participation on a plea of guilt. Such programs can be considered coercive, be faulted for improper inducement by holding out the promise of immunity based on the dismissal of charges. (See Standard 2.3.)

Finally, the criterion of voluntary and intelligent consent should apply to actual program conditions and the participant's service plan. The participant who does not complete the program is usually remanded to the court and faces prosecution—pending actual implementation of Standards 4.1 and 4.2, the practice suggests a negative reflection of such "failure" upon the processing of the defendant's court case—issues concerning unrealistic service plans and subjective assessment on the part of the diversion staff member, bear upon that of voluntariness and should be subjected to guidelines (cf Standards 3.7 through 3.4 and 4.3).

Standard 2.1. Formal Eligibility Criteria Should be Established Following Consultation with Criminal Justice Officials and Program Representatives. Criteria Should Exist in Writing and be Available any Routinely Disseminated to All Interested Parties

Substantial differences of opinion exist among prosecutors, judges, defense attorneys and program administrators as to who should be diverted (see Standard 2.2) and the ways the selection process should be implemented. Another consideration is that programs have to work within local communities and be sensitive to their concerns.

In regard to the latter issue, and in order to provide effective alternatives to ordinary criminal justice processing, program administrators should ensure cooperation and consultation with such groups.

As far as consultation with the criminal justice system is concerned, most diversion programs orighnally started on the basis of informal agreement with prosecutors and/or the court. However, legal issues such as equal protection of the law, the relationship between the concept of diversion and rehabilitation, and the issues of expanted social control have led to more formal processes and, in some cases, to court rules or legislation.

In order to protect a defendant (starting with the earliest contact with a program) written and formal arrangements within the criminal criteria, possible abuses cannot be challenged by either party. And, unless these criteria are routinely disseminated, realistic access to the necessary information is impeded.

Further, it is strongly recommended that the diversion program include a screening component and/or that the original selection process be handled by individuals other than members of the criminal justice system (in other words, that screening not rely solely on referrals from prosecutors, defense counsels or judges). While programs should not usurp the function of defense counsel, they have a privileged position in reviewing all arrests and verifying through specialized staff that all eligible defendants are brought to the attention of counsel, prosecutor and court. Finally, this also enables diversion programs to verify through research and evaluation, that eligible defendants have been reviewed or that eligibility criteria should be revised.

Standard 2.2. These Criteria Should Be Broad Enough To Include all Defendants That Can Benefit From the Diversion Option, Regardless of Level of Services Needed by the Defendant—Revised as Often as Necessary in Keeping With Standard 1.2.

As mentioned in Standard 2.1, opinions vary as to who should be diverted.

One opinion holds that criteria should restrict participation to defendants who are least likely to recidivate:

"Unless conservative criteria becomes the norm, and confine diversion programs to a very few low risk persons who might otherwise have their cases dismissed, will not the extension of diversion programs lead to more troublesome defendants, more doubling of processing, and more duplication of pretrial and post-conviction service programs?" [32]

Restrictions on the basis of sex, age, residence, employment, status, seriousness of charges and previous arrest or conviction records also exist. Some of the reasons used to support such exclusions are reviewed below.

The Fifth and Fourteenth Amendments to the Constitution state that "citizens may not be denied the equal protection of the laws." Nevertheless, some programs have excluded the participation of women defendants because special services (such as day care, etc.) were not available. Or, as stated by Naneen Kuvvaker, they are due to "assumptions about the offenses of females and their potential for rehabilitation." [33] She suggests that "most programs assumed that the prostitute and shoplifter were found in maximum numbers but could not benefit from pretrial intervention." [34] Another "common misconception" is that "arrested womne who move out of the female's traditional role of homemaker and mother are somehow more dangerous and untrustworthy than men and women who adhere to the traditional stereotype." [35]

As for the criteria dealing with age, programs generally have been responsive to the youthful defendant who is "too old for juvenile court jurisdiction but too young to deserve the full impact of a criminal conviction." [36] Similar flexibility has been lacking for persons over 40 or 50 years old, who are regarded as too old to benefit from rehabilitation.

In the case of criteria relating to employment, diversion programs have historically seen employment stability as a major goal and increasing "the accessibility of adequate employment through increased academic and vocational skills and improved work habits" [37] as a major role. Accordingly, participants have largely been selected from the unemployed, underemployed, and unemployable, often excluding those who are economically well off or regularly employed.

Nonresidents have been excluded from participation because their nonproximity was viewed as hampering regular contacts with the diversion program or service delivery.

By far one of the most controversial criterion deals with restrictions due to charges. It is here that concerns about community risk, rehabilitation potential or local politics surface most fiercely.

As a result, defendants with property offenses which fall into misdemeanor and less serious felony categories are usually eligible to participate, whereas defendants with serious felony charges, including personal charges and property charges (that is, armed robbery, aggravated assault, sale of narcotics, assault of a police officer) are automatically excluded. This is spelled out in NAC's Standard 2.1.

Among the factors that should be considered unfavorable to diversion are: any history of the use of physical violence toward others . . . a history of antisocial conduct indicating that such conduct has become an ingrained part of the defendant's life style and would be particularly resistent to change . . . any special need to pursue criminal prosecution as a means of discouraging others from committing a similar offense.[38]

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[32] Raymond T. Nimmer, Diversion, the Search for Alternative Forms of Prosecution, Chicago: American Bar Foundation, 1974.

[33] 1975 National Conference on Pretrial Release and Diversion, Final Report, October, 1975, Chicago, Illinois: April 15–18, "Women and the Courts: Unequal Justice?" Panelist: Naneen Kuvvaker.

[34] Ibid.

[35] Ibid.

[36] National Advisory Commission on Criminal Justice Standards and Goals, Courts Task Force Report, Chapter 2: "Diversion," Washington, D.C.: Law Enforcement Assistance Administration, 1973.

[37] Rovner-Pieczenik, Ibid.

[38] NAC, Ibid.

Such exclusions are, in part, based upon the assumption that violent and serious charges are: "somewhat less susceptible to short term rehabilitation especially in the case of multi-problem individuals who have demonstrated prior history of criminal recidivism; more dangerous to society and thus should not be given the benefit of possible dismissal of charges; or that society's retributive interest in prosecution of these offenders should not be avoided." [39]

Most programs have similar restrictions on participation due to prior arrests or convictions, under the theory that these defendants are less susceptible to rehabilitation. By and large, this theory precludes the enrollment of defendants with more than one or two prior charges.

As mentioned above, these restrictions are being reconsidered in part due to recent court rulings. Some restrictive criteria are viewed indefensible because: Our present knowledge is such that we can't say who will benefit from participation.[40]

Specifically, in terms of serious charges:

"There is little evidence to support the proposition that multiple offenders or especially those charged with more serious crimes are less susceptible to early and relevant rehabilitation.[41]

"Eligibility criteria based on the offense charged against the individual seem difficult to justify." [42]

In 1968 two studies independently reached similar conclusions. A Harvard Study on pretrial recidivism analyzed criteria in the District of Columbia Preventive Detention Bill.[43] The study by four Harvard Law students was unable to establish a correlation between initial charges and subsequent criminal behavior. Its findings did indicate, though, that "defendants with records of juvenile arrests, prior incarceration, prior convictions, had substantially higher recidivism rates than those without such records." Even so, the findings "were so far from predictive accuracy that constitutional problems of equal protection and due process may result."

The second study by the National Bureau of Standards also "found no significant correlation with rearrest in such factors as initial charge." [44] Moreover, the NBS study found no correlations with previous records, although it did find "that persons arrested for dangerous crimes tended to be arrested at a somewhat higher rate than felons in general.[45] It found, too, that unemployment was high among rearrest defendants with "dangerous" crime charges against them (as roberry, burglary, arson, rape, narcotics) as well as those with "violent" crime charges (that is, dangerous crimes plus homicide, kidnapping and assault with a dangerous weapon).[46] Because the data on recidivism and post-program arrests using select variables are certain, the question "are multiple offenders or especially those charged with more serious crimes . . . less susceptible to early and relevant rehabilitation [47] still has to be determined.

Meanwhile, in *State of New Jersey* v. *Frank Leonardis* [48] (A–20) and *State of New Jersey* v. *Stephen Rose, et al.* (A–21), the defendants successfully challenged the Bergen County program which denied them admission based on criteria that excluded defendants with serious charges. On appeal, Supreme Court of New Jersey ruled that:

"Exclusion by type of charge, because there is little data, should not be done until and unless it can be shown that the type of charge does, with some reliability, predict an inability to accomplish deterrence from future criminal behavior. To be fair, then, all defendants, irrespective generally of charge or record, should be afforded the opportunity to provide their motivation to succeed in the program . . .".

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[39] Michael R. Biel, Legal Issues and Characteristics of Pretrial Programs, Washington, D.C.: American Bar Association, National Pretrial Intervention Service Center, April 1974.

[40] Joan Mullen, Dilemma of Diversion—Resource Materials on Adult Pre-Trial Intervention Program—Monograph, ABT Associates, Inc.

[41] Biel, Ibid.

[42] Harvey S. Perlman and Peter A. Jaszi, Legal Issues in Addict Diversion: A Laymen's Guide, Washington, D.C.: Drug Abuse Council, Inc., and the American Bar Association Commission on Correctional Facilities and Services, 1975.

[43] Reported by Mullen, Ibid.

[44] National Association on Pretrial Service Agencies, 1974 National Conference of Pretrial Release and Diversion in San Francisco, California, June 1974. Reported in Article by Kelly, Michael, "Social Science Evaluation and Criminal Justice Policy Making: The Case of Pretrial Release."

[45] Kelly, ibid.

[46] Ibid.

[47] Biel, Michael R., Ibid.

[48] *N.J. v. Leonardis*, 71 N.J. 85 (1976) at 90.

Further on the Court said:

"We find the exclusionary criteria accord misplaced emphasis to the offense with which a defendant is charged and hence fail to emphasize the defendant's potential for rehabilitation."

Therefore, ". . . we reject the Bergen County exclusionary criteria as absolute standards by which to evaluate defendants' applications."

For those same reasons, other exclusionary criteria are difficult to defend. If the diversion option is indeed geared toward Goals 2 and 3, exclusions related to sex, age, employment status and residence are equally indefensible and would violate the equal protection clause.

Instead, individual potentials for benefiting from the diversion option should be assessed, within the context described in Goal 1, and blanket exclusions of catecategories or classes of defendants otherwise deleted. In other words, all individual whose case would not be "more appropriately handled through the adversary system" should have access to diversion programs. This should include defendants whose need for services is minimal or quasi non-existent in order to achieve Standard 3.3; and defendants who, within the short term program involvement concept, require more specialized or intense service delivery toward implementation of Standard 3.3.

At the other end of the spectrum, and in keeping with Standard 1.2, eligibility criteria should be revised and delete categories of defendants when, obviously, previously eligible charges have been decriminalized (. . . obviously) eligible or the handling of certain charges through the regular process leads to decisions or options which become less restrictive than the diversion option.

Standard 2.3. Enrollment in Diversion Programs Should Not Be Conditioned on a Plea of Guilt, Nor on an Informal Admission of Guilt or of Moral Responsibility. For the Same Reason, Defendants Who Maintain Their Innocence Should Be Permitted Enrollment in Diversion Programs

Certain pretrial diversion programs require the eligible defendant to plead guilty prior to admission into the program. Without knowing exactly what the implications of such plea can be, the defendant is likely to give up the Fifth Amendment privilege against self incrimination and possibly the right to a trail by jury and to confrontation of witnesses at a later time. Under those circumstances, and as mentioned in Standard 1.2, the defendant's decision does not meet the requirement that it be "intentional, voluntary and intelligent", not to mention: "the implicit threat that the prosecutor may otherwise seek the maximum penalty allowed by law".[49]

Even when the defendant benefits from legal counsel, enrollment conditioned by a plea of guilt can turn the diversion option into a form of plea bargaining rather than an alternative in its own right: It can also be viewed as coercive or as a promise of immunity.

On the other hand, *Brady v. U.S.* (397 U.S. 742), and *North Carolina v. Alford* (400 U.S. 26), present situations where the guilty plea "represents a voluntary and intelligent choice".[50] According to Brady, the guilty plea made by the defendant who was charged with kidnapping was voluntary "even though the plea was entered to avoid any possibility of an imposition of the death penalty".[51] In response to this vewpoint, Pearlman and Jaszi argue that the justification given by the prosecutors; i.e., that there are serious risks in delaying prosecution, is a false one, since pretrial program usually delay prosecution for six months only, and that such delay is not likely to hamper the prosecutor's case in any meaningful way.[52]

Other arguments in favor of guilty pleas concentrate on their "therapeutic" values: "It demonstrates a step toward "rehabilitation through admission and presumably repentence . . . and it may increase the leverage of the treatment staff and prosecutor in forcing persons to remain in diversion programs." [53]

The latter statement is in contradiction to Standard 1.3. As for the first part, i.e., the benefits of repentence, the arguments are shaky.

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[49] National Association of Pretrial Service Agencies, 1974, National Conference of Pretrial Release and Diversion, Nancy E. Goldberg, "Pretrial Diversion Bilk or Bargain."

[50] As discussed in Harvey S. Perlman and Peter A. Jaszi, Legal Issues in Addict Diversion: A Layman's Guide, Washington, D.C.: Drug Abuse Council, Inc. and the American Bar Association Commission on Correctional Facilities and Services, 1975.

[51] Ibid.

[52] Ibid.

[53] Ibid.

If a defendant has opted for the traditional process and/or gone through such process and been found guilty, alternatives to the traditional sentencing process can then be offered. Whether such alternatives lead to eventual dismissal of charges or not, they are substantially different than those reviewed in this paper. Precisely because the defendant has been found guilty, program content, requirements placed on the individual and possible review of guilt in counseling sessions (if such sessions are part of the program) belong to a different aspect of the criminal justice discipline.

If, on the other hand, the diversion program attempts to provide a pretrial alternative, and to help the individual to avoid future crisis situations which might lead to arrest, the requirement of a guilt plea in order to achieve such purpose might lead to arrests, the requirement of a guilt plea in order to achieve such purpose appears of no value.

As described in Commentary on Standards 3.1–3.4, service delivery is not viewed as "therapeutic". And while the participants' service plan should address his/her arrest, and might discuss his/her actual commission of a crime, such discussion should again be geared towards defusing future crisis situations and be kept confidential between participant and diversion staff member—not be a part of the official process of program entry.

Another area which merits consideration pertains to defendants who maintain their innocence:

"To take any steps to bar the participation of such persons would be an unwarranted discrimination. Innocent defendants, as well as those who are actually guilty, face harm from the disruptive process of full prosecution and can, if convicted, be harmed by the affixing of a criminal label. To require that innocent persons face the risk of trial is to assume that innocent persons are routinely found innocent. The extent to which this is true in practice is not relevant; a defendant who intelligently weighs the risks between the relative surething of PTI and the possibility of conviction at trial, and who chooses PTI, should be recognized as having a right to make either election." [54]

Standard 2.4. Furthermore, No Conditions Other Than Regular Program Requirements Should be Imposed by the Court on the Divertee

Arguments similar to those made for a plea of guilt conditioning diversion program enrollment are used in favor of diverted defendants paying restitution to the victim for loss or injury.

While restitution can be considered as a civil matter agreement to such enrollment condition can: negatively affect the defendant's case if s(he) is evetnually remanded to the court upon noncompletion of the program—unless such agreement is not admissable; turn the diversion program into a collection agency (with the corollary issue of: what happens to the defendant's case if s(he) is unable to meet the restitution requirement); and discriminate against the poorer defendants.[55]

Even if restitution (as opposed to victim's compensation) [56] is symbolic the denial of equal protection less likely, the value of such condition then becomes questionable. Its purpose, if any, should be related to service plans tailored for each individual and in keeping with section 3—not be a blanket condition of enrollment for all defendants.

A different approach to restitution has also been suggested, i.e., the condition of unpaid (volunteer) work. Either approach, if used, however, raises again the issue of voluntary participation in the program and the "possibility of challenge to such work assignments on Thirteenth Amendment (involuntary servitude) grounds . . . ."[57]

Again, the only acceptable form for such options should be as part of the service plan, with the agreement of the participant, and under the standards of section 3.

These standards do not propose to review legitimate rights of victims or possible compensations which might be awarded to victims (following conviction of a defendant, for example). Further as demonstrated by the recent growth of victim assistance programs, victims are often in need of assistance other than compensation (advice in court, counseling, information).

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[54] Proposal for State Wide Implementation of a Uniform Program of Pretrial Intervention Under New Jersey Court Rule 3:28, State of New Jersey, pp. 37–38, April 1975.

[55] For more information on legal aspects of restitution, see Pretrial Intervention—Legal Issues: A Guide to Policy Development, American Bar Association, Washington, D.C., 1977.

[56] Ibid.

[57] Ibid, p. 35.

Standard 2.5. Prior to Making the Decision to Enter Diversion Programs, Eligible Defendants Should be Given the Opportunity to Review, With Their Counsel Present, a Copy of General Diversion Program Requirements (Including Average Program Duration and Possible Outcomes)

Despite the obvious importance and complexity of the defendant's decision, most defendants have to make this decision on their own.[58]

Standards in section 1 reviewed the essential need for advice of counsel. Alone, it is unlikely that the defendant can balance "the threat of prosecution and conviction against the conditions of diversion" [59]

"The accused remains fully subject to prosecution and criminal sanctions (fine, probation, incarceration) for alleged criminal conduct if he/she (i) fails to meet the program requirements for successful termination or (ii) in some cases, fails to convince the prosecutor or judge that a positive determination as to satisfactory participation merits dismissal of the prsecution." [60]

Besides reviewing alternate options, the defendant should have a detailed understanding of the diversion program. In practice, some programs accomplish this by starting to work with the defendant prior to official enrollment. When such format is not feasible, and/or too costly, the following information should be conveyed:

(*a*) Factual description of program, including philosophy and methods, duration, restrictions, on freedom, etc.;

(*b*) the likelihood of success of failure, and the possible and probable consequences of each;

(*c*) the effect of the waiver of any rights required as a condition of diversion; and whether such a waiver could be successfully challenged;

(*d*) collateral effects, including practical and legal effects of engagement of record or lack of expungement and the presumption of guilt implicit in the diversion programs;

(*e*) whether or not statements the client makes in connection with the diversion process will be considered confidential; and

(*f*) whether or not, should diversion be terminated, the client receives credit against any sentence for time spent in a diversion program.[61]

To help fulfill this obligation, the diversion program should be responsible for making this information accessible to counsel.

Standard 2.6 Diversion Programs, When Denying Enrollment, Should State in Writing Their Reasons for Denial to Defendants and Their Counsel. Such Information Should Remain Confidential (Not be Admissible Evidence)

Whoever makes the final decision concerning diversion program enrollment, it should be the defendant's prerogative to be able to challenge the decision through his/her defense counsel.

In support of such notion are the arguments presented in the Leonardis case (under appeal) which considers that:

"Providing a defendant with reasons for the denial of his application will not only allow a defendant to adequately prepare for judicial review of that decision, but will also promote the rehabilitative function which the PTI concept serves. At the very least, disclosure will alleviate existing suspicions about the arbitrariness of given decisions and will thereby foster a respect for the fair operation of the law." [62]

Although a trial-type proceeding is not necessary, defendants should be accorded an informal hearing before the designated judge for a county at every stage of a defendant's association with a PTI project at which his admission, rejection or continuation in the program is put in question.

The New Jersey decision placed the onus of responsibility for giving reasons for denials on the prosecutor. The case is under appeal, and division of power doctrines should rest with the appropriate authorities.

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[58] National Legal Aid and Defender Association, National Colloquium on the Future of Defender Services, Chapter VI: "The Defense Attorney's Role in Diversion and Plea Bargaining," National Study Commission on Defense Services, 1976.

[59] Ibid.

[60] Biel, Michael R., Legal Issues and Characteristics of Pretrial Intervention Programs, Washington, D.C.: American Bar Association, National Pretrial Intervention Service Center, April 1974.

[61] National Legal Aid and Defender Association, National Colloquium on the Future of Defender Services, Chapter VI: "The Defense Attorney's Role in Diversion and Plea Bargaining", National Study Commission on Defense Services, 1976.

[62] *State v Leonardis*, 71 N.J. 85 (1976).

These standards suggest, however, that diversion programs should offer the defendant the possibility of challenging his/her own evaluation. And that information provided in support of such denial should not be used to prejudice the defendant's case.

Standard 2.7 Once a Final Decision Has Been Made Regarding Enrollment/Non-Enrollment Into Diversion Programs, the Responsibility to Challenge the Decision or Request an Explanation Should be That of Defendant's Counsel, Not of the Program

As the courts extend the concept of equal protection and as diversion programs review applications for admission on a case by case basis, the possibilities increase for challenges to enrollment denial.

While program administrators should have the mandate to formulate program policies and procedures which safeguards participants' rights, it is not their role to act either as an adversary of or antagonist to any other parties in the criminal justice system.

Further, and on behalf of the defendant, such role has been traditionally assigned to the defense counsel. When a defendant is denied entrance into a diversion program, it should therefore be the responsibility of his/her counsel to challenge if that decision appears arbitrary or capricious.

Standard 3.1. Diversion Programs Should Devise and Adopt, as Soon as Possible After Entry, Realistic Plans With Achievable Goals With the Active Involvement of Participants

Purpose and parameters of service plans are reviewed in the subsequent standards. Before reviewing those issues, however, one should remember the conditions under which such services are delivered.

Since the diversion program is defined as voluntary, it is therefore necessary as soon as possible to determine and inform the defendant what the service plan will include. Besides enlightening the participant, such practices are also recommended from a cost effective point of view: the longer it takes for the defendant to realize that s(he) may have agreed to program enrollment on he basis of possible misunderstandings, the more program costs and energies are wasted.

As will be reviewed in Standard 3.2, service delivery will differ from one individual to another while keeping with the general parameters of the diversion option, as presented at the time of the enrollment decision. These standards do not negate the fact that time is necessary to establish a relationship between participant and diversion program staff member and to elicit background information necessary to formulate a service plan. Certainly such service plans may be affected by new insights or developments at a later stage (cf Standard 3.4). It is strongly suggested, however, that a clear definition of the service plan agreement be developed immediately upon program entry and that diversion programs' policies and administration be geared toward that practice.

Again, in keeping with the voluntary aspect of the program where the participant is presumed innocent (and pleaded guilty), it is viewed essential that the participant be actively involved in the formulation of such plan. In order to accomplish their mandate, (cf Goal #3), service plans should be viewed by the participant as a tool and a help in their specific situation, not as punishment, a substitute for sentence, or "something to do to get over". While service plans will often place requirements on the participant (attendance at certain number of seesions, for instance), these requirements should all be geared toward a specific purpose (training toward securing a vocational situation is one example) with the participant cognizant of such goals.

The service plan should, in addition, be geared toward goals which can be realistically accomplished within the time frame of the diversion program and be adapted to the specific participant potential. Unrealistic service plans are likely to fail. The participant unable to complete the program and to abide by his/her agreement to complete a "treatment" plan is returned to ordinary prosecution (Treatment in quotes by the authors: these standards are disagreement with the terminology of "treatment" for diversion participants).

Standard 3.2. Service Plans Should Meet the Needs of the Alleged Offender Rather Than Be Based on the Offense; Nevertheless, Time Spent in the Program Should Relate to the Minimum Sentence Imposed for the Offense if the Defendant Were Convicted

According to the Standards listed so far, defendants eligible for the diversion option will vary greatly in terms of charges as well as of personal situation.

Most practitioners, however, lean to the notion that programs should respond to the personal needs of the defendant rather than "treat" him/her for the crime which was allegedly committed. In favor of this notion is the presumption of innocence. The purpose of service delivery is, in addition, more geared toward the future of the defendant than the commission/non commission of the alleged crime. A similar view was reflected in the New Jersey Supreme Court's decision in the *State of New Jersey* v. *Rose* and the *State of New Jersey* v. *Leonardis*, in which the court ruled that "conditioning admission solely on the nature of the defendant's crime may be both arbitrary and illogical." [63]

Using a model of providing services based on the personal needs of defendants means offering unemployed or employment-handicapped defendants aptitude achievement testing, vocational counseling, job training to develop "the skills necessary to obtain and retain a job," and job placement the puts the defendant in employment commensurate with his/her abilities.

For the young defendant, it means broad-based educational services, including remedial education. For female defendants, projects should include access to day care facilities and structure program hours to correspond to a woman's lifestyle and work or home responsibilities.

Beyond these basic services, programs should offer defendants who need it, personal counseling and psychological testing, either directly through the program or through referrals to outside agencies. A good comprehensive multi-service program would provide services directly and act as a referral agency as well, matching clients with other services in the area. As a result, clients could be placed in programs tailored to their specific problems when they need group therapy, individual therapy, or vocational rehabilitation, family and/or individual counseling, emergency financial aid, assistance in matters of housing, welfare, medical, or legal nature.

These commentaries do not suggest, however, that the alleged offense is irrelevant to the service plan. Common to all participants is the experience of an arrest and the exposure to the preliminary stages of criminal processing.

"Each participating defendant has, as indicated by his or her arrest, a problem or set of problems which caused the involvement in the criminal process. Each is subject in addition to the anxiety produced by the threat of ordinary prosecution." [64]

In addition, as will often happen in one to one sessions if a relationship of trust is developed between participant and diversion staff member, the participant will discuss the incident. As long as the ultimate purpose of service plans is safeguarded, realistic service plans may support that "different treatments for different types of offenders" [65] should be considered. Thus the defendant charged with property crime might receive vocational/employment assistance, whereas others whose alleged crime might indicate emotional problems could benefit from psychological referrals. This approach however, appears valid only if geared towards Goal #3 and is in keeping with Standard 3.3.

Finally, the alleged offense should be considered in order to ensure that service plans are not substantially longer than the usual sentence imposed for that offense (following conviction of plea bargaining), keeping in mind that "the time required to 'cure' an individual may bear no relation to the harm caused by his criminal act." [66]

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[63] *State v. Leonardis*, 71 New Jersey 85 (1976).

[64] Administrative Office of the Courts, Proposal for State Wide Implementation of Pretrial Intervention under New Jersey Court Rule 3:28. State of New Jersey, p. 104.

[65] Edward DeGrazia, "Diversion from the Criminal Process: The 'Mental Health' Experiment," 6 Connecticut Law Review, 432, 1974.

[66] G. S. Gorelick, "Pretrial Diversion: The Threat of Expanding Social Control," 10 Harvard Civil Rights—Civil Liberties Law Review 1, Winter 1974.

Standard 3.3 Services Should be the Least Restrictive Possible and be Administered to Help the Individual Avoid Criminal Behavior

These standards uphold that the major objective of any service plan is to help the individual participant avoid future crisis situation which might lead to future arrests.

In designing service plans, however, programs should keep in mind that levels of intensity of service required by participants will vary significantly:

"To the extent that project reports are able to compile meaningful information, a not unusual finding was that the control group used for comparison with persons who entered the diversion program showed a high rate of outright dismissals." [67]

Further, "the vast majority of their participants (are) from defendant groups that face little punishment in the criminal justice system [and] who probably need not be accompanied by extensive rehabilitation." [68]

As a result, certain participants may need little more than supervised reporting (in person or by telephone) once the necessary assessment has been made. Service delivery and program requirements which go beyond the general purpose cited above may be an invasion of privacy and lead to serious question of due process, equal protection of the laws, and other Fourth, Fifth, and Fourteenth Amendment progections.

It is neither the duty nor the right of criminal justice agencies to require behavioral change of rehabilitation beyond that necessary for such deterrance.[69]

Because: " * * * the mere fact of arrest and the securing thereby of control over the life of a defendant cannot mean that problems unrelated casually to the alleged offense should be the subject of treatment or rehabilitative services. A homosexual defendant charged with embezzlement should not as a result of PTI enroll ment be required to undergo "treatment" for homosexuality." [70]

Another area which requires safeguards relates to individuals whose personal situation is such that intensive services are needed:

" * * * Is it not fundamentally unfair to return to prosecution the participant with a difficult and complicated treatment program who is charged with a minor offense, when one charged with a serious matter may easily be able to comply with relatively non-restrictive conditions?" [71]

In these situations, it is strongly recommended that service plans include referrals for long range service delivery. Defendants with hard drugs and substance abuse problems or with serious emotional problems fall within the category. Completion of the program would not, in these situations, require that all problems be resolved; but that the defendant's situation be sufficiently ameliorated to give him or her the supports required to avoid future crisis.

Finally the use of terminology is of particular importance to this set of standards. Service plan is being recommended as opposed to "treatment", "counseling", "cures", or "rehabilitative models". Given the vast range of eligible defendants, any labeling which could ultimately stigmatize their involvement in a diversion program is self-defeating.

"As entrance into diversion programs is determined by more institutionalized and formal procedures, the risk that diversion programs will develop a stigma of their own may increase.[72] The unexamined assumption is that participation in a diversion program does not label the individual as a deviant.[73]

"Assuming participants would have been convicted and subjected to at least a year probationary period under normal circumstance, is it not clear that providing supervision before adjudication of guilt is any less stigmatizing than the normal criminal process?" [74]

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[67] Dan Freed, Final Report—National Conference on Pretrial Release and Diversion, National Association of Pretrial Services Agencies, San Francisco, California, June 1974.

[68] Roberta Rovner Piecznik, Pretrial Intervention Strategies Evaluation of Policy—Related Research and Policy-Maker Perceptions, Washington, D.C.: American Bar Association, National Pretrial Intervention Service Center, November 1974.

[69] Proposal for State Wide Implementation of Pretrial Intervention Under New Jersey Court Rule 3 :28, State of New Jersey, Administrative Office of the Courts.

[70] Ibid, pp. 23–24.

[71] Ibid.

[72] J. S. Gorelick, "Pretrial Diversion: The Threat of Expanding Social Control", 10 Harvard Civil Rights—Civil Liberties Law Review 1, Winter 1974.

[73] National Legal Aid and Defender Association, National Colloquium on the Future of Defender Services, Chapter VI: "The Defense Attorney's Role in Diversion and Plea Bargaining", National Study Commission on Defense Services, 1976.

[74] Joan Mullen, Dilemma of Diversion—Resource Materials on Adult Pre-Trial Intervention Program—Monograph, ABT Associates, Inc.: Pretrial Services: An Evaluation of Policy Related Research, ABT Associates, Inc., 1974.

One should reflect on the experience of juvenile courts which were created in the hopes of avoiding for youths the stigma of criminal justice processing. Yet, processing through the juvenile courts has developed a stigma of its own, a danger which could apply to diversion.

To presuppose that all diverted defendants need treatment is to apply to all, whether they need it or not, an undifferentiated approach and leads to another type of overreach, that of services. In an attempt to avoid the above, diversion programs should stress flexibility of approach with each defendant and minimize staff members' caseloads in order to prevent wholesale processing of divertees.

Standard 3.4. Commentary Not Completed

Standard 4.1. Participants Should be Able to Formally Withdraw at Any Time, Before the Program is Completed and Be Remanded to the Court Process Without Prejudice to Them During the Ordinary Course of Prosecution

Consistent with the voluntary aspect of the diversion option should be the possibility for the participant to withdraw from the program at any time.

It is argued against this theory that, once the decision of enrollment has been finalized and especially when the withdrawal takes place at a point late in program participation, the costs already expended are significant and regular processing of the case is more difficult.

Certain safeguards should help, however, to reduce the instance of withdrawal: intelligent choice on the part of the defendant, careful screening at the initial stages, and early development of a service plan.

Notwithstanding the above, participation is either voluntary or it is not. Any form of coercion to keep the participant in the program against his/her wishes after the situation has been discussed, the consequences of remanding to the court process reviewed with the defense counsel, and alternate service plan approaches considered would be as much or more costly.

The proposal that such option be formailzed (i.e., written statement from the defendant, for instance) stems from a differentiation between the participant's option and the program's decision (of Standard 4.2). In reality, the two may often be combined unless the participant can no longer be reached; or unless the participant expresses a desire to remain in the program, but repeatedly fails to follow the service plan. In both situations, non-completion should have no bearing on the defendant's case during the ordinary course of prosecution and should avoid that: "these cases are subject to a kind of informal double jeopardy, in that this group may be prosecuted more vigorously . . . the end result for most "unfavorables" is conviction followed by another period of probation supervision." [75]

Standard 4.2. Diversion Programs Should Also Have the Option To Cease Service Delivery to Participants Who Would Then Be Remanded to the Court Process. However, When Non-completion of the Program Occurs because of the Diversion Programs' Decision, Written Reasons Should Be Available to the Defendants and Their Counsel. This Information Should Remain Confidential (Should Not Be Admissible Evidence), and Non-completion of the Program Should Not Prejudice Defendants During the Ordinary Course of Prosecution

Pretrial diversion programs often face the situation where service delivery is no longer possible because, in the judgment of the program staff, the defendant is not cooperative or has failed in some way to meet the agreed upon conditions of the service plan.

In keeping with commentaries of Standard 4.1, such decision should not jeopardize the defendant's case. If it did, the diversion option "may well be asking the courts to add social performance criteria to definitions of criminal conducts." [76]

Furthermore, the program's decision to terminate services is often related to subjective assessments on the part of diversion program staff. Before such decision is final, it is recommended that: alternate service plans approaches be considered; and defense counsel be informed of the tentative decision and have a chance to contact his/her client and review the possible consequences of remand to the court process.

Throughout that process, the participant and his/her counsel should have access to a written statement from the diversion program stating the reasons for

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[75] Joan Mullen, Dilemma of Diversion—Resource Materials on Adult Pre-Trial Intervention Program—Monograph, ABT Associates, Inc.

[76] Joan Mullen, Dilemma of Diversion—Resource Materials on Adult Pre-Trial Intervention Program—Monograph, ABT Associates, Inc.

tentative termination. In the best of circumstances, this may clarify possible misunderstandings and enable the participant to remain in the program. If the decision is final, and considered arbitrary by the former participant and his/her counsel, this statement enables them to challenge the decision (of Standard 4.5).

Standard 4.3. Programs' Decision To Cease Service Delivery Should Be Based Solely Upon Failure by Participants To Meet the Requirements of the Service Plan

The single justification for terminating a defendant should be the participant failing to meet the conditions set out in the agreed upon service plan. Any other criteria impact on the voluntary aspect of the program and jeopardize fairness to the defendant. To avoid later conflicts, the service plan should be descriptive and precise, stating what is expected of the participant while he/she is in the program (including at a later point, the necessary adaptations in keeping with standard 3.4). Otherwise, in the event of challenge to termination decision, the defense counsel can argue that the service plan was unnecessarily vague or arbitrary.

Attempts have been made to devise fixed point systems where events or tasks are rated. The token economy concept, a variance of the point system, assigns in advance points for completion or noncompletion of certain requirements, with a certain number of points "earning" program completion.

This approach has its obvious advantages. It reduces subjectivity on the part of diversion staff members and uneven assessment of participants. In practice, however, the limits are also apparent. Certain areas are easily measurable (attendance in counseling sessions, if part of the service plan, are one example). But they overlook important indicators of growth or achievements which are also part of the service plan yet less easily measurable.

Pending the development of a magical formula which eliminates all forms of subjective assessments, it is therefore recommended that point systems be used but limited to easily measurable achievements and be combined with subjective evaluation; and that other safeguards (such as termination hearings) be instituted to protect the defendant against unfair or capricious practices.

It is also suggested that any practice in contradiction with the above standards should be avoided: e.g. the prosecutor threatening termination unless the participant testifies against another defendant etc. And that, under these circumstances, the participant be afforded a court review with counsel present. (cf Standard 4.5)

Standard 4.4. Rearrests or Conviction on a New Arrest During Program Participation Should Not Automatically Lead to Termination From the Program

As stated in Standard 4.3, termination from a pretrial program should be only for noncompliance with conditions of the service plan and for no other reasons.

At present, though, a defendant who is re-arrested while in a pretrial diversion program is often terminated from the program and returned to the court for regular processing. This practice is even more widespread when the re-arrest charge ends in conviction.

It is suggested, however, that such termination not be automatic. Unless the defendant has pleaded guilty, or until conviction of the charge, he/she is presumed innocent of the new charge.

Even if the new arrest leads to plea of guilt or to conviction, the re-arrest may be minor and the individual and community may derive greater benefit from service plan completion. Further, it would be "unrealistic, and perhaps counterproductive to expect a complete alteration of behavior." [77]

It is therefore suggested that these situations be examined on a case basis within the context of a broad agreement with the courts and that the defendant be informed at program entry what the program's position is, vis a vis re-arrests and/or convictions.

Standard 4.5. If or When Participants Do Not Complete the Program, They Should Have Avenues of Review of Such Decision if They so Choose, With Counsel Present. If Court Officials, the Hearing Officers Should Not Be Those Who Would Eventually Hear the Case if Participants Were Remanded to the Court Process

As reviewed previously, termination decisions are frequently based on subjective factors, not "hard" evidence and the diversion program may act arbitrarily or unfairly towards the participant.

[77] Harvey S. Perlman and Peter A. Jaszi, Legal Issues in Addict Diversion: A Layman's Guide, Washington, D.C.: Drug Abuse Council, Inc. and the American Bar Association Commission on Correctional Facilities and Services, 1975.

Therefore, in the event that the defendant does not complete the program under the conditions set forth in the previous four standards, he/she should have access to a termination hearing under principles of due process (and in accordance with the principles held by the U.S. Supreme Court before parole or probation can be revoked). "It is strongly recommended that such hearing be conducted according to regular due process proceedings, i.e., with notice of violation; disclosure of evidence; right to present witnesses and cross-examine witnesses; hearing before a neutral examiner; written findings of fact." [78]

Although the cases deal with parole and probation, *Morrissey* v. *Brewer* and *Gagnon* v. *Scarpelli* should apply equally to diversion because of the similar threat of "loss of liberty" following program termination. Further, in *Kramer* v. *Municipal Court*, the Court ruled that: "although the statute specifically authorized termination from a diversion program only for the arrest and conviction of the divertee for any criminal offense during the period of diversion . . . termination for cause was implied by the statutory language." [79]

Or, as expressed in the NLADA's National Colloquim: "the right to a hearing prior to termination is required absent of a clear showing of legislative intent to the contrary." [80]

Both the hearing and written record requirement are insisted upon in the *State of New Jersey* v *Frederick John Strychnewicz* (on appeal) at the time of program entry. This position can be extended to support similar review at the time of termination.

Finally, similar views are shared by the NAC where the value of a written statement is stressed in case a defendant decides that he/she was the victim of an unfair administrative decision.[81]

"The presence of an attorney during such hearing is viewed equally essential. The termination process should be considered as a critical stage in the criminal process (of *Powell* v *Alabama*, 1932). And the right to counsel has been extended to include preliminary hearings, arraignments, and other situations in which the defendant could benefit from legal advice." [82]

The necessary presence of counsel at this stage of the diversion option further supports the recommendation that it take place following formal charging (of Standard 1.1). "To adhere to the principles of due process, the hearing officer should be a neutral party. It is further recommended that the hearing officer be a judge—ensuring that, at all stages of the diversion process, justice has been fairly applied."

Standards 5.1 Through 9.2.—Commentaries not Completed

OUTLINE FOR INTRA AGENCY MANAGEMENT INFORMATION

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[78] Michael R. Biel, Legal Issues and Characteristics of Pretrial Intervention Programs, Washington, D.C.: American Bar Association, National Pretrial Intervention Service Center, April 1974.

[79] *Kramer* v. *Municipal Court*, 49 Cal. 3d 418 (1975).

[80] National Legal Aid and Defender Association, National Colloquium on the Future of Defender Services, Chapter VI: "The Defense Attorney's Role in Diversion and Plea Bargaining", National Study.

[81] National Advisory Commission on Criminal Justice Standards and Goals, Courts Task Force Report, Chapter 2: "Diversion", Washington, D.C.: Law Enforcement Assistance Administration, 1973.

[82] Harvey S. Perlman and Peter A. Jaszi, Legal Issues in Addict Diversion: A Layman's Guide, Washington, D.C.: Drug Abuse Council, Inc. and the American Bar Association Commission on Correctional Facilities and Services, 1975.

GOAL	HYPOTHESES OR ASSUMPTIONS	POSSIBLE ANALYSES FOR TESTING HYPOTHESES	I DATA REQUIRED FOR TESTING HYPOTHESES
I. To provide the Criminal Justice System with a more flexible approach than the traditional process in order that the System: 1. may be more responsive to the needs of defendants and society. 2. may preserve its energies to effectively process cases that would be more appropriately handled through the adversary system.	1. The diversion program is seen and utilized as a viable alternative process by judges, prosecutors and defense attorneys. 2. If the diversion program was not available the defendant would be treated in a manner that would be more deleterious to the defendant and/or society.	1. Comparison between the number of eligible defendants passing through the judicial system and the number of cases referred to or permitted entry into the diversion program by judges, prosecutors and defense attorneys. 2. Comparison of the amount of detention and court dispositions of a control group of diversion-eligible defendants with the diversion client body. 3. Interviews with the judges, prosecutors and defense attorneys regarding their opinion of the diversion project as an effective alternative to the regular judicial process.	1. Number of diversion eligible defendants within the jurisdiction of the diversion project. 2. Number of defendants referred to the diversion project by judges, prosecutors and defense attorneys (broken down into these 3 catagories). 3. Court dispositions of control group and client population (including fines and jail time spent). 4. Amount of detention time experienced by control group and client population. 5. Percentage of judges, prosecutors and defense attorneys whose interviews indicate a favorable opinion of the diversion project.

GOAL	HYPOTHESES OR ASSUMPTIONS	POSSIBLE ANALYSIS FOR TESTING HYPOTHESES	DATA REQUIRED FOR TESTING HYPOTHESES
II To provide defendants with an opportunity to avoid the consequences of criminal processing, to avoid conviction and the consequences of criminal conviction.	1. Defendants who go through a diversion program have fewer court appearances and fewer convictions then they would if they underwent regular judicial processing. 2. Diverted defendants spend less time in detention and jail then they would if they were not diverted. 3. The vocational lives of diverted defendants will be less disrupted and handicapped then would be if they underwent regular judicial processing. (The assumption that diverted defendants will experience lower recidivism can also be connected to this goal. This assumption, however, is more directly connected with Goal III and consequently, will be dealt with there.)	I. A comparison between the number of court appearances experienced by a control group of diversion-eligible defendants with the diversion program's client population. 2. Comparison of the control group's conviction rate, disposition profile, time spent in detention and jail with these indices for the diverted population. 3. Comparison of the extent to which members of the control group lose their vocational positions as a consequence of criminal processing and/or conviction and the extent to which this occurs in the diverted population. 4. Comparison between the post-arrest vocational activities of the control group and the diverted population. 5. Analysis of the educational and/or vocational barriers that exist in the diversion program's jurisdiction for convicted as opposed to arrested persons.	For both the control group and diverted population: 1. Number of court appearances prior to final court disposition. 2. Number of days spent in detention. 3. Profile of final court disposition including number convicted and of those number receiving unconditional and conditional discharges, fines, probation, imprisonment. 4. Vocational status just prior to arrest and just after arrest and the extent to which vocational positions were lost as a direct result of arrest, criminal processing and conviction. 5. The number of days the defendant is vocationally active during the year following arrest. 6. Income levels during the first, second and third years following arrest. 7. The number of defendants partially or totally subsidized by the state the year prior to and the year following arrest. In addition the diversion

GOAL	HYPOTHESES OR ASSUMPTIONS	POSSIBLE ANALYSIS FOR TESTING HYPOTHESES	III DATA REQUIRED FOR TESTING HYPOTHESES
III Help in deterring and reducing criminal activities by offering to the defendant the necessary opportunities to effect such changes as necessary, at a minimum demonstrate whether such reduction took place.	1. Diverted defendants will experience less recidivism than they would had they not been diverted. 2. Diverted defendants who receive counseling, and/or vocational services will experience less recidivism than they would if they were diverted without receiving such services.	To adequately test the assumptions underlying this goal, post-arrest recidvism measures must be gathered and analyzed for at least 3 groups of diversion eligible defendants: 1. Those who are placed in a diversion program which provides counseling and/or vocational services, 2. those who are diverted but are not provided with counseling or vocational services, and 3. those who are not diverted and consequently undergo the regular judicial processing.	(Continued from preceding pg.) program should become knowledgeable about the statutes in their jurisdiction which relate to the restrictions imposed on arrestees as well as those convicted. III For all groups being analyzed: 1. Number and severity of rearrests during the first, second and third years following their arrest. 2. The extent to which each member of each group received counseling and/or vocational services during the first, second and third year following their arrest. This measure should be compared with the recidivism reduction (if any) evidenced by those defendants receiving counseling and/or vocational services.

GOAL	HYPOTHESES OR ASSUMPTIONS	POSSIBLE ANALYSES FOR TESTING HYPOTHESES	IV DATA REQUIRED FOR TESTING HYPOTHESES
IV To effect its mandate as reflected in the other 3 goals in the most effective, economical or non-duplicative fashion.	1. The diversion program is cost-effective (i.e. the benefits outweigh the costs). 2. The benefits available through the diversion program are not being offered more effectively or economically by another program or agency in the same jurisdiction.	1. Comparison between the costs of diversion program and the cost savings of its demonstrated benefits. 2. A description and analysis of the services presently being offered (with their attendant costs) by other programs and agencies operating in the diversion program's jurisdiction.	1. Total annual budget for the diversion program 2. Total number of defendants successfully serviced by the diversion program 3. Total number of defendants unsuccessfully serviced by the diversion program 4. Total number of clients serviced in a limited manner by the diversion program (e.g. former clients, family members of active clients, etc.) 5. Costs incurred by control group defendants undergoing regular judicial processing (e.g. increased detention time, greater number of court adjournments, probation costs, costs of imprisonment). 6. Cost savings of demonstrated benefits (e.g. increased taxes paid by increase in earnings, decrease state subsidies, cost savings involved with reduction in recidivism). 7. Description of services (and cost of these services) offered by all other components of the criminal justice system in the jurisdiction of the diversion program.

STANDARD	HYPOTHESES OR ASSUMPTIONS	POSSIBLE ANALYSIS FOR TESTING HYPOTHESES	DATA REQUIRED FOR TESTING HYPOTHESES
3.2 Service plans should meet the needs of the alleged offender rather than be based on the offense; nevertheless, the time spent in the program should relate to the minimum sentence imposed for the offense if the defendant were convicted.	Entry into the diversion program is not a more restrictive experience than the defendant would experience were he/she to choose to be processed in the regular manner.	Comparison between the restrictions imposed by the diversion program on its clientele and the restrictions imposed on a control group by the regular judicial process.	1. Average time spent in the diversion program. 2. Documentation of the restrictions imposed upon and the require- expected to be met by the diversion program's clientele. 3. Profile of the restrictions imposed upon the control group by the court (e.g. conditional discharges, probation, fines, imprisonment).

STANDARD	HYPOTHESES OR ASSUMPTION	POSSIBLE ANALYSIS FOR TESTING HYPOTHESIS	DATA REQUIRED FOR TESTING HYPOTHESIS
4.1 The participant should be able to formally withdraw at any time, before the program is completed and be remanded to the court process without prejudice to him/her during the ordinary course of prosecution.	Those who we terminate unfavorably from a diversion program will not experience a more restrictive response from the courts than they would had they never been diverted.	Comparison of the court disposition of unfavorably terminated diversion clients and the court dispositions of a control group of diversion-eligible defendants who have equivalent charges.	1. Profile of final court dispositions of unfavorably terminated defendants. 2. Profile of the charges against these clients. 3. Profile of final court dispositions of a control group of diversion-eligible defendants who have equivalent charges.

STANDARD	HYPOTHESIS OR ASSUMPTION	POSSIBLE ANALYSIS FOR TESTING HYPOTHESIS	DATA REQUIRED FOR TESTING HYPOTHESIS
5.1 Each participant should receive a dismissal of the charges for the diverted case upon completion of the program.	Those who successfully complete the diversion program have their charges dismissed.	Analysis of the final court dispositions of all clients who successfully complete the diversion program.	Precentage of defendants who successfully complete the program who receive a dismissal of their charges. The goal for a diversion program should be 100%.

STANDARD	HYPOTHESIS OR ASSUMPTION	POSSIBLE ANALYSIS FOR TESTING HYPOTHESIS	DATA REQUIRED FOR TESTING HYPOTHESIS
7.4 In adopting a particular methodology for research and evaluation, the diversion program should be cognizant of problematic models previously used, and avoid methodologies leading to false statements or misleading information.	The diversion program will utilize rigorous methodologies in evaluating its own performance and will not communicate information regarding the benefits of its services unless it has been rigorously demonstrated.	Comparison between the claimed benefits of the diversion program and the degree to which these benefits have been documented via rigorous research.	The essential issue in maintaining this standard is the utilization of adequate control groups in any evaluative studies performed by the diversion project. The control groups should be as equivalent as possible. Therefore, whenever possible, defendants should be placed into the control group randomly and should undergo as much of the diversion screening process as is politically feasible in the jurisdiction of the diversion project. The control group is inadequate to the extent that it does not experience the full screening procedure that a diverted defendant experiences.

STANDARD	HYPOTHESIS OR ASSUMPTION	POSSIBLE ANALYSIS FOR TESTING HYPOTHESIS	DATA REQUIRED FOR TESTING HYPOTHESIS
8.1 The staffing of the diversion program should be directly related to the number of clientele, to the scope of services to be provided in-house by the program, and to the kind of defendants who are likely to be diverted in that community.	1. Staff members who are similar to their clients will be more effective than staff members who are not similar to their clients. 2. The staff members of the diversion program are similar to their clients.	1. Comparison of the attendance rate, recidivism, and vocational stability of clients who have counselors similar to them with the same dependant variables of clients who have staff members who are not similar to them. 2. Comparison of staff members with clientele along the variables of sex, race, age, prior arrest history and personality characteristics.	1. Sex, race, age, number and severity of prior arrests, personality measurements of clients and the diversion program's staff members. 2. Attendance rate, vocational stability and recidivism of those clients who are similar to their counselors with respect to sex, age, race, number and severity of prior arrests and personality measurements. 3. Attendance rate, vocational stability and recidivism of those clients who are not similar to their counselors with respect to sex, age, number and severity of prior arrests and personality measurements.

Senator DECONCINI. What are your feelings toward expungement of the arrest record of the individual? Do you think that's a necessity to require that after the person has completed the requirements of the diversion program successfully, there should be some expungement of that record of arrest?

Mrs. CROHN. That's another thorny issue.

I would think that expungement of records would be desirable, except for one thing.

Realistically, the prosecutor or the court does not benefit from having an individual go through the process—and I think that might apply a little more for local courts than for the Federal system, although I'm not sure—who goes through and through the diversion program, always completes it successfully, and then gets rearrested. And because the record is expunged, there is no way to verify whether or not the individual has gone through the process.

One possible way of verifying it is to maintain records in the diversion program, but depending on where the individual is rearrested, that might have some problems also.

An alternative, to try to accommodate the legitimate concerns of the court system and at the same time the legitimate rights of the defendant, might be the sealing of records with the possibility that information be brought to the attention of the magistrate when, indeed, an individual, according to criteria, has already been diverted a certain number of times or only once or whatever.

The only difficulty with this—and that's why I don't feel I have any simple answer—is that the sealing of records is sometimes a farce. I have heard of all kinds of litt'e gimmicks that can be used even when the record is sealed, especially for juvenile offenders, so that information could still be taken and given to other parties than to those who are entitled to the information.

But I would think that it is unrealistic to think that total expungement would be tolerated by the court.

Senator DECONCINI. Thank you very much. We appreciate your taking the time, and your statement will be reviewed very carefully.

Mrs. CROHN. Thank you very much.

Senator DECONCINI. We will now have, as our next witness, Harry Connick.

Harry, thank you very much for coming this distance to be with us today. We appreciate immensely your sharing with us your views on your program in New Orleans and also your observations of this bill.

STATEMENT OF HARRY CONNICK, DISTRICT ATTORNEY, ORLEANS PARRISH, NEW ORLEANS, LA.

Mr. CONNICK. Thank you very much, Senator.

It's a pleasure and an honor to be here.

I think, when discussing the concept of diversion, it would be good to define some terms.

Diversion, as I appreciate it, began in what was formally called the Brooklyn Plan. As assistant United States attorney a number of years ago, I employed it—successfully. And upon becoming the chief prosecutor in New Orleans, the first program we instituted was a diversionary program.

I think it is imperative that whenever you discuss the concept of it, you have to consider diversion and what it is. It is designed, in my opinion, to be a prosecutive program and not one to be operated by the judiciary.

I think the other program—the one that is operated by the courts—parole and probation—has been in operation for a longtime. The concept of diversion is one that has to begin with the prosecutor He is the one that is charged, in my opinion, with making that prosecutive determination. It is, therefore, he, I believe, who should be in absolute control of the program.

I think the main function of the program is to rehabilitate the offender. The concept of diversion is to cause the offender to, almost immediately after his arrest, be brought into contact with the prosecutor.

In working with the arresting agency, whether it be the police or a Federal agency, that that police officer or agent have some input with the prosecutor and as quickly as possible, call upon the offender to understand that he has committed a crime; that he can be prosecuted for the crime; but that there is an alternative to prosecution and does he want to participate in that particular program.

The main function, and I agree with the previous speaker, is that the purpose should be to rehabilitate the offender.

I have listed in a paper that I have given certain essential features of the program which I believe are absolutely essential if it's going to be successful.

First of all, I think the prosecutor must be convinced that such a program is a workable program. For someone to have a program thrust upon him that he isn't convinced can be successful I think is a waste of time and money.

I believe that the prosecutor, secondly, should have absolute control over the program; and he should be the one to decide who gets into the program and who is dismissed from the program.

I think the interest of the victim must be paramount. I think historically we have given, and we should give, deference to the offender. He should be afforded an attorney if he can't afford one. He should be afforded a speedy trial and whatever is needed to see that his rights under the Constitution are represented.

But I believe that there should be some contact—there must be some contact—with the victim if the offender is to de diverted.

Senator DECONCINI. Do you think it should be mandatory, or are you satisfied if it's discretionary—either with the prosecutor or with the court?

Mr. CONNICK. I think that should be discretionary, Senator.

I believe it is advantageous. And we try, and we succeed, I think, in——

Senator DECONCINI. In your program, is it mandatory that the victim agree to the diversion? Or do you maintain the discretion?

Mr. CONNICK. We maintain the ultimate discretion to divert or not. But in 99 percent of the cases, we get the consent of the victim.

We let the victim know that this person, who has been arrested, has, in fact, committed a crime against them; and we want to find out what they have to say about it. And we're telling them what we're considering and why.

We tell them that if the offender, at any point in time along the course of the program, fails to comply with the conditions of the program, we intend to prosecute him.

So they are willing, in other words, to give the first offender—the nonviolent offender—a chance or a break. And I think this is something that we all want to do.

I do believe that the arresting authority has to be aware of the program too—in our situation, the police department and in your situation, the Federal enforcement agencies—the FBI and customs—must be aware of the program. You should have some input from them. Let them recommend to the prosecutor, for instance: We've arrested this young person. He has, in fact, committed a Federal crime but we do believe that he is a fit, suitable subject for diversion.

I believe you must have definite guidelines. The policies must be spelled out in order for there to be confidence in the program to eliminate any concept of arbitrariness on the part of the prosecutor.

I think it's a compelling feature of the program that these guidelines be spelled out with particularity and that they be followed and that they be respected.

I believe that before an individual offender is accepted into the program, he must be aware of the fact that he did, in fact, violate a law for which he could be prosecuted and convicted.

If there is any reservation on the part of the offender as to whether or not he violated a law, he should not be in the program. I believe the proper course for that case to take is for it to go to court and let his guilt or innocence be determined by a judge or a jury.

I believe that perpetrators of violent crime should not be allowed to participate in the program. Public confidence in this kind of a program is extremely important, in my opinion. I believe the public attitude today is to look at a man who has been given a second and third chance to say that that's enough and let's prosecute him.

If he commits a violent crime, let's prosecute him for it.

I believe to give violent offenders a second chance—whether the armed robber or the person who commits some Federal crime or bank robbery involving violence—I think these individuals should be excluded from the program.

I have made a few notes, Senator, about the bill itself.

Senator DECONCINI. Excuse me. What about drug offenders? Do you include any drug offenders—marihuana possession or anything.?

Mr. CONNICK. A minor percentage of the people participating in our program are drug offenders. But for isolated violations of the drug law, some prosecutors have drug-oriented diversionary programs, and I'm not familiar with the successes or failures of these programs.

At some point in time, it is my hope that in our city we can have a juvenile diversion program and a drug offender program.

Senator DECONCINI. Yours are selected case that you include in it?

Mr. CONNICK. Yes. But a small percentage of them.

Senator DECONCINI. Other than marihuana?

Mr. CONNICK. Marihuana in Louisiana—possession—is a misdemeanor. Our program is felony oriented.

Senator DECONCINI. So those are not included.

Mr. CONNICK. No.

I think the fact that a misdemeanant in Louisiana can have his record expunged at some point in time down the road makes it really not a stigma.

One of the advantages of the diversionary program, as I see it, is that the offender is not going to be stigmatized in future life with a criminal record. He has none under this procedure.

Again, I'm emphasizing the fact that this offender is diverted before charges are brought.

Occasionally, when we get a case into court, we'll find out that this person should have been included in the program. We will dismiss those charges with the understanding that if he fails to conform to the conditions of the program, they can be reinstituted.

But most of our caseload comes from—or all, I should say—precharging. We have very few aftercharges. And if we do find one, we maintain control of it and don't bring it into the court.

Another purpose of the program, I believe, is to free up the dockets of the court to allow attention to be given to more serious violations.

Senator DECONCINI. And that applies to your prosecutors also.

Mr. CONNICK. Absolutely.

Section 3(1) of your proposed bill mentions violent offenders. I would respectfully suggest that they be excluded from the program.

Section 3(4) says that a committing officer be involved in the program. I believe that the U.S. attorney should be allowed to determine, independent of any judicial input, who wants to be in the program and who needs to be in the program.

I think that the assistant U.S. attorney in charge of the case should make the decision to divert, and that decision should be based upon the facts of the case in conferences with the arresting officer and based upon the willingness of the offender to participate.

One of the advantages, I think, of a diversionary program is that the prosecutor—once he makes that determination—can unmake it and can tell the offender: You are being given an opportunity to rehabilitate yourself. We'll get you back into school. We will help you find a job.

If the offender is emotionally disturbed, we'll send him to some social agency or medical agency to get proper medical assistance.

But if you don't conform, we're going to prosecute you, and it's going to be done immediately.

And we hold the club, and that's what makes the program, in my opinion, so successful.

If you divert an individual and send him into the court or into some other agency, two or three or four layers removed from the prosecutor, you are facing the same problem you have in probation, in my opinion.

I think the committing officer, therefore, should not be involved in the program at all.

Senator DECONCINI. Along that line, do you have any suggestions as to legislation, implementing legislation, that would make the program precharge?

We drew this up, trying to find our way into the Federal criminal justice system of an area where diversion could be somewhat standardized—as much as you can.

I come from the same background you do and the same kind of diversion program, but I wasn't satisfied that each Federal district attorney would implement a program similar to the one that you have.

Have you given any thought to that?

Mr. CONNICK. Yes; I have. I was thinking about that as the previous speaker was addressing you.

I do believe that if you want to get into this area, legislation is appropriate. I would not mandate any U.S. attorney to institute a program, but I would set forth some strict guidelines.

Senator DECONCINI. If they do do it.

Mr. CONNICK. Right.

This is available to you as a Federal prosecutor and if you choose to participate in this program, the Department of Justice will make money available to you in your budget to accommodate this particular need. However, you are going to have to conform to these guidelines and rules.

I think they are very simple, and I have included what we follow, which is really patterned after other——

Senator DECONCINI. Your full statement will appear in the record, and we will review it.

[The prepared statement of Harry Connick follows:]

Mr. Chairman, I am pleased to have the opportunity to speak with you relative to the proposed Federal Criminal Diversion Act of 1977.

Over the years, it has been my experience as a federal and state prosecutor to recognize that a properly supervised diversionary program is a definite asset to any criminal justice system.

Properly administered diversion programs throughout the nation have aided state criminal justice systems by removing from the system many non-violent, first offenders, felons and misdemenants, who demonstrate a willingness to become part of this prosecutive rehabilitation program. The main function of these programs is to rehabilitate the offender. These programs, however, also benefit the system. Cases that are normally processed through the courts, at great expense, are diverted from the system completely, thus reducing by that amount the number of cases from those court dockets. This, of course, frees prosecutor and court time for the prosecution of other, more serious cases.

When I became district attorney in New Orleans in April 1974, the first program instituted was a diversionary program for non-violent, first offender felons, the first of its kind in the state. The program, funded by LEAA, has been highly successful.

Briefly, our program works as follows:

1. Arrest;
2. Booking;
3. Magistrate Court (Eligibile persons may be released on their own recognizance.); and
4. The police officer then brings his completed report to our screening division where a determination is made concerning referral to diversion.

The essential features of the program which account for its success are as follows:

1. The prosecutor must be convinced that such a program is needed, wanted, can and will work successfully.
2. The prosecutor has absolute control over the program and decides who is allowed into and dismissed from the program.
3. The interest of the victim must be paramount. While defendants' rights at all times must be protected, the victim must be made aware of the diversionary potential and consulted about that decision.
4. The arresting authority must be aware of the program and encouraged to participate in the decision making process.
5. There must be definite and specific program guidelines which must be followed in all cases.
6. All cases accepted into the program must in fact be prosecutable cases.
7. Perpetrators of criminal acts of violence must be excluded from the program.

Further information concerning the New Orleans diversionary program is included in the materials which you have before you.

Now, allow me to be more specific in my comments about the bill that proposes to create the Federal Criminal Diversion Act of 1977.

Section 3(1): Violent offenders should be excluded from the program.

Section 3(4): I believe that each United States attorney should be allowed to determine if he wants or needs a diversionary program. This should be his decision. One of the advantages of the diversion concept is that the judiciary is not at all involved with the decision to divert. The "committing officer" referred to in the act, Section 3(4), in my opinion, can be eliminated.

Section 4: The assistant United States attorney in charge of the case should, after consulting with the case agent, make the decision to divert. The interview by the administrative head of the diversionary program of the offender should occur after arrest but before any charge is accepted. The formal criminal charge (whether by indictment or information) should occur only after the offender has been refused admission into the program or has failed to conform to the conditions of the program.

Section 5(a): Again, the "committing officer" should not be involved in the program. The proposed law allows the offender to view the committing officer (the judge or magistrate) as the decision making authority to prosecute when in reality it is the prosecutor who makes this decision. The diversion relationship should be one between the prosecutor and the offender and the diversionary personnel acting for and under the direction of the U.S. attorney.

Further, Section 5(b), requiring the victim to furnish an agreement in writing before the offender can be released from the program appears unnecessary. Mere notification of this action should suffice.

Section 6(a): There should be a report made to the U.S. attorney concerning the progress of the alleged offender. There should be, however, no requirement to report to the committing officer.

Section 7(a): The criminal charges against eligible individuals should be held in abeyance during the period of time that the person is being considered for diversion and while the person is actually a participant in the program.

Section 7(b): The committing officer should be the U.S. attorney or the person delegated by him.

Section 8(a): The U.S. attorney of each district is authorized in his discretion to appoint an advisory committee for each federal criminal diversion program. Any such committee so appointed shall be composed of those persons representing a cross section of community leaders and including individuals representing social services and other agencies to which persons released to a federal criminal diversion program may be referred under this act. The chairman or chairperson should be chosen from the members of such a committee.

Section 8(b): It shall be the function of each such committee so appointed to act as a liaison to the community. The committee shall report at such times and in such manner as the U.S. attorney may prescribe.

In conclusion, I do not feel that it is necessary that legislation be enacted mandating diversion, but that it should be at the discretion of the U.S. attorney within each district to establish such a program.

However, I do believe that it is incumbent upon the attorney general to establish definite guidelines with regard to eligibility criteria and definite methods of procedure.

Appendix A—District Attorney's Diversionary Program

Eligibility criteria for project participation

1. *Sex, Age.*—Males and females, 17 years of age or older.

2. *Residence.*—Orleans Parish. This residence requirement is needed because the project is still a pilot program and counseling participants outside the parish presents problems in personnel and travel, at this time. Special arrangements could be made for out-of-state college students who are attending local colleges and universities. The residence requirement, in any case, will allow closer supervision and control of participants.

3. *Employment Status.*—If the participant is unemployed, he should be encouraged to seek employment and once established in a position must maintain that position and not change without first consulting with the program counselor. If the participant is a student out of school, he should be encouraged to return to school or if this is not possible, seek employment. Vocational testing would be employed here.

4. *Prior Record.*—Present offense shall not constitute part of a continuing pattern of anti-social or deviant behavior.

5. *Charge.*—The offense shall not be of an assaultive or violent nature, whether in the act itself or in the possible injurious consequences of the act. Crime of a "violent nature" are interpreted as "crimes against persons."

Examples of acceptable charges are: Petty theft, attempted auto theft, receipt of stolen property, forgery, burglary.

Anyone charged with a crime of violence, as described in the above paragraphs, (arson, forcible rape, assault, armed robbery, purse snatching, etc.) will be automatically excluded from project participation.

A. Persons who insist on their innocence will not be admitted into the program.

B. Where search is attacked by the defendant as illegal, then it will go through the courts.

6. *Victim Cooperation.*—Before a candidate can be considered for the program, the victim in each case must be contacted by the Program Director, the program explained to the victim, and a signed release obtained from the victim, giving permission for the candidate to be considered for participation.

7. *Additional Requirements.*—The defendant must not be an addict or alcoholic or have mental or physical health problems which preclude participation.

DISTRICT ATTORNEY'S DIVERSIONARY PROGRAM WORK FLOW CHART

Step 1—Law Enforcement Officer:
1. Arrest.
2. Central Lock Up and Booking.
3. Preliminary police reports and prior records are accumulated.

Step 2—Release on Recognizance (if applicable):
1. R.O.R. Evaluation or Supervisory Release Evaluation.
2. R.O.R. Interview of Supervisory Release Interview.

Step 3—Magistrate Courts:
1. Bond is set.
2. Judge approves or disapproves R.O.R. bond or Supervisory Release Bond.
3. If approved, offender is released on R.O.R. bond or Supervisory Release Bond.
4. R.O.R. advises Diversionary staff of potentially eligible candidates.

Step 4—Diversionary Program:
1. Review eligibility of those submitted by R.O.R. and Supervisory Release.
2. If eligible, these names are given to D.A. Screening Division.
3. Those not eligible for Diversionary Program will continue process through R.O.R.
4. Other possibilities may come directly from the Screening Division because of having made bail other than R.O.R., or a Trial Assistant's recommendation after the case has gotten to a section.

Step 5—Law Enforcement Officer:
1. Must submit to D.A.'s Office a detailed report of the arrest.

Step 6—D.A.'s Screening Division:
1. Review all the information and records of offender.
2. Interview arresting officer.
3. Apply referral policies and criteria.
4. Confer with program director.
5. Determine acceptance of charge, dismissal of charge, or referral to program.
6. If eligible, refer to program. (Form No. DAD 201)

Step 7:
1. Obtain victim's consent where necessary.

Step 8—Diversionary Program:
1. Request all records and information pertaining to arrestee.
2. Check juvenile record.
3. Review all information.
4. Send client letter advising him to contact program immediately and set up appointments. (DAD 202)
5. If contact is made, arrange interview time. If ignored, fill out DAD 203 advising R.O.R. and Screening Division of failure to accept invitation. (In failing this instruction, client will continue on R.O.R. or Supervised Release.)
6. Prepare case file.
7. In-take process:
   A. Secure acknowledgement of offender's Constitutional rights (booklet—DAD 204 & DAD 205).

B. Explain program and have offender sign waiver of "speedy trial". (DAD 206)
C. Have offender sign waiver of confidential material. (DAD 209)
D. Secure acceptance into program. (DAD 206)
E. Complete application for voluntary probation. (DAD 207). Application is to be taken home and returned at time of first session with counseling staff.
F. Director completes intake report. (DAD 210)
G. Set up interview with staff counselor or if borderline case, refer back to Screening Board if necessary.
H. The client's participation is noted on computer.

8. Counselor Screening:
   A. Meet with client and family.
   B. Secure acknowledgement of client's acceptance into program and its requirements.
   C. Develop background information and treatment plan.
   D. Apply prosecutor and intake screening policies and criteria; verify.
   E. Contact Police Department advising them that applicant has been accepted into program.
   F. If deemed necessary, a psychological/psychiatric evaluation will be given. A fee of $35 will be charged each client which will be used to purchase this evaluation.
9. Termination: If program is successfully completed, request for termination (DAD 208) is submitted to D.A.'s office.
10. Revocation of Status: If program is unsuccessful, notice of refusal is submitted to D.A. (DAD 203)

DISTRICT ATTORNEY'S DIVERSIONARY PROGRAM
AND RELEASE ON RECOGNIZANCE PROGRAM
New Orleans, La.

DEAR ———: Your case has been referred to the District Attorney's Diversionary Program by the District Attorney's office and further prosecution has been temporarily deferred pending your prompt response to this letter.

If you do wish to participate in this program, contact this office within five (5) working days after receiving this letter so that an interview appointment may be arranged. Your parent(s), spouse, or member(s) of your immediate family must attend this meeting with you. Contact this office on or before at 822–1357 or 822–2414 ext. 332.

The District Attorney's Diversionary Program is a voluntary probation program which has been established for the benefit of those charged with an offense. If you do not wish to participate in this program, you will be contacted by a law enforcement officer within the near future and your case will be handled in the normal judicial process.

Sincerely,

ROBERT E. DONNELLY, *Director.*

DISTRICT ATTORNEY,
PARISH OF ORLEANS, STATE OF LOUISIANA,
New Orleans, La.

YOUR RIGHTS AS A CITIZEN WHEN YOU ARE ACCUSED OF AN OFFENSE

You are accused of violating the law and have been referred to the District Attorney's Diversionary program. If you are accepted in this program, it is our purpose to help you demonstrate to the community that anti-social or unlawful acts are not characteristic of your daily conduct.

This is a voluntary program and you cannot surrender or be deprived of any of your Constitutional Rights. Before you can be considered for this program you must fully understand your Constitutional Rights. If you have any questions as to whether you have been referred to the District Attorney's Diversionary program you should ask them at this time. If you have any questions or doubts as to your legal status you should consult with an attorney at this time.

This booklet has been prepared to help you understand your constitutional rights. Please read it carefully.

If you have been accused of a crime—

You—are presumed innocent until you either plead "Guilty" or are found after trial.

You—are entitled to be represented by an attorney at every step in the court proceedings.

You—are entitled to have the court set the amount of bond.

You—have (unless there is a grand jury indictment or bill of information filed) the right to a preliminary hearing at which time the Assistant District Attorney must show:

1. That a crime was committed.
2. That there is probable cause for finding that you committed the crime.

If the Assistant District Attorney fails to show these two things, the charges against you will be dismissed. If the assistant District Attorney shows these two things, your case will be sent to the court for other hearings, trial, and the final determination of your guilt or innocence. The maximum penalty for the offense is set by law.

You—have a right to a jury trial in all cases where the fine that may be imposed is in excess of $500.00 or the imprisonment that may be imposed is in excess of six (6) months. In all other cases you have a right to a judge trial.

You—have a right to appeal your case if you lose.

If you understand your constitutional rights to have your guilt or innocence determined in a court of law, if you wish to be considered for the district attorney's diversionary program, you should understand that—

You—may not by this request surrender or be deprived of any of your Constitutional Rights, now or any time in the future.

You—will be asked to give permission for a confidential investigation to be made into your family and social background. None of the information obtained about you or your offense will ever be used in a court of law against you or released to unauthorized persons.

You—may be accepted, or rejected, for the district Attorney's Diversionary Program only by the Orleans Parish District Attorney at his discretion. If you are accepted on this voluntary probation program, prosecution for the offense of which you are now accused will be futher deferred.

You—may withdraw from this voluntary program at any time. The District Attorney may, in the best interests of society and justice, set aside your status in this program at any time.

If—you are not accepted for this program, or withdraw from it, or your status is set aside by the District Attorney you will immediately be subject to prosecution.

If—you successfully complete this voluntary probation program, the District Attorney will Consent to No Prosecution for the offense of which you are now accused, and you will have no criminal record for this offense.

Constitutional Rights Questionnaire

You have read the booklet explaining your Constitutional Rights. The purpose of this questionnaire is to demonstrate your understanding of those Rights.

(The Applicant will read and answer the first six questions *without assistance* from the interviewer.)

1. What is your legal name? Please write it. Name:_____.
2. What is the date of your birth? Write the month, day, year_____.
3. What is the highest grade you completed in school?_____.
4. What is the name of the last school you attended?_____.
5. Are you presently under the influence of drugs or intoxicants?
   Answer *yes or no.* _____.
6. Do you understand the questions you have been asked thus far?
   Answer *yes or no.* _____.

(The Applicant will read and answer the following questions *with assistance* from the interviewer.)

7. You have been accused of violating the law. The purpose of our talking with you at this time is to determine whether or not you clearly understand your Constitutional Rights. And for you to decide whether or not you desire to have prosecution temporarily deferred and be considered for the District Attorney's Diversionary Program.

Do you understand the purpose of our talking with you at this time?

Answer *yes or no.* _____.

8. Do you understand that any decision you make must be made freely and voluntarily on your part? Answer *yes or no.* _____.

9. Do you understand that you have been accused of violating the law by: _____.

Answer *yes or no.* _____.

10. How old were you at the time this violation is alleged to have occured? _____.

11. Do you understand that you are presumed to be innocent of this violation of the law until you either plead "Guilty" or are found "Guilty" in a court of law? Answer *yes or no.* _____.

12. Do you understand that you have the right to answer in court any accusations made against you? Answer *yes or no.* _____.

13. Do you understand that you have the right to have an attorney represent you and advise you at every step in any future criminal proceedings? Answer *yes or no.* _____.

14. Do you want to consult with an attorney at this time. Answer *yes or no.* _____.

15. Do you understand that by participating in the District Attorney's Diversionary Program you may not surrender or be deprived of any of your Constitutional Rights, now or at any time in the future? Answer *yes or no.* _____.

16. Do you consent to a confidential investigation of your personal and family background by the District Attorney's Diversionary Program. Answer *yes or no.* _____.

17. Do you now wish to request of the District Attorney that your right of prosecution be indefinitely deferred for the purpose of your being considered for the District Attorney's Diversionary Program. Answer *yes or no.* _____.

18. Do you fully understand all of the questions you have been asked? Answer *yes or no.* _____.

Please sign your name here: _____

Interviewer: _____

Witnessed: _____

Date: _____

Requirements for Voluntary Probation in the District Attorney's Diversionary Program

You must fully understand and accept the following requirements before you make application for voluntary probation in the District Attorney's Diversionary Program.

1. I may withdraw from the program at any time and answer in court any accusations made against me regarding the offense.
2. I must not violate the law again or I may be prosecuted for both this offense and the new offense.
3. I must not leave the metropolitan area or state without obtaining written permission from my counselor.
4. I must not knowingly associate with persons who violate the law.
5. I must report to my counselor and participate in counseling sessions as required, in the counselor's office, my home, or as arranged.
6. I must inform my parent(s), or spouse, or member(s) of my immediate family of my participation in the program and permit them to talk with my counselor.
7. I must report to and cooperate with any agency to which I am referred by my counselor.
8. I must pay a Probation Service Fee of $35.00 as directed by my counselor. This $35.00 is payable in advance and in the full amount at my first counseling session.
9. I must pay any restitution required for this offense as directed by my counselor.
10. I understand that failure to fulfill any of these obligations may be considered sufficient reason by the District Attorney's Screening Division to proceed with prosecution for this offense.

Waiver

I, _____, understand that I have a right to speedy trial under the Constitution of the State of Louisiana and of the United States. I further understand that I have a right to have criminal proceedings filed and my case brought to trial, to determine my guilt or innocence.

In order to participate in the District Attorney's Diversionary Program, I do hereby freely and voluntarily waive:

1. My right to a Speedy Trial, pending consideration of my application for admission into the District Attorney's Diversionary Program. If I am accepted into the District Attorney's Diversionary Program, I further waive my right to a Speedy Trial throughout the period of my participation;

2. My right to invoke the prescriptive laws of this State as a bar to prosecution for those delays occasioned by my application and/or participation in the District Attorney's Diversionary Program;

3. My right to trial during the period of my application and/or participation in the District Attorney's Diversionary Program.

I hereby apply for voluntary probation and request that the District Attorney temporarily delay prosecution for this offense in order to permit consideration of this application. I understand my Constitutional Rights and accept my obligations for participation on voluntary probation.

_____
Applicant's Signature

_____ _____
Date Witnessed by

_____ _____
Date Approved by

DISTRICT ATTORNEY'S DIVERSIONARY PROGRAM,
PARISH OF ORLEANS,
New Orleans, Louisiana.

To:———.

I hereby authorize the release of such confidential information to the District Attorney's Diversionary Program as is necessary for the benefit of _____ _____ and agree to hold you harmless and relieve and release you from all liability thereof.

Client: _____
Witnessed: _____
Date: _____

DISTRICT ATTORNEY'S DIVERSIONARY PROGRAM

INTAKE REPORT

Referral Date	Offense	Agency	Officer in Charge of Case	Item No.

Asst. D.A.	DAD No.	Interviewer	Booked	Def. Attny.	Co-offender - Disposition

Complainant & Address	Phone	Restitution

Name: Last	First	Mi	(Maiden)	Age	D.O.B.	P. O. B.

Address	Phone

Sex	Race	Height	Weight	Eyes	Hair	Build	Oper.Lic.No.	Soc.Sec.No

Education	Occupation	Marital	Children	Dependents

Nearest Relative & Address	Phone	Relationship

Juvenile History	Adult History

References

Counselor & Appointment

Form No. DAD-210

NOTE: This application is given to the offender at the time of the intake interview and is instructed to fill it out and return it at the time of his first session with the counselor assigned to his case.

APPLICATION FOR VOLUNTARY PROBATION

in the

DISTICT ATTORNEY'S DIVERSIONARY PROGRAM

(Please print or type)

Name_____ Date_____
First Middle Last

Address_____ Telephone_____

Date of Birth_____ Age_____ Sex_____

Circle One: Married Widowed Divorced Number of Dependents_____
Single Separated

Name and address of person to contact in case of emergency:
Name_____ Address_____

Relationship to you _____

I. Family Background: (Please list the names, address, ages, and occupations of your parents, brothers, and sisters).

Name	Address	Age	Occupation	Relationship

II. Marital Situation: (If married before, list date and place of marriage(s), to whom, and then list any marriage problems below.)

Spouse's Name	Date Married	Place	Your Age	Date Ended

(If married, list any marriage problems. If unmarried, state any plans for marriage.)

III. Military Status: (Please state current draft status; describe past military service, if any, including branch of service, dates, job performed, rank attained, and discharge.)

IV. Education: (List schools attended, subjects studied - easy or difficult, degrees received, and any problems encountered.)

School Name	Address	Subjs. Liked or easy, maj.	Subjs.disliked or difficult	Degree

Future plans, if any:

V. Employment: (List jobs held, employers, dates employed, average earnings, and reason for leaving. If no employment, explain any difficulty and your plans, if any.)

Job	Employer	Address	Dates Employed	Earnings Average	Reason Left

VI. Economic Situation: (List all debts - to whom, what for, how paid. List all assets - include property owned, savings, income, etc.)

DEBTS	To whom	What for	How paid

ASSETS

VII. Briefly explain why you wish to be accepted on voluntary probation with this agency.

_____

_____

_____

_____

I certify the above information to be true and correct to the best of my knowledge.

Signature of Applicant:_____

Date of Application:_____

Form No. DAD-207

DATE:

MEMO TO: FILE

FROM:

SUBJECT:

THE ABOVE CANDIDATE HAS THE FOLLOWING JUVENILE RECORD:

OFFENSE	DATE OF OFFENSE	DATE
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

THE ABOVE CANDIDATE HAS NO JUVENILE RECORD_____

DISTRICT ATTORNEY'S DIVERSIONARY PROGRAM
NOTICE OF REFUSAL
DISTRICT ATTORNEY
PARISH OF ORLEANS
2700 Tulane Avenue
New Orleans, Louisiana 70119

TO: SCREENING DIVISION

Applicant	Asst. Dist. Attny.	Diversionary Counselor

DAD Number	Charge	Date of Referral	Item Number

You are hereby notified that the above named Diversionary Probationer is being refused from the Diversionary Program for the following reasons:

Date:_____ Signed:_____
Diversionary Counselor

Form No. DAD-203

State of Louisiana
OFFICE OF THE DISTRICT ATTORNEY
REQUEST FOR TERMINATION OF STATUS AS DIVERSIONARY PROBATIONER

TO: SCREENING DIVISION

Applicant	Asst. Dist. Attny.	Diversionary Counselor

DAD Number	Charge	Date of Probation	Probation Term

You are hereby notified that the above named Diversionary Probationer, having successfully completed the requirements of the Diversionary Program, is hereby terminated from said program.

Date: _____ Signed: _____
Diversionary Counselor

Form No. DAD-208

Mr. CONNICK. Talking about section 5(d), requiring that the victim furnish an agreement in writing before the offender can be released, I do not think is necessary.

I think the relationship of the prosecutor vis-a-vis the victim should be an initial contact, and I think that the victim should be made aware of the possibility of diversion. I would get their consent wherever possible and abide by their wishes. I would let them know when the program is completed. But an agreement not to prosecute I think detracts from the authority of the prosecutor. He's vested with that authority, and if he doesn't perform well, they're going to get somebody else to do it at the next election.

I don't think, therefore, in section 6(a) where the bill proposes that there should be a requirement to report to the committing officer and that theme and my remarks regarding that concept would apply throughout the act.

In section 7(a) it is suggested that the criminal charge against eligible individuals should be held in abeyance. This is our feeling: Do not charge unless he violates the conditions of the program.

In summary, Senator, I do believe that it is a good concept; I believe that U.S. attorneys should be made aware of it—those that do not know of it.

The Brooklyn plan concept has been embodied in U.S. attorney manuals for years. I would venture to say that most assistant U.S. attorneys aren't aware of it and have not used it and will not use it.

I do believe though that if you make known to them the concept of diversion and show them now successful these programs have been and that they can be successful in the Federal system, that you will see some of these programs coming into existence.

Senator DECONCINI. Thank you, Mr. Connick.

Have you had the necessity to prosecute people who have failed in the program?

Mr. CONNICK. Yes.

Senator DECONCINI. Are there very many?

Mr. CONNICK. Not very many. I think our recidivism rate is about 5 percent.

Senator DECONCINI. In your program, not having had a chance to read your statement, do you require a confession or a statement of guilt in writing or on tape or anything?

Mr. CONNICK. Yes.

I'm going to have to confess ignorance on the exact manner in which it's done. I'm satisfied that the offender must be aware of the fact that he has, in fact, violated a law. That has to be communicated to the people in the diversionary program. Otherwise, you have offenders who say: "I'm really not guilty of anything, but I would like to take part in the program." I will reply to them: "If you want to participate in the program, you have to have committed a crime that we can prove." Otherwise we have no—if we can't prove that a crime has been committed, and that he committed the——

Senator DECONCINI. You don't attempt, however, to get an admissible statement for later prosecution. It's more of an acknowledgement by the offender that he has, in fact, violated the law. Is that a safe statement?

Mr. CONNICK. I think it is. How mechanically it is done I don't know. But he is afforded all of his rights, including——

Senator DECONCINI. Including counsel.

Mr. CONNICK. Yes.

Senator DECONCINI. If this person is arrested, when they are considered for diversion is when the arresting officer comes to your office to get a complaint or an indictment or an information—or whatever you call it in your jurisdiction. Is that where the determination is made of whether or not to divert?

Mr. CONNICK. My assistants will refer the prospective divertee to the diversionary program.

Senator DECONCINI. At the intake and the charging——

Mr. CONNICK. Yes.

Senator DECONCINI [continuing]. Process of your office?

Mr. CONNICK. That's right.

Senator DECONCINI. At that time, if they refer the defendant, has he already had counsel appointed?

Mr. CONNICK. Usually no, and sometimes, yes. It just depends.

Senator DECONCINI. You take him before a court and get counsel appointed?

Mr. CONNICK. No; not necessarily. It's made known to them that they can have an attorney. All of their rights are read to them, and they understand that. I think this is essential: You have been arrested. If they say: I didn't do anything, then we say: We're not going to consider you. We have to have a good case.

We feel unless a crime has been committed, and the individual has committed it, he's not going to want to participate. It has to be a willing thing and activity on his part. In effect, he has to say that he did, in fact, commit a crime.

Keep in mind though that whatever he tells the people in diversion does not and is not used against him in court. If he makes a confession, it's not admissible.

Our case has to be a good case against the offender before we consider diversion.

Senator DECONCINI. How do you police your deputies?

How big is your office?

Mr. CONNICK. I have 62 attorneys.

Senator DECONCINI. That's a big office.

How do you police your deputies and insure that it isn't used for bargaining and for snitch purposes, and what have you?

I ran into that when I was a prosecutor time and time again. It took a very, very heavy hand and often my own determination. I wonder if you've run across that same thing.

Mr. CONNICK. We haven't had a problem in that area.

We have a screening unit which we think is very sophisticated compared to what was in New Orleans before.

Senator DECONCINI. So they find out if that happens to be the motive of the prosecutor who has referred it there?

Mr. CONNICK. Yes; we've had prosecutors come to us after the charge has been made and suggest diversion. Sometimes we do reconsider it and take the person into the program. And on other occasions, we don't. We don't want to use the divertee as a source of police information or anything like that.

Senator DECONCINI. I know that you don't. But maybe your police force is different down there and maybe your prosecutors are different; but I have found that there is that temptation of those who are not real believers in the program to attempt to get the best they can from the prosecutorial point of view.

Mr. CONNICK. Right.

One of the things we did when we took office 3 years ago, insofar as giving consideration to the police for informants, was to require from the superior—from the superintendent of police or from the head of the FBI or whatever—a letter in writing telling us who they wanted for us to give special consideration to and why they wanted it and what results did they contemplate were going to be derived and what the public was going to get out of it. We were met with the situation there where every police officer had his special informant, and I think we cured that when we went into office. It really doesn't conflict at all with this.

Senator DECONCINI. Mr. Connick, thank you very much. We appreciate your statement, and we may be back in touch with you for some more observations as we work this bill through.

Mr. CONNICK. Anytime; it would be a pleasure.

Senator DECONCINI. Our next witness is Gordon Zaloom.

We welcome you this morning and thank you for coming down from New Jersey. We have your prepared statement which shall be placed in the record.

[The prepared statement of J. Gordon Zaloom follows:]

STATEMENT OF J. GORDON ZALOOM

I am grateful for the opportunity of presenting my views on the proposed diversion act, because diversion is to me of such importance that I believe it deserves a permanent place in the criminal-justice systems of every State and of the United States.

Since 1970, I have been involved in the development of diversion in New Jersey, both as a program director and in an administrative capacity with the New Jersey Administrative Office of the Courts, and thus, my comments will in major part reflect New Jersey's diversion system and experiences. I would offer first, for background, a summary of the state of New Jersey's diversion program.

NEW JERSEY DIVERSION

Pretrail Intervention in New Jersey has been authorized by Supreme Court rule since 1970. Today, there are PTI programs in 19 of the State's 21 counties, and I consider it most likely that the remaining two counties will have programs by the end of this year. The New Jersey diversion program operates in the following manner:

Defendants who are eligible under the Supreme Court's rule and guidelines (copies of both are attached to this statement) are informed of their right to seek PTI enrollment at their first appearance before a judge. Applications are made to the PTI program in the county in which the defendant has been charged; if the defendant's application is accepted by the program director, a service plan is devised, and the plan is submitted to the County Prosecutor along with the director's recommendation that the defendant be diverted. No guilty plea or admission of moral responsibility for the offense is required of the defendant. If the prosecutor gives his or her consent to diversion, the plan, recommendation and consent are submitted to a judge specially designated to hear all PTI matters in the county who must finally approve or disapprove the diversion.

Diversion is, in most cases, for a period of 3 months, and may be extended for an additional 3 months. In instances, however, of drug-dependence the period may be extended to up to one year.

Defendants successfully completing their service plans are recommended to the judge for dismissal of charges, and if the prosecutor consents to dismissal, the judge may dismiss the charge. The court has the final word, though when both recommendations are positive, it is rare for a judge not to grant the dismissal.

Defendant protections are built into the rule and the guidelines. Confidentiality is assured by a provision making inadmissible any statements of the defendant or program records about the defendant at any subsequent proceeding.

If the defendant is recommended for termination (return to ordinary prosecution) by either the prosecutor or program director, he or she has the right to a hearing, and the judge may, and sometimes does, order continuation in the program.

Though New Jersey's system of diversion is still in the process of development, many of the difficult problems have recently been resolved through litigation. In 1976 the Supreme Court of New Jersey decided *State* v. *Leonardis, etc.*, 71 *N.J.* 85 (Leonardis I), which decision led to the promulgation of the Court's guidelines. The guidelines gave the State-wide program formal sanction, and in addition, provided for completely open eligibility: any defendant charged with any offense is eligible, though the burden of showing amenability to rehabilitation is on the defendant. The guidelines further provided that rejections of defendants' applications could be appealed to the designated judges.

The issue of the respective roles of the court and the prosecutors—a problem that had caused a good deal of controversy—has been settled by the *Leonardis I* decision, the guidelines, and by the Court's decision on rehearing *Leonardis: State* v. *Leonardis, etc.*, ——— *N.J.* ——— (Decided May 31, 1977) (Leonardis II). The issue arose because a PTI judge, on application of a rejected defendant, ordered the prosecutor to supply the defendant with reasons why he would not consent to diversion, notwithstanding the rule's requirement that prosecutorial "consent" must be granted. The Supreme Court held that the reasons must be supplied by prosecutors (and by judges and program directors as well), that decisions of the prosecutors are judicially reviewable, but that adverse decisions of the prosecutors will be overturned only where, ". . . the defendant clearly and convincingly establish[es] that the prosecutor's refusal to sanction admission into the program was based on patent and gross abuse of discretion."—*Leonardis II*. Slip opinion at 28.

FEDERAL CRIMINAL DIVERSION ACT OF 1977

There are three major types of diversion processes: (1) Prosecutor diversion: matters are withheld from ordinary prosecution and administratively dismissed, in the prosecutor's discretion, without ever presenting the matter to the court for approval; (2) Court diversion: matters are diverted in the discretion of the judge usually with only an opportunity for the prosecutor to be heard, and (3) Joint Prosecutor–Court Diversion: matters are decided both by the prosecutor and the court. New Jersey's program is of this third type. California's drug-diversion statute (Cal. Penal Code § 1000 et seq.) also provides formal decision-making roles for both the courts and the prosecutors.

In my judgment, the system of checks in joint prosecutor-court diversion serves the criminal-justice system best, and best assures due-process and equal-protection by making the decision-making process visible. In this light I would recommend amending the proposed Federal Diversion Act.

Section 3 defines an eligible defendant as one who is recommended by the U.S. attorney, and who also meets the other criteria in § 3. No standards are proposed as bases for the U.S. attorney's recommendation, and a defendant without a prior record charged, for example, with a non-violent offense, is simply not eligible unless the U.S. attorney recommends him. I assume that the purpose of this bill is to give some formalization to the prosecutor-diversion programs now in operation, but the act's present language does not narrow discretion at all.

I would suggest as one model the provisions of Cal. Pen. Code § 1000 (a) which sets criteria for eligibility and states the range of permissible prosecutorial discretion, or the New Jersey procedure of setting very broad eligibility criteria without tying eligibility to the prosecutor's unfettered discretion. I would recommend further that with eligibility standards, set defendants be permitted to apply to the committing officer to challenge the prosecutor's refusal to recommend diversion, and that the act provide for limited judicial review such as that in the *Leonardis II* decision.

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In its present form the act provides only for a veto by the committing officer of the prosecutor's recommendation to divert. The attorney for the government may, in his sole discretion, reinstitute prosecution in the ordinary course, and the case must be dismissed by the committing officer if the administrative head with the prosecutor's concurrence certifies that the defendants has completed his or her program of diversion. Section 7. (b), (c). The role of the committing officer, beyond the initial stage, is purely ministerial.

I would recommend that if the committing officer is to approve the case initially, he or she should be in a position to review the defendants's participation record and decide whether or not dismissal of charges is warranted by that record. In the alternative, if the procedure now contained in the act is important, it might be better simply to provide for automatic dismissal or reinstitution of ordinary prosecution without the purely formal necessity of returning to the committing officer.

The proposed act authorizes the Attorney General to issue regulations and policy statements for the diversion programs. Section 9 (E) (2). I would recommend that the act make mandatory, by a date certain, the issuance of regulations or guidelines for all Federal diversion programs, setting Department policy with the concurrence of the Judicial Conference. The advisory committees (§8(a)) will be planning the diversion program for each district; the Attorney General should approve such plans in light of national guidelines or regulations. These guidelines should provide for matters too detailed for the act, and by making such guidelines mandatory, a good deal of national uniformity can be assured. I would suggest as model guidelines the forthcoming Pretrial Diversion Standards and Goals being prepared by the Pretrial Services Resource Center under an LEAA grant to the National Association of Pretrial Services Agencies. And, naturally, I would also propose that the New Jersey PTI guidelines be considered.

Issues that are not resolved in the act, or that are in need, in my opinion, of clarification, and that can be dealt with in guidelines are:

(a) *Guilty plea or admission of responsibility.*—I believe that neither should be required, and suggest that a policy be adopted such as that contained in New Jersey Guideline 4.

(b) *Eligibility.*—The act provides for virtual open eligibility. Factors to be considered in exercising discretion in recommending or ordering diversion should be set down. E.g., age, prior record, to what extent persons charged with political crimes should be diverted.

(c) *Restitution and uncompensated service.*—Guidelines should be written providing for methods of determining restitution amounts. Will a hearing be necessary to determine the amount? Is partial or "symbolic" restitution acceptable? Can restitution be required as a condition of diversion?

Uncompensated community service is a matter deserving of well thought out guidelines. While attractive, and without doubt an effective rehabilitative or corrective regimen in many cases, when imposed as a condition of diversion before conviction, there are potentially serious 13th Amendment problems. Without going into this issue in detail, I do favor the use of community-service work so long as the defendant truly volunteers to do it, the work has a direct relation to the offense charged, or so long as the work has direct therapeutic value in relation to the offense, or the work assignment has therapeutic value not otherwise available.

I would recommend that the provisions of § 5(b) be deleted. Certainly, the victims of crime should be consulted by the U.S. attorney prior to recommending diversion. The language of § 5(b), however, requires that the program administrative head secure consent forms from all the victims. To do so might well require a separate investigative staff, or prove to be a burdensome use of the U.S. attorney's investigators. Imagine the theft of even a moderate amount of mail. It would be preferable, in my opinion, simply to leave the matter of victims' acquiescence to the good judgment of the attorneys for the government; to mandate victims' written consents looks like a return to private prosecutions. It is not unlikely that a victim might refuse to agree to the diversion of a defendant, who clearly could benefit from the program, for purely vindictive reasons, or demand restitution in an unwarranted amount. At the very least, I would suggest amending this section to read:

> (b) In no case however shall a person charged with a criminal offense against the United States be released for diversion unless the attorney for the government certifies that in making his or her recommendation for diversion, he or she has given appropriate consideration to the views, toward the defendant's diversion, of those persons injured by the offense.

The funding appropriated in § 10 does not seem sufficient to provide any significant level of diversion services in all the districts. I would recommend therefore that in addition to devising diversion guidelines, the Attorney General be asked to designate certain districts to initiate diversion programs during, say the year after the effective date of the act. In such designated districts, it would be good to require rather than authorize advisory committees to plan with the Attorney General in what manner and by which agency the diversion programs will be administered.

An effective means of initiating and operating diversion programs would be to have some of them operated by the Federal Pretrial Services Agencies. These agencies are experienced in dealing with pretrial defendants, and because of their involvement at the pretrail-release stage, they are in a position to identify defendants eligible for diversion. Such early identification would assist in conserving funds and resources of the criminal-justice system.

At least one Pretrial Services Agency that I know of (Maryland) already handles diversion cases, and these agencies appear to have been intended to do so under the Speed Trial Act (18 USC 3152 *et seq.*).[1]

In addition to administering diversion through such Federal agencies, I would strongly recommend that under § 9(1)D, the Attorney General use the appropriated funds in part to purchase services—either rehabilitative services alone, or even full reporting, supervision and defendant services—from State and local diversion programs already in operation. Both Florida and New Jersey, for example, have developed very extensive systems of diversion programs that could work with Federal defendants.

Thank you.

STATEMENT OF GORDON ZALOOM, ATTORNEY, NEWARK, N.J.

Mr. ZALOOM. Thank you, Senator. I am very happy to be here.

I am very much in favor of diversion, and I certainly hope that there will be a Federal diversion law so as to standardize Federal diversionary systems.

I come from a State where the diversion system is operated under court rule and guidelines promulgated in accordance with that rule; and the system, therefore, is a little different from the procedure proposed in this act, and I would like to offer some comments from the perspective of a judicially operated system.

Essentially, in New Jersey, diversion requires the consent of the defendant. It requires the consent of the prosecutor. But the final decision in all stages of the process is for the court to make.

No guilty plea or admission of responsibility is required of defendants.

We have been in business in New Jersey since 1970 and have had a number of cases on diversion. The most significant one which was most recently determined defined what prosecutorial consent means, and it caused a good deal of controversy in New Jersey.

The issue came up because a defendant, who had applied to a diversion program and was denied prosecutorial consent, moved to compel a prosecutor to state his reasons why he would not consent.

The trial court ordered the prosecutor to do so, and that was upheld in the Supreme Court. The law in New Jersey now is that the program director or the judge or the prosecutor in denying diversion must supply written reasons. The court also found that the decisions of the prosecutors are judicially reviewable.

The case of *State* vs. *Leonardus* on rehearing, which was decided May 31 of this year, the court settled the prosecutorial discretion

[1] Daniel B. Ryan, "The Federal Pretrial Services Agencies," 41 *Federal Probation* No. 1, March 1977.

issue, I think, very much in favor of the prosecutors by saying that an adverse decision of a prosecutor will only be overturned "where the defendant clearly and convincingly establishes that the prosecutor's refusal to sanction admission into the program was based on patent and gross abuse of discretion."

Frankly, I think that is the ultimately unmeetable burden.

There are three major types of diversion: Prosecutor diversion where the court really has no role at all—I think Mr. Connick's program operates that way; court diversion where the decision is made by the court, usually with only an opportunity for the prosecutor to be heard—New Jersey's drug diversion statute is of that kind; and then joint prosecutor court diversion where there are formalized roles for both the court and the prosecution.

Of the three, I personally prefer the joint system. I don't like court diversion without a role for the prosecutor, simply because that will mean that the court is not going to have very much information about that defendant unless the prosecutor so informs it.

I think the system of checks involved in the joint prosecutor court program best assures due process and makes the decisionmaking process visible.

Senator DECONCINI. Would you favor language similar to what the court stated in New Jersey as to the prosecutorial——

Mr. ZALOOM. Yes.

Frankly, I think the court would have the power to review the decision anyway for a patent and gross abuse of discretion.

Senator DECONCINI. I do too.

Mr. ZALOOM. That is, the Federal cases as I recall them and in New Jersey.

This program is really one that is very hard to fit into the prosecutorial discretion sphere or the court sphere. It involves elements of sentencing and certainly involves the prosecutor discretion.

The system we finally came to in New Jersey makes the reasonable compromise that the decisionmaking is open and visible. It can be reviewed but not very often.

Prior to this decision, we have had a good number of appeals. It took a lot of time. We saw it coming.

It could get to the point, theoretically, where we wind up trying the case before an indictment—which is not what diversion is supposed to be about.

I would suggest, however, some amendments in the act, based on a joint court prosecutor system.

The act as it reads at this point simply defines as eligible one who the prosecutor says is eligible with no standards or bases proposed for the U.S. attorney's recommendation.

I would suggest, perhaps as a model, the provisions of California Penal Code, section 1000, which is a drug diversion statute which sets out the eligibility criteria and effectively sets the range of the prosecutor's discretion—although the prosecutor's discretion is certainly involved in it.

I have a preference, of course, for the New Jersey system of broad eligibility criteria that are not tied to the prosecutor's discretion but which require prosecutorial consents or a strong recommendation, or some other system of that sort.

I think it would be wise to include in the bill that there may be limited judicial review.

The act provides, in its present form, only for veto by the committing officer of the prosecutor's recommendation to divert. But the attorney for the Government in the bill has the sole discretion to reinstitute charges in the administrative head. It is with the concurrence of the prosecutor and may require that the case be dismissed.

The role of the committing officer after the initial decision appears to be purely ministerial.

I would suggest that if the committing officer is going to approve the case initially, that the committing officer then have the authority to review the record of the participant in the program and to decide whether or not a dismissal is warranted.

Or, in the alternative, to simply provide for automatic dismissal without the necessity of going back to the committing officer and saying: Here is the dismissal form; please sign it.

You mentioned before, Senator, about standardizing the system; and I completely agree with that.

I would suggest one way is that the bill could provide that the Attorney General issue guidelines within a certain time after the effective date of the act for the operation of all the programs. I think it would be good to have the concurrence of the Judicial Conference, rather than just consultation.

There will be advisory committees—at least they're authorized under the bill.

What I would suggest is that the Attorney General issue guidelines on how the programs are to operate. The local advisory committees can submit plans which may vary to some extent from the guidelines because of local needs or problems or whatever, and then the Attorney General could approve the program as conforming to the Department's policy along those lines.

It is similar to what we have been doing in New Jersey, where the Supreme Court's rules and guidelines govern all the programs. But each local county has been permitted to submit an application with some variations.

For example, because of funds, some counties limit the diversion program to felonies—simply because they don't have the funds to handle misdemeanors. Other counties handle both misdemeanors and felonies, and I'm sure we are going to have a case on it pretty soon.

I like the idea of national uniformity. I would suggest that not only there be guidelines for all programs but that the initiation of programs be made mandatory under Department policy. It's going to have to be scaled, I presume, because of funds—within a certain period of time.

Senator DECONCINI. Do you have some fears of forcing a diversion program upon a reluctant prosecutor?

Mr. ZALOOM. No; I don't.

Senator DECONCINI. Why not?

Mr. ZALOOM. We've had a similar experience in New Jersey. Let me put it this way. We now have the program in 19 out of the 21 counties and only 2 rural counties remain. So the program covers well over 90 percent of the population.

At this point we've established a right to apply to a diversion program in the State.

Frankly, whether or not the prosecutor or the judiciary in that county want it I don't think they can resist it.

We've had one decision already, finding that the lack of a program in a county was the denial of equal protection.

Senator DECONCINI. How do you address the problem, then, of a prosecutor who is hostile philosophically—and some are, and I respect their difference of opinion, although I happen not to be one—and who attempts to use it.

Someone who is not asking to be diverted comes into the prosecutorial system, and then the prosecutor tells him if he will do this and this, he will get him in the diversion program. Do you find that the case in New Jersey?

Mr. ZALOOM. I think it's very rare. I really can't cite any experiences of what is called prosecutorial dumping. I think what we have to do is rely on the integrity of prosecutors not to do that.

I don't really know of any effective way to check it, and I suspect that prosecutors don't do that.

I think one solution to the problem is—one of the New Jersey guidelines is that the diversion is available to any defendant to apply for it at any time up to 25 days after the issuance of an indictment. We prefer that the diversion application be made the day of the arrest, because we want to save some time and money.

Senator DECONCINI. The defendant is advised at that time, of course, that is an alternative—right at the time of his arrest?

Mr. ZALOOM. At the first appearance before a judge—a bail setting—by court rule the defendant must be informed that a program exists that he or she may apply to. If there is any probable cause problem, of course, the defendant may have a probable cause hearing in the local court or may even let the matter proceed to the grand jury. He still has the opportunity to apply for it after the point of indictment.

I personally disagree, to some extent, with that guideline. I would rather see the opportunity available up to the point of indictment. simply because by the time the district attorney has prepared the case and submitted it to the grand jury, what is usually left is a guilty plea and you're not saving any money at all.

The theory in New Jersey is that this is primarily a rehabilitation program; that any savings or spin-off is nice to have but secondary.

I think that attempts to save funds and resources should certainly be made.

I would like to comment on some of the specific provisions in the bill.

I don't know that the bill needs to deal with the guilty plea issue, but it should at least be within uniform guidelines. I don't think that it should be required. I think it is essentially a counseling decision.

I believe that defendants who maintain their innocence—and who actually may be innocent—have an equal right to take this route if they so choose.

We did have some experience with that, and usually it was a matter of policy that we would send the defendant back to his attorney three times before——

He would have to come in and say: I do not want to take the risk of trial. We would say: On that basis, you may come in. We don't want to hear anything about your innocence from now on.

I think that eligibility standards—age, race, prior record, et cetera—should be set down in guidelines.

The restitution and uncompensated service I find kind of interesting. I'm very much in favor of restitution. As a general rule, I think it should be used as therapeutic value and should not be required as a condition of entering a diversion program.

However, there are some instances, to be realistic, in which it would be absurd not to require restitution. A case, for example, of a man who turned himself in to the police station for embezzling from a school book fund. He was a teacher. Now to allow him into a diversion program without saying he had to pay it back would simply be an absurdity.

I think it's a matter of balance, but I wouldn't require it across the board.

Uncompensated community service is becoming popular—at least in the last couple of years, particularly in the probation setting.

My concern in doing it pretrial is that there are potential 13th amendment problems. These people are not convicted of crimes.

I think it can be done; I do favor it. I think so long as the defendant truly volunteers to do it, and that would really require giving the defendant an option to do voluntary service or report or do a number of things—I think the work should have a direct relation to the offense charged, or it has a direct therapeutic value in relation to the offense, or it may have therapeutic value not otherwise available.

For example, you may have an absolutely unemployable defendant, and you can't find a job for him. Volunteer work in an agency might provide some employment experience.

So I think it should be done, but I think it should be done very, very carefully.

I agree with Mr. Connick and Mrs. Crohn about section 5 about a mandatory requirement that victims be contacted. I think, frankly, it's unworkable. With mail theft, for example, you couldn't contact both the addressees and the senders.

I certainly think that victims should be consulted. The prosecutor, of course, is the attorney for the people; and I think he should consult his clients. And the prosecutors do. I think that really should be left to the discretion and the good judgment of the U.S. attorneys.

Perhaps what the bill could say is simply to require that the attorney for the Government give great weight to the feelings and the attitudes of the victims. I'm sure it is done by practically every prosecutor who's involved in a diversion program.

The funding of $3.5 million per year I don't think would be sufficient—I don't know whether it was intended to be—for all the Federal districts.

As I noted before, I would suggest that the Attorney General be asked to draw guidelines to select, say, 10 districts—I don't know how far the money would go—that would be the first ones to initiate the program. I presume that those would be districts in which the prosecutor wanted the program to start.

I don't think it should be experimental. I think we're well beyond that stage. This simply is a matter of finances.

I would suggest that the pretrial services agencies, the Federal agencies, be used. In fact, I understand that the pretrial services agency in

Baltimore is already supervising pretrial defendants for the U.S. attorney and that there may possibly be others.

Of course, the pretrial services agencies are involved in interviewing people for bail and at the same time are in a position to identify defendants. I wouldn't want to see a duplication of agencies interviewing defendants.

The act does provide for the purchase of services by the Attorney General. I would suggest that one way of saving some funds, or using the funds very economically, might be to use the services of State programs that are already set up.

For example, both New Jersey and Florida have systems of diversion that are either operated directly under the judiciary or under an executive corrections department, so that they are not just private agencies. There are some controls.

And it would be possible for the U.S. attorney to arrange with the State programs to have them either do just supervision or do supervision and reporting on a per-head basis. I think that could work fairly effectively.

We did do one or two cases in New Jersey that way, but it never really did get to be very extensive.

Senator DECONCINI. Thank you, Mr. Zaloom. That's very fine testimony. We appreciate the thoughts that you've given us here.

Let me turn back to your remarks regarding volunteer services.

There has been some testimony here, and from some experiences of myself, that certainly has a great deal of appeal to the public. Quite frankly, if you leave it optional, most offenders aren't going to want to do something at the Red Cross or the city library or the mental health center, et cetera.

What do they do in New Jersey? Do you just encourage them or give them some options, or do you tell them to go out and find something and you'll approve it within reason?

Mr. ZALOOM. It's not a routine system, Senator.

Let me see if I can think of a good example.

A medical student charged with selling marihuana, for example. We told him we thought it would be a good experience for him to work in a drug rehabilitation agency without pay; and if he could find himself a place, we would accept that as a program and he would have to report once a week to the program. If he didn't want to do that, we would find other things for him to do and he would report more often.

I'm not suggesting that it may be made a choice between doing volunteer work and having an easy time.

Senator DECONCINI. What other kinds of things would you be referring to—say that particular individual couldn't find or didn't find some program?

Would it be a lesser of two evils or a harrassment thing or just an inconvenience for him or what?

Mr. ZALOOM. It's probably not a good example. In that particular instance, rehabilitation, I think, really had to take the shape of some kind of punishment, in effect.

This particular young man needed to learn that he didn't get away with things with impunity. He was very bright, and his family had a lot of money.

I suppose the alternative you could characterize as harrassment. We would make him come into the program with great frequency. We simply did not want to have that charge dismissed with that defendant having the attitude that he got off lightly.

I think it would have been a terrible thing.

Senator DECONCINI. I compliment that.

I also agree with you that we don't need any more experiments; we need these programs implemented.

I agree with your suggestion of some limited funds going into the field, on not an experiment basis, but just on fiscal restraints.

Mr. ZALOOM. I think it's something that the Department of Justice can determine—what is the cost. I have no idea.

Senator DECONCINI. I don't either.

Mr. ZALOOM. Simply because, in a State like New Jersey or a State like Florida, for example, where it is possible to purchase services, it could possibly be done much more cheaply than in other areas.

Senator DECONCINI. Is that cost borne by the State in New Jersey?

Mr. ZALOOM. No, sir, by the counties and to some extent by the State. There is still some Federal funding left. We did want to get LEAA funding for the whole system, but we were unsuccessful in doing that.

At the moment, the programs for the great part are installed in the probation services. We still have a county system where the county governments pay for each probation service.

The court is trying to come up with a State probation system in which case it would be paid by the State.

Senator DECONCINI. Thank you very much. We appreciate your testimony.

Mr. ZALOOM. Thank you.

Senator DECONCINI. The subcommittee will adjourn at this time, and there will be further hearings on this bill in September.

[Whereupon, at 9:55 a.m., the hearing adjourned.]

THE FEDERAL CRIMINAL DIVERSION ACT OF 1977

MONDAY, SEPTEMBER 19, 1977

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:04 a.m., in room 2228, Dirksen Senate Office Building, Senator Dennis DeConcini (chairman of the subcommittee) presiding.

Staff present: Romano Romani, staff director; Robert E. Feidler, counsel; Timothy K. McPike, deputy counsel; and Kathryn M. Coulter, chief clerk.

Senator DECONCINI. The Subcommittee on Judicial Machinery will come to order.

Good morning. Today is the final day of hearings on S. 1819, the Federal Criminal Diversion Act of 1977. Today we will explore the experience of Federal courts in diversion programs. Federal public defenders from three Federal districts and Federal Magistrate Richard Goldsmith will testify on the operations of diversion programs in their courts. Deputy Associate Attorney General Doris Meissner will describe the results of her evaluations of several of the Justice Department diversion programs. Mr. Don Phelan will outline the effect on court administration of some recent New Jersey State Court decisions that mandate review of diversion proceedings.

The questions we will explore today include: What types of crimes are persons to whom diversion is offered accused of committing? Are Federal prosecutors in districts where diversion is employed saving court time and costs? Are prosecutors "dumping" nonprosecutable cases in the diversion program? Are persons placed into diversion better off than persons processed through regular channels?

Each of the witnesses will have an opportunity to be assured of their entire statement placed in the record if they have one.

The first witness today will be Mr. Jim Hewitt. Then we will proceed to Judge Goldsmith.

Mr. Hewitt, if you will please come forward, let me welcome you to the committee and thank you very much for making the long trip. We are seeing you for the second time in Washington.

STATEMENT OF JAMES HEWITT, FEDERAL PUBLIC DEFENDER, SAN FRANCISCO, CALIF.

Mr. HEWITT. It is always a pleasure to appear before this committee I am sorry I am late, but we tried your new Metro system. I am sorry to report that it does not work much better than our system in San Francisco.

First, let me express my appreciation to the committee for your offer to testify concerning this piece of important legislation—the Federal Criminal Diversion Act of 1977.

First, may I ask that my statement be made a part of the record?

Senator DECONCINI. It is so ordered; it will be.

[Material follows:]

PREPARED STATEMENT OF JAMES F. HEWITT

May I first express my appreciation for the kind invitation of the subcommittee to appear and offer testimony on this bill, S. 1819, the "Federal Criminal Diversion Act of 1977."

In considering the feasibility of pre-trial diversion in federal courts, there are several factors which arise due to the limited jurisdiction of federal criminal law. For all practical purposes, there is no substantial juvenile jurisdiction in light of the limitations imposed by the Federal Juvenile Delinquency Act. Secondly, the United States Attorney may decline federal prosecution in lieu of state prosecution in those cases which it is felt local handling is more appropriate. It is from the residue that pre-trial diversion must be considered.

Perhaps the first consideration should be the basic philosophy of diversion as a prosecutive tool. Is its primary purpose to funnel out those cases that need not involve the complex machinery of our criminal justice system, with its panoply of constitutional protections? Or is its aim to protect minor offenders from the stigma of a criminal record? In truth, it may be a combination of these goals; and as a practical matter, others not so lofty. There can be no doubt that in some jurisdictions, a pretrial diversion program will draw more people into the criminal justice system than without it. Cases that are now declined outright (or in lieu of local prosecution) will be prosecuted, with a view to diversion instead of trial. This would not further either aims suggested above, but would surely have a deterrent effect on those committing minor infractions who would otherwise go unchastised.

From a practical viewpoint, very few candidates for diversion will be in custody. Most will be those who are summoned to appear, since the gravity of the offense and the criminal background of the defendant will be minimal. The Act seems to be directed more to those in custody who could be released to a suitable program, if the procedures were readily available. We find that the criminal justice system is many times the only means whereby certain persons can find their way to the help they desperately need. Many of our clients are drug addicts, mentally ill persons, or simply those who cannot function in a complex society. Often, the commission of a crime is the means of escape; to the security of the prison. This is a sad commentary on our social system, but it is one of the realities of our times. Many find their way into our courts because there simply is no other place to go. And, tragically, for many, life is less complicated and more comfortable in an institution than on the streets of our urban cores. As one client stoically reminded me, "freedom means nothing to me; with no family, no friends, no job, no money, I am just as confined as if I were in prison."

Unfortunately, many of these people will have extensive criminal records; many will have a history of erractic behavior; many have been in some kind of trouble since their childhood; and consequently will not meet the criteria unless it is broad enough to include this type of offender. It is my hope that S. 1819 will accomplish these goals.

I would like to make several comments on the bill which relate to some problems in its administration.

1. In the definition of "committing officer," it would be desirable to recognize the expanded jurisdiction of magistrates as embodied in pending legislation, and authorize either "judge or magistrate" to fulfill the function of the committing officer. This will eliminate the need to bring the matter into district court should the United States Attorney desire to dispose of the case before the magistrate. The requirement of "potential trial jurisdiction" or specific designation may result in delays and serve no useful purpose. Since the proceeding is primarily one involving the deferred exercise of prosecutive discretion, there is no need to involve the district court at all, since the matter may be resolved by the prosecutor and magistrate.

2. Section 4 is unclear on the point in time at which the person charged is interviewed by the administrative head. Perhaps it should be made clear that

any such interview should follow the preliminary apparance before the magistrate where the question of counsel could be resolved. Usually, it will be counsel, whether retained or appointed, who will initiate the suggestion of diversion, after having explained to the defendant his rights, and those which must be waived. It may not be appropriate to discuss diversion with one who has not had the advice of counsel (or waived it).

Section 5 speaks in terms of "release" to a program, and it is clearly the intent of the bill that persons not in custody may be diverted rather than prosecuted. This semantic confusion may result from use of the words "committing" and "release." Subsection (b) will create many problems. There is no definition for the term "persons injured." Does it apply to the victim teller in a bank robbery; the defrauded victim in a mail fraud? Also, it may be difficult to locate an "injured person" in some circumstances, and the purpose of speedy disposition will be frustrated. I would anticipate that the United States Attorney will exercise sound discretion in recommending diverion so that the public would feel no affront at the action. Any "substantial injury" would disqualify the person under Section 3(a).

Section 6(a) should include the counsel for the person, if one was of record, as a person to whom a copy of the report should be made. This will afford counsel an opportunity to anticipate any difficulties which may be suggested, and assist in correcting them. Subsection (b) speaks to barring use of statements made "on the issue of guilt," in any proceeding involving "such offense." May such statements be used as investigative leads; or as proof of other offenses, either federal or local? May they be used to enhance punishment, should the person be tried and convicted? Counsel might be reluctant to suggest diversion in light of a potential hazard of such prosecutorial use of the information.

Section 7(b) authorizes termination of diversion and prosecution whenever the prosecutor finds that the diverted person is not fulfilling his obligations, or when "the public interest so requires." No standards are given by which a divertee may gauge his conduct, and it appears to rest in the unfettered discretion of the prosecutor. No opportunity is afforded for any hearing to contest the decision, or even to be heard on the question of what public interest is involved. It is conceded that the concept of diversion is predicated upon the executive power to prosecute, and that such power is subject to few limitations. But having waived such fundamental rights as speedy trial and the statute of limitations, the divertee should be protected from arbitrary and capricious action onthe part of the prosecutor.

Section 8 provides for the appointment of an advisory committee. Since each district now has a Speedy Trial Planning Committee composed of essentially those with an interest in criminal justice, it would be more appropriate to simply designate that committee to perform the function, and add the administrative head of the diversion program to the committee's membership. This will eliminate a duplication of advisory committees with the same basic aims.

In the area of duplication, this subcommittee might consider a consolidation of duties in the pre-trial release agencies now functioning in certain districts. Whether this function should be separate and apart from the probation office is a matter of some importance, but the duties outlined do indeed overlap. Perhaps the experience to date in the pilot districts would be helpful in determining the suitability of this proposal.

Some questions have arisen in my mind concerning some collateral problems I anticipate. When a defendant has been arrested in this district on a charge pending in another, may he be afforded the opportunity for diversion in the district of arrest, or must he be returned to the charging district? Under Rule 20 of the Federal Rules of Criminal Procedure, he may remain in the arresting district and plead guilty or nolo contendere, if both United States Attorneys agree. It would seem appropriate to provide the same benefit to one eligible for diversion. This is especially appropriate where all of the family and employment contacts are in the district of arrest.

Should there be standards for resumption of prosecution, so that the divertee will know what is expected of him? The bill seems to vest absolute discretion in the prosecutor, with no standards. Also, should there be standards of eligibility adopted to insure uniformity in treatment, or may the prosecutive discretion be based upon such factors as personal dislike of the defendant or his attorney? Do not think that in our adversary system these are not critical elements to many decisions. More directly, should so much discretion be vested in the prosecutor; or should it be ultimately the decision of a judicial officer? I recognize that these questions involve important policy considerations, but they may have a deciding effect upon defense counsel's advice to his client.

Finally, I would like to make one recommendation. We have utilized, for the past several years, a program we have referred to as the "San Francisco Plan," devised by our Chief Magistrate, Richard S. Goldsmith, who will testify before this subcommittee today. It is not a radical procedure, since it parallels our existing state practice. It is very similar to the provisions of 21 U.S.C. § 844(b), as applicable to those convicted of drug possession. The essentials of this procedure have been carried over into S. 1437, and may be found in § 3807 of that bill. While not a diversion plan, strictly speaking, it does protect first offenders from the stigma of conviction, if they succeed on the short period of probation. The procedure does involve a plea or finding of guilt, but most of the other benefits of diversion are present. This progressive, humane, and practical treatment of first offenders will minimize the tragic results that flow from our tendency to overcriminalize antisocial conduct. To label a bank teller convicted of a $150.00 embezzlement a "felon," (unless the complex and time consuming pardon procedures are invoked), for the rest of their life is medieval. It would be my recommendation that the provisions of § 3805 of S. 1437 be made a part of S. 1319 as an alternative to pretrial diversion, to be applied to *all* first offenders who would otherwise be eligible for diversion under this bill.

I would like to thank the subcommittee for this opportunity to appear and offer my comments on this bill. It has become obvious that many offenders do not require the full involvement of our judicial machinery to accomplish a just end. If the codification of existing procedures will encourage the use of pre-trial diversion, it will surely result in a reduction of precious district court time and energy. The time has come where alternatives to our traditional procedures are essential. This bill will give statutory sanction to diversion programs that have proved themselves, and will go far to add a new perspective to our system of criminal justice.

Mr. HEWITT. There are several areas which I think we might explore in connection with this legislation—keeping in mind that with the recent amendments to the Federal Juvenile Delinquency Act there is very little jurisdiction now over juveniles except those that commit crimes on Government reservations.

In light of certain amendments, in that connection, it may well be that most of those juveniles will not be covered by the Juvenile Delinquency Act at all for petty offenses.

Second, the opportunity of the U.S. attorney to decline prosecution outright or to defer to local prosecution gives him an opportunity that might otherwise be suitable for pretrial diversion.

My first feeling when reading this bill was that perhaps there should be more judicial control over the exercise of prosecutor discretion. However, in looking through the record of the previous hearings in connection with a prior similar bill submitted by Senator Burdick, it may well be that perhaps this exercise of prosecutorial discretion should be relatively unfettered as far as the U.S. attorney is concerned, since after all it is a decision that he must make. It is a decision for which he must take full responsibility. I have certain reservations as to whether there should be any substantial degree of judicial control over the exercise of decision.

We must keep in mind that he may have factors that guide him which may not be relevant to the court in making such a decision.

We know, for instance, that in certain plea bargaining situations many times the U.S. attorney is willing to strike an incredibly good plea bargain mainly because he does not have much of a case. Certainly he cannot be expected to come into open court and say, "Well, the reason that I am striking such an advantageous bargain to the defendant is because we could not convict him if we went to trial."

Those of us who have some experience in the defense area see this as a reality, in fact, of life.

I do feel that perhaps rather than keeping people out of the criminal justice system, a viable and workable pretrial diversion program may bring more people in. I certainly think that it will eliminate a good deal of bottleneck and a good deal of congestion in the district court area of the criminal justice system.

Many people are not amenable to prosecution because of the lack of seriousness of the crime. The U.S. attorney will outright decline prosecution or refer it to local authorities. He may now feel inclined to proceed with a pretrial diversion program, and that person will have the benefits of some type of supervision through the probation office that perhaps would benefit him.

At the present time I would suggest that very few people who are subjects of a pretrial diversion plan are in custody at the time. I think most pretrial diversions involve those who are charged with very minor offenses usually brought into court by summons or invitation.

There are a number, however, of relatively serious offenders that we find would be suitable for pretrial diversion—for instance those with serious drinking problems that might be diverted through a drinking program to a State rehabilitation program, drug addicts, and so forth.

As we know from past experience, there are a number of people who use the criminal justice system as a means of getting some attention and of getting some help for another serious problem.

All of us have had clients who commit a crime solely to get back into prison. They just cannot cope with the complexities of this society. They find that by committing a crime they put into the work the entire machinery of the criminal justice department, which is aimed at rehabilitation and aimed at helping them.

Many times I have had clients who were acquitted who turned to me after it was all over and said, "Well, who is going to take care of me now? What is going to happen to me now that I have been acquitted?" This is the reality of the criminal justice practice.

In connection with the bill, I would like to make some suggestions concerning what I think might be some problems.

I would ask the committee to consider providing that either the judge or the magistrate perform the pretrial diversion function rather than requiring that the district court be involved if a felony is involved.

The reason for that is that the person customarily makes his first appearance before the magistrate. If it requires the action of the district court, I think one of the major objectives of the bill would be defeated. You would involve district court judge power and time expended and docket crowding to involve the court in this procedure.

Since it is not a criminal prosecution and since there is no constitutional right to an article III proceeding, really this is a hearing held under prosecutorial discretion. I see no reason to involve the district court in it even for felonies, other than perhaps capital offenses, which I do not imagine would be susceptible to this type of diversion. I would like it to permit the magistrate to function as the statute provides whether it be a felony or a misdemeanor.

Section 4 of the bill is unclear concerning at what point in the prosecutive process the person is to be interviewed by the administrative head. It perhaps might be made clear that prior to interview the person should either be provided counsel or opportunity counsel or an opportunity to intelligently waive counsel.

In determining whether to subject yourself to the hazard of pretrial diversion, since there certainly are some with resumption of prosecution as a reality, it may well be that counsel may not advise his client to opt for pretrial diversion if there is a possibility of acquittal or if the weight of the evidence is such that a trial would be warranted.

I would suggest that there be some provision that counsel be injected into the process as soon as possible, perhaps upon first appearance before the U.S. magistrate. If the magistrate is not being utilized, as under the present Brooklyn plan, I think perhaps the U.S. attorney should arrange to determine the right to counsel issue before proceeding with the diversion program.

Section 5, as I suggested in my statement, speaks in terms of release to a program. I think it should be made clear that persons in custody can have the advantage of pretrial diversion perhaps into some type of custodial program—a State hospital, a drug program, or any other type of group.

Subsection (b) I discussed with some of my fellow Federal public defenders. I think we all agree that it poses certain problems to inject into the system the consent of the person injured. The definition of the person injured, I think, would be a very vague one. Must there be a physical injury or is the teller in a bank robbery or the defrauded victim in a mail fraud the person injured whose consent must be obtained?

Second, I can see where this would cause delays of locating the person, interviewing them, and obtaining their consent. Thereby you would be defeating the purpose of expeditious handling of these matters.

Senator DeConcini. Excuse me. We have had just about unanimous agreement on that suggestion. I am very pleased to hear it from the defense bar as well. We will no doubt strike that.

Mr. Hewitt. Fine; thank you, Mr. Chairman.

Senator DeConcini. Thank you for your suggestion.

Mr. Hewitt. With respect to a copy of the progress report of the divertee, I would suggest that section 6(a) consider seriously whether a report should be provided to counsel for the person.

For all practical purposes, under our present practice, when a person is diverted under a Brooklyn plan or a San Francisco plan we consider the case closed, to be reopened if prosecution is to be resumed.

I cannot recall more than one or two cases in the past 10 years when prosecution was resumed when a person had been diverted.

Therefore, it may be, for all practical purposes, that the defense lawyer is finished with the case when the person is diverted. So he may have no particular interest in the progress.

If this statute is going to require periodic report or especially a report where resumption of prosecution is suggested it would seem that defense counsel should obtain a copy of this. He may very well be able to forestall the resumption of prosecution, or he may be able to assist the probation officer or the prosecutor by talking to the defendant, clarifying what might be confusion or misunderstanding on the part of the prosecution, and perhaps have him restored to the pretrial diversion program.

I think that to exclude defense counsel from this information could create more problems than it would solve.

We know from past experiences that many times probation or a petition to revoke probation may be made upon bad information that defense counsel can correct and bring to the attention of the probation officer or the court and eliminate that drastic step in the process.

We find some problems in connection with the use of the statements on the issue of guilt in any prosecution for such offense, since that narrow restriction would permit the use of any statements on other offenses, and we are concerned with the possibility that that information might be available for use of State prosecutors on State offenses. A person may not quite understand the scope of the use of the statement and may make statements to the supervising diversion officer. That could pose serious fifth amendment self-incrimination problems.

Second, may they be used to enhance punishment should prosecution be resumed and should the person be found guilty after a trial?

If these hazards are present, and if they are real in a particular case it may prompt alert defense counsels to decline the diversion program if he might otherwise advise his client to engage in it.

I would rather see something along the lines of transactional immunity, whereby any statements made could not be used for any purpose in any court against a diverted person.

Section 7(b) has also caused us some problems in that it seems to vest in the prosecutor unfettered discretion to terminate the prosecuted decision.

At first I felt that this was unwise. However, now that I have given it some thought, if the power to authorize prosecution is vested with no control in the prosecutor, certainly the power to terminate it would likewise be vested in him.

There ought to be some standards. I think the lack of standards could create some problems.

Senator DECONCINI. Let me interrupt you there, Mr. Hewitt. Do you think there should be judicial review of the prosecutor's decision either to use diversion or to reinstitute prosecution?

Mr. HEWITT. I have mixed emotions about that. I feel that it really is his decision whether to prosecute or not. I think that if he has the power to make that decision without judicial intervention certainly he should have the power to resume prosecution without judicial intervention.

Senator DECONCINI. If the bill provided that any statements made by the divertee would not be admissible, would that be a little more acceptable than if you did not provide for judicial review?

Mr. HEWITT. I think it would help. The problem I find is that the phrase "when the public interest so requires" pretty much gives the prosecutor arbitrary discretion to resume prosecution. There probably should be some grounds. It may be that there should be some judicial intervention at this particular point.

Senator DECONCINI. If there is a hearing provided where the accused or the divertee would have notice and be able to come with counsel and be confronted even though under the prosecutor's forum, do you think that is a wise procedure? In this way certainly they would know and have an opportunity to present to the diversion program that in fact they were not seen where it may have been indicated that they were or that they did not do what they had been accused of.

Mr. HEWITT. Yes, sir. I think that would go far toward solving the problem.

Senator DECONCINI. Can I take it then that it is your judgment—if you want to maintain reservation for the record, please do—that if you provide enough safeguards as to the defendant that you could be comfortable with nonjudicial review in the event of reprosecution or a determination by the prosecutor to prosecute?

Mr. HEWITT. Yes; I think that is a fair statement.

Senator DECONCINI. Thank you.

Please proceed.

Mr. HEWITT. Section 8 provides for the appointment of an advisory committee. While I recognize that that was in the predecessor legislation prior to the Speedy Trial Act enactment, I would suggest that the committee consider making the Speedy Trial Planning Group—which exists in every judicial district—also the pretrial diversion group. Perhaps we could add to the membership of that committee a pretrial diversion officer if it is provided for in the statute.

There seems to be no practical reason that we should have two planning groups existing with criminal justice aims at the same time, since we have the speedy trial group which involves the chief judge of the district, the chief probation officer, the U.S. attorney, the Federal public defender if one is acting in the district, I believe the clerk of the district court, and others interested in the criminal justice system as members of the private bar.

I certainly think that the administrative head of the diversion program, whoever he might be, would be an asset to the Speedy Trial Group anyhow, since he is certainly involved in the expeditious handling of criminal justice matters.

Also, we would suggest that the committee consider that if pretrial release agencies, either through private groups or through probation offices, are adopted in all districts, then perhaps the committee might consider that that group would be a suitable one for the pretrial diversion program.

At the present time our district has the probation office acting as the pretrial release agency. The senior probation officer has been appointed in that function. It is fairly obvious that his duties and his background would lend themselves to him being the person to function for a pretrial diversion function as well.

He interviews most of the people who are detained in custody initially upon their arrest. He has facilities for assisting them in pretrial release programs very similar to the pretrial diversion program that this committee is considering in the legistlation.

I would ask that that be considered, perhaps, as a convenient method whereby the same purpose could be accomplished.

I have suggested that perhaps either an amendment to rule 20 be made, which of course would have to be taken up by the Advisory Committee on Criminal Rules, or that the statute could provide that the provisions of rule 20 permitting transfer of the charge to the district of arrest might be available for pretrial diversion. Thus, the person arrested, let's say, in San Francisco, based upon a complaint in New York—if the United States attorney in New York and the United States attorney in San Francisco are agreeable, may appear and obtain the benefits of pretrial diversion in the district of his arrest. It is customarily the district of his residence or the district of his employment.

To require him to return across the country to New York to take advantage of a diversion program would be expensive and inconvenient. I think it would defeat a number of the purposes of this legislation.

Of course, this would be predicated—as is rule 20—upon the consent of both United States attorneys. They must both agree to this.

Perhaps either by the adoption of guidelines by the Justice Department or perhaps by legislation, there should be some guidelines as to what is expected of the person who is put into the diversion program so that he knows when he accepts this responsibility what is expected of him and what will happen to him if he violates those conditions.

There seem to be no standards in the bill. I think that could pose some problems—especially with respect to uniformity of treatment and uniformity of prosecutorial discretion so that we do not save the situation that I gather is happening now. Some United States attorneys do not participate in any kind of pretrial diversion, Brooklyn Plan or otherwise, and some that use a great deal of flexibility.

Senator DECONCINI. Excuse me.

Do you think that those could be handled through regulations promulgated by the Attorney General and the criminal division governing all district——

Mr. HEWITT. Well, if I can quote Patrick Henry, "My feet are guided by one lamp. That is the lamp of experience."

I recall in 1971 at the National Conference on Corrections in Williamsburg that then—Attorney General Mitchell in his major address indicated that he felt a Brooklyn plan for adults was a good idea. He announced that he was going to instruct the executive office of United States attorneys—to instruct all U.S. attorneys that they were to consider using this as a means of diverting people from the system.

That was in 1971. Not much has happened until last year. It is hard to believe that it took, the Justice Department 5 years to determine the feasibility of it.

I felt encouraged at the time that since the Attorney General had announced that he was in favor of this plan that that sanction might prompt greater use of it. However, it did not happen.

I am hopeful that this legislation, if it is enacted, will give U.S. attorneys confidence that what they are doing is legal and that there is nothing wrong with bypassing prosecution by using a diversion program. Hopefully, they will use it.

Senator DECONCINI. Do you think that we should consider mandating the Attorney General to promulgate rules and regulations setting forth some of the standards that should be used by district attorneys?

Mr. HEWITT. Yes. I think guidelines should be made available to the U.S. attorneys as well as to the pretrial diversion agencies, and perhaps to the public, so that the defense attorneys and the clients would know just what is expected of them.

Senator DECONCINI. That is one of the quandaries that the committee and this member is having: if you leave all or part of a diversion for the most part in the hands of the prosecutor, how can we be certain that the Attorney General will implement it through all

districts and prosecutors? I do not know exactly how to do that. If you have any suggestions I would like to hear them.

Mr. HEWITT. Well, I am always reluctant to suggest guidelines after seeing what happened to the parole commission and their guidelines. I shudder at the thought of having to deal with them.

However, I cannot see any particular alternative unless the committee wishes to put it in the statute that it would be workable.

The suggestion has been made that there already are regulations in the United States Attorney's Manual. Of course, that is available only to United States Attorneys, for the most part.

I would rather see some guidelines published in the Federal Register. I use that term "similar to the parole guidelines" only as a similarity of being published in the Federal Register.

Senator DECONCINI. I agree with you. It seems to me that you could come across a Federal District Attorney who for philosophical reasons did not want to divert people because he thought it was a copout or something. If, in fact, it was in a statute it would certainly put him or her on the spot for not considering it even if he or she exercised a prejudice. At least they would have to admit publicly that it is in there. The defense bar could bring it to their attention and sooner or later they would have to implement some or they would be in a very embarrassing situation.

Mr. HEWITT. I think it could be helpful as well as to the public to know what is expected of them and what the pretrial diversion program involves through published guidelines. I would make that suggestion.

Lastly, I would like to make one recommendation. I recognize that this may very well be a matter that while affecting pretrial diversion, it may be a matter involving sentencing. Perhaps it would be beyond the scope of responsibility of this subcommittee.

For several years we have had what we call colloquially the San Francisco plan. Magistrate Goldsmith from San Francisco has been invited by this committee to testify. He will address part of his testimony to that plan.

It is not a radical procedure. It is very similar to that involved in the present 844(b) of title XXI, the Comprehensive Drug Abuse Act concerning a deferred judgment.

The essentials of this procedure have been carried over into S. 1413 now being considered by a different subcommittee of this committee. It is now found in section 3807 of S. 1437. It only applies to certain drug offenders of a certain age rather than to defendants across the board.

As you know, Mr. Chairman, at the present time the Youth Corrections Act provides for a certain degree of expunging the record upon successful completion of probation or other commitment. S. 1437 does not include the Youth Corrections Act within its scope.

I would suggest that this committee, if it is appropriate within the scope of the committee's responsibility, consider a procedure similar to that which we have in California. It provides for expunging the record if the person successfully completes a period of probation. In all probability this would be for first offenders.

It accomplishes, I think, the laudable aim of eliminating a felony conviction of a person who has only committed one offense in their life and must live with that stigma for the rest of his life.

If you have ever had any contact with the complexities of getting a Presidential pardon, you can certainly sympathize with the plight of a first offender in a relatively minor felony who must go through the pardon process in order to eliminate the felony conviction as a lifetime stigma. I think it requires 5 years after the conviction and extensive FBI investigation.

This seems a little silly when we are talking about a bank teller who was convicted of a $150 embezzlement. Therefore, I would ask that the committee consider this procedure. If there were a procedure for expunging the record and for setting aside a conviction in cases where first offenders have successfully completed probation, in conjunction with pretrial diversion, I think those two advantages would meet both of the primary aims of the legislation—that of preventing persons from having to suffer from the collateral consequences of a criminal conviction as well as diverting people from the criminal justice system.

I would like to thank the committee for this opportunity to appear and offer my comments. I think that it is obvious that there are a number of offenders who just do not have to get themselves involved in the complex machinery of the criminal justice system.

The constitutional protections that are involved and necessary to a preservation of the system are fine for those who are charged with serious offenses and for those who must, of necessity, undergo the system.

However, this complex machinery should not be required for relatively minor offenses that will obviously not happen again from a review of the person's background. I think this legislation will go far to expedite the handling of business in our Federal courts.

Thank you for this opportunity.

Senator DECONCINI. Thank you, Mr. Hewitt.

Let me just touch a couple of questions. As far as the stages at which diversion could be appropriately used, do you have any reservation about having that apply any place—prearrest, precomplaint, preindictment, postindictment, and just prior to trial?

Mr. HEWITT. I would suggest that pretrial diversion be made available at any time during the criminal justice process. We have had it used during the course of a little head-banging ceremony before picking a jury in the judge's chambers, where it might appear that the case could be better handled by a pretrial diversion rather than going to the expense and spending the time in picking a jury and trying a case that should not really be tried.

I would certainly urge the committee to consider making it available at any time during the process proir to conviction or guilty plea.

Senator DECONCINI. Making an assumption that it would be upheld as constitutional—and the committee is not sure of that assumption—do you see any advantage to having a precomplaint diversion or even preindictment by the prosecutor and then pretrial diversion after that by application to the court by the accused and the court approving it?

Mr. HEWITT. I see some separation of powers problems.

Senator DECONCINI. Assuming that the prosecutor agrees at that time, but making it available for someone else to enter into the determination, do you see constitutional problems?

Mr. HEWITT. I do if the court is given the power to do this, notwithstanding the prosecutor's suggestion or consent. I can certainly see a problem with the legislative branch granting authority to the judicial branch to affect a traditional responsibility to the executive branch.

It would seem that if there were sufficient flexibility for the prosecutor to enter into a pretrial diversion program at any time in the trial process prior to a finding of guilt or plea, I think that option should be left available to him.

He may have his own reasons that he does not want to discuss with the court. Many times you may have a person who has agreed to cooperate with the prosecution in some major cases and do himself some good and the prosecutor does not want to make a public record of the fact that that is one of the reasons why they may want to——

Senator DECONCINI. Going to that question, do you think it is proper for a prosecutor to do that with divertees? Do you think it is proper to use it for plea bargaining or exchange of information?

Mr. HEWITT. I think it is going to happen.

Senator DECONCINI. I think it does, too. I would like to see it minimized.

Mr. HEWITT. I do not see any way it could be stopped.

Realistically, we know that a number of cases are diverted because the evidence is weak and the prosecutor is willing to take half a loaf rather than none.

Senator DECONCINI. Well, going to that point, shouldn't the case really be dismissed or reduced to another charge if that is the set of circumstances?

Mr. HEWITT. Well, depending upon the stage of the prosecution, once an indictment has been obtained it is not that easy to get a dismissal out of the Justice Department. Form 900 must be submitted with details of why a dismissal is wanted. Sometimes the people in the Department do not have quite the same view of a case as those out in the field and do not want to dismiss the prosecution.

At the complaint stage it is a fairly simple matter, but again, I think prosecutors are reluctant to dismiss once they have decided to make the charge. It is much easier to defer prosecution if that procedure is agreeable to all parties than to outright dismiss.

Senator DECONCINI. That is a very good point.

Mr. HEWITT. I think it is being used as a plea bargaining tool. As I suggested, I do not think there is any way we can avoid that.

Senator DECONCINI. Do you think that the regulations or even the statute should indicate that it is not to be used as a plea bargaining tool?

Mr. HEWITT. No; I do not think it would do any good. I think you you would just have to leave that to the sound discretion of the U.S. attorney and prosecutor. I think that for the most part sound discretion will be exercised by the vast majority of U.S. attorneys.

There may be office policies set up within a particular district concerning the utilization of pretrial diversion. Certainly in those districts with a Federal Public Defender we can sit down with the U.S. attorney and discuss guidelines and our own suggestions as to what procedure should be followed.

I do not anticipate that that would be a great problem.

Senator DECONCINI. Thank you, Mr. Hewitt, for your testimony and for traveling the distance you did to give this evidence to us. We greatly appreciate your cooperation. We will keep in touch with you.

Mr. HEWITT. Thank you, Mr. Chairman, for the opportunity to appear.

Senator DECONCINI. The next witness is Judge Richard S. Goldsmith, the Chief United States Magistrate for the Northern District of California.

Welcome, Judge Goldsmith. We thank you for your patience in traveling this far to testify on behalf of S. 1819.

Your statement in toto will be in the record if you care to highlight it, or you may proceed as you please.

[Prepared statement of Hon. Richard S. Goldsmith follows:]

STATEMENT OF HON. RICHARD S. GOLDSMITH, CHIEF UNITED STATES MAGISTRATE, NORTHERN DISTRICT OF CALIFORNIA

Before commenting upon S. 1819, the Federal Criminal Diversionary Act of 1977, I belive it is appropriate that I set forth my background in handling criminal cases which fall in the category of those which will be covered by Section 3 of the proposed legislation.

During my tenure of more than six years as a Magistrate for the Northern District of California and prior to that, during much of the period I served as United States Commissioner in the 1960's I was aware of the availability and use of the diversionary program, commonly known as "The Brooklyn Plan" in the Northern District. When it was distributed, I read the memorandum on the subject prepared by the United States Attorney for the Northern District of Illinois, Wm. J. Bauer, September 9, 1970 and I had become familiar with the Department of Justice "deferred prosecution of a juvenile offender" Form No. 15 which was designed May 1st, 1964.

The Northern District of California has utilized a modified version of this form for many years but it is only during the latter half of the administration of U.S. Attorney James L. Browing that the volume of cases has become significant. Mr. F. Steele Langford, Head of the Criminal Division informed me that a conservative figure for Brooklyn Plan defendants would run between 3 and 5% of all cases per year, currently. This means that between 35 and 60 defendants against whom complaints are filed by the United States Attorney are diverted to the Brooklyn Plan each year.

In order to verify Mr. Langford's educated guess, I obtained statistics from the Probation Office which maintains records of all probationers who have signed agreements and are supervised prusuant to the Brooklyn Plan. For the past three calendar years the diversionary cases averaged 5 percent of the total number of criminal filings instituted in this District, based on figures furnished by the Clerk's office. More significant than the percentage is the trend; which is upward. For the first half of 1977, Brooklyn Plan cases had climbed to 8 plus percent of the total number of filings. (34 out of 395). Just five years ago, only .7 percent fell in this category. The total number of diverted defendants from 1972 through June of 1977 was 189 which represents 4% of all criminal filings during this period. In addition to cases initiated by the United States Attorney the Magistrates have conducted many matters commenced through the citation process but in which the Brooklyn Plan appeared to be the appropriate remedy for the Court to utilize. In these Magistrate cases in the petty offense or infraction category. the United States Attorney is not always present for the prosecution or he is sometimes represented by an Extern whose work is supervised by a staff member. The Court itself has frequently taken the initiative in utilizing deferred prosecution of such defendants by recommending its application to the United States Attorney. After reviewing selected portions of my bench book for the past several years I would estimate, based upon extrapolation, that the Magistrates have disposed of between 180 to 200 cases under the Brooklyn Plan since 1972.

In utilizing the deferred prosecution program at the Magistrate level, we have followed the general guidelines set forth in the memorandum prepared by William J. Bauer referred to above.

The defendants have committed minor types of offenses,[1] the violation has been an isolated one as opposed to a series of incidents and the likelihood of success on probation has been excellent. One of the guidelines we did not follow was that which pertains to the age of defendants. If we believed a subject was suitable for Brooklyn Plan treatment we would avail ourselves of this remedy regardless of age. Thus, we did not limit ourselves to juveniles. Our practice has also been followed by the U.S. Attorney's Office in this District. Mr. Langford informed me that he avails himself of the Brooklyn Plan treatment for defendants regardless of age where the individual otherwise meets the criteria referred to above. Although statistics are lacking in his office, Mr. Langford is of the opinion that the degree of success of his defendants has been extraordinarily high. This is confirmed by the Probation Office. So far as I am aware there are few shortcomings to deferred prosecution. It enables defendants to avoid the stigma of a criminal record in view of the fact that the charge is dismissed by the Judge if the defendant succeeds on probation. It avoids numerous appearances in Court and eliminates the necessity of time-consuming trials. It has been recognized by the Congress in the Speedy Trial Act of 1974 which expressly eliminates from computation of time the period that defendant is placed on probation under the Brooklyn Plan and is under deferred prosecution.

What are its shortcomings? If a defendant fails to meet the conditions of probation and thus subjects himself to a deferred prosecution, both the government and the defendant find themselves handicapped at a trial by reason of the passage of time. Should many months have elapsed between the time of the offense and the date at which trial commences, witnesses to the offense may not be available or, if available, their memories will have faded. Thus it is sometimes difficult for the government to prosecute a case successfully, even though it has made a complete record of the episode at the time it occurred and has been able to refresh the memories of witnesses who would still be available. Likewise, the defendant would find himself hindered by deferred prosecution if delay deprived him of witnesses or has caused potential witnesses to forget the details of the incident. His recourse is the same as that of the prosecution: prepare a record of events promptly after they occur so that witnesses will be able to recall the details of the alleged violation of law. This Court became aware of the defects of the deferred prosecution program some five years ago when it instituted a modified form of the Plan with the concurrence of the United States Attorney, the Office of the Public Defender and the Probation Department. The modified plan, which for identification purposes we shall call the San Francisco Plan, is similar in its operation to the procedure outlined in 21 USC § 844(b) for first-time offenders under the controlled substance laws. It also has its counterpart in California Penal Code No. 1203.4 procedure. The defendant enters a plea of guilty or is found guilty after trial and is thereafter placed on probation without the Court actually entering an adjudication of guilt. In other words, the judgment and sentence are held in abeyance while the defendant is serving his probationary period. Should the defendant violate the conditions of probation, as found by the Court after a proper hearing, the adjudication of guilt then takes place and is entered of record. This Plan has been utilized in a few other Districts.

Senior District Judge Walter E. Hoffman makes mention of the practice in his article on "Purposes and Philosophy of Sentencing", p.Q52 in a Federal Judicial Center publication, "An Introduction to the Federal Probation System". As the years have passed the Magistrates have increased their reliance upon the San Francisco Plan. It eliminates the major shortcoming of the Brooklyn Plan but at the same time accomplishes the beneficent results of a diversionary program. It avoids a criminal record on the part of a successful probationer whose plea is set aside upon completion of probation and whose charge is dismissed as it would have been if the defendant had been treated under the Brooklyn Plan. It avoids trials (very few defendants have been placed on probation under the San Francisco Plan after a conviction following a trial). However, for the rare offender who fails on probation, there is no need to initiate a delayed trial as is required under deferred prosecution of a defendant. It would be my recommendation that the proposed legislation be broadened or supplemented to authorize not only diversion through deferred prosecution but also deferment of entry of Judgment and Sentence such as is practiced under the San Francisco Plan.

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[1] Since the Magistrate is handling only petty offenses and minor offenses as a matter of jurisdiction, he need not concern himself about serious crimes in determining the wisdom of utilizing a diversionary program.

As to the specifics of the Plan as presently drafted, I would make the following comments and suggestions:

1. In Sec. 2, which declares that innovation is appropriate in creating alternatives to prosecution, I would add after the work "Prosecution" on line 2, page 2, the phrase "or imposition of Judgment and Sentence".

2. In Sec. 3(1), the "eligible individual" is defined and provision is made for determination of such individual by the attorney for the government. This is the present practice under the Brooklyn Plan and it works well if the U.S. Attorney of the District is familiar with proceedings for handling deferred prosecution cases. But if he is reluctant to avail himself of this remedy, the Act does not provide for an alternative means of initaiting Brooklyn Plan proceedings. I would suggest that the probation officer to whom the case would be referred is an appropriate individual to recommend to the committing officer the wisdom of employing deferred prosecution in a specific criminal case. This can be achieved by inserting after the word "Government" on line 18 of page 2, the language "or by the probation officer to whom the case is referred".

3. In Sec. 3(4), the term "committing officer" is defined. I would substitute for the language which appears on line 10 after the word "case" the following: "before whom the individual must appear". This will permit a Magistrate to utilize the Act.

4. In Sec. 3(5), the "administrative head" is defined and the method of selecting him is set forth. Why is it not feasible to have the Chief Probation Officer of each District designate a member of his staff as the "administrative Head" rather than create a new position outside of the Probation Office? I believe that the function is one which a specifically trained probation officer can assume as part of his regular duties. If this be the case I would change the language on line 14 of page 3 by substituting "Chief Probation Officer" in lieu of Attorney General. I would envison a single individual being able to handle the entire program.

5. In Sec. 4, a procedure is set forth for preparing the defendant to participate in a diversion program. Would it be appropriate to require, at least for felonies and misdemeanors, that the interview referred to be conducted after the individual has conferred with his attorney? If so, I would add the following language to the paragraph: "Such interview shall be conducted after the person had conferred with counsel."

6. Under Sec. 5(a), Provision is made for release of a defendant on the diversion program. Reference is made to the requirement that the individual make an intelligent waiver of his rights "with the advice of counsel". Since I would anticipate use of the deferred prosecution program in many petty offenses in which an attorney is neither appointed nor retained I think it might be advisable to insert on page 4, line 14 after the word "counsel" the clause "in other than a petty offense." This is not an Argersinger problem which requires representation of an attorney because the Court intends to send the defendant to an institution.

7. In Sec. 5(b), the Bill requires that the injured party give his consent to disposition of the case under the diversion program. I think it is a mistake to permit the victim (whose identify may not always be clear) to determine an appropriate remedy to be used by Court and prosecutor. If approval is to be granted it should be the committing officer who would be consulted by the prosecutor as to the appropriateness of the diversionary program. I would strike the language beginning on line 19 with the word "all" and concluding with the word "with" on line 20. I would substitute the following: "the committing officer has informed".

8. In Sec. 7(a), on page 5 provision is made for the period during which the individual on the diversion program is released on probation. I would rephrase the language so that the probation officer himself might recommend conclusion of supervision and dismissal of the charge in a period less than twelve months. It might be expressed as follows beginning on line 18 by inserting after the word "a" the following: "period not to exceed". On line 19 the word "period" should be stricken and the word "month" should be pluralized. On line 22 I would add to the end of the sentence the following language: "on motion of the probation office."

9. Under Sec. 7(b), the attorney for the government is permitted to prosecute the diverted individual if he finds that the person has not fulfilled his obligations. It might be advisable to involve the probation officer who is handling the case in guiding the attorney for the government in making his findings. The following language should appear on line 4 page 6 after the word "government": "upon report of the probation office."

10. In Sec. 7(c), the committing officer is authorized to dismiss charges against an individual who has completed his program successfully. Approval of the attorney for the government is required. Why is this necessary if the administrative head certifies that the program obligations have been fulfilled? I would strike the language on line 10 page 6 beginning with the word "and" and ending with the word "concurs" on line 11.

11. In Sec. 8, provision is made for the appointment of an advisory committee for the diversion program for each District. Rather than establish another group, why would it not be feasible to enlarge the scope of the work now being performed by the Speedy Trial Planning Group so it might fulfil this additional function? If this is the case then it would be unnecessary to establish a new committee and the balance of (a) beginning on line 15 with the word "Any" and ending on line 22 with the word "Act" could be stricken. There is certainly a close relationship between diverted cases and the purposes of the Speedy Trail Act. Under Sec. 8(b), on line 24, I would substitute the word "of" for the word "for" after the word "implementation". I believe the Bill represents important legislation that should be made a part of our statutory law. It clarifies procedure which is being followed in many Districts throughout the United States. It will make for uniformity and will encourage broader use of a diversionary program which has already demonstrated its efficacy during its many years of use.

I would hope that the committee would also enact specific provisions encompassing the requirements of a plan for deferred entry of Judgment and Sentence in those cases in which a defendant has entered his plea of guilty or has been so found after trial. As stated above this District has relied upon the San Francisco Plan for a number of years with excellent results and we believe it should be sanctioned by the Congress. Mr. James L. Browning, the present United States Attorney for the Northern District of California has authorized me to state that he joins me in requesting the passage of legislation for the San Francisco Plan which has been analyzed by the Administrative Office and found valid as a matter of law but in need of clarification through legislation. In his remarks, Mr. James F. Hewitt, Chief of the Public Defender's office for the Northern District of California, has also recommended passage of legislation which will establish sentencing procedures for application of the San Francisco Plan. He has outlined the method whereby this can be accomplished. I would urge you to follow his recommendations so that the federal trial courts will have an alternative remedy to pretrial diversion.

STATEMENT OF RICHARD GOLDSMITH, U.S. MAGISTRATE, SAN FRANCISCO, CALIF.

Judge GOLDSMITH. Thank you. I appreciate the opportunity of appearing before the committee. I am most grateful. I hope that my remarks will supplement those of Mr. Hewitt.

As I listened to him, I felt that there might also be a charge of collusion, because as to the specifics of the bill I find that I am in almost complete agreement with his comments as to certain deficiencies and what might be done to correct them.

Apart from that, I felt that first I should give you a little background because I think Mr. Hewitt suggested that I be called by this committee in the light of the Brooklyn plan, the deferred prosecution.

During my tenure as a magistrate for the past 6 years I have seen the plan utilized very often in our own district. Before that, when I was a U.S. Commissioner, we did use it on a lesser scale in San Francisco.

When I received the invitation I thought that I should try to get some statistics. I inquired of Mr. Langford, who handles our criminal prosecutions in San Francisco. He said that off the top of his head he felt perhaps from 3 to 5 percent of defendants are now being handled through deferred prosecutions in San Francisco. That would mean around 35 to 60 defendants a year, which is a substantial number.

To verify this, since he had no actual statistics, I went to the Probation Department, which would have records of those who were on probation under deferred prosecution. I obtained their total number of cases and then applied them to statistics I obtained from the Clerk's office. I verified the accuracy of Mr. Langford's guess.

It turned out that at present there are 5 percent of our defendants in San Francisco actually being handled in this manner. In the first 6 months of the present year there were 8 percent.

In 1977 we are talking about 34 out of 395 defendants who have actually been placed on probation under the diversion program. Of course, these are people who have had their matters handled by the U.S. attorney's office, In addition, we have our petty offense matters that the magistrates themselves might have handled without actually going through the U.S. attorney's office initially, where there might be a citation to begin it.

I knew that we were handling a number of these cases in the same manner. What we do in San Francisco on these programs is that we have externs who are related to Hastings Law School and work with a practice class. They are professors there, and they make themselves available for services to the court. They also are controlled by the U.S. attorney's office who is empowered, I believe, to hire several of them in a special program.

Frequently, the magistrate himself will suggest to the extern that after he has had a little background on the case he may decide that it is appropriate that we utilize it as deferred prosecution.

I computed the figures of the matters of petty offense character that the U.S. attorney might not have initiated himself and found that we have just about an equal number over this 5-year period. In other words there are 180 to 200 cases that the magistrates have handled in San Francisco as deferred prosecutions, in addition to the ones that were begun by the U.S. attorney.

We may be talking, in this 5-year period, of as many as 300 to 400 people. This is, then, a substantial background.

The guidelines that we have used are those that were suggested by U.S. attorney Bauer in Illinois, who put out a brochure many years ago in which he described the plan. He said that the standards would be these: First of all, the offense should not be a very serious one; second, it should be an isolated incident and not something that occurs on a regular basis with a particular person.

I think that initially the emphasis was on juveniles. However, now that we do not prosecute very many juveniles in the Federal court, but rather have the State do it, there is less reason to use the plan except to the extent that if we do have a juvenile committing an offense and the State may be reluctant to handle that matter, so that there is not going to be any superivison at all, then there is an excellent reason for having a deferred prosecution and diversion plan.

If we take an installation such as Fort Ord, Calif., where there are some 35,000 people living—because of the large Army installation there—necessarily there are going to be many, many youngsters who get in trouble. I know that the local authorities there are somewhat hesitant to supervise all of those youngsters.

We do have an excellent probation office centered right in Monterey, Calif. We utilize the deferred prosecution plan there with great success.

So from that standpoint it is very helpful to have it available to the juveniles that we might otherwise have to send to the State because we are not privileged to handle them.

Mr. Hewitt mentioned our own variation, called the San Francisco plan to distinguish it from the Brooklyn plan. I might give you the genesis of it. Initially, we felt that there was one shortcoming in the deferred prosecution plan. Whenever a person waives his right to a speedy trial it means that we are going to have to wait during the full probationary period to determine whether he will meet the requirements or not.

If he should fail and we have to have a delayed trial we have all the problems that arise when we do not prosecute somebody promptly. We may lose witnesses. If we still have the witnesses available, then some of them may have forgotten exactly what the details are, so it is difficult for the government to prove the case and also difficult for the defendant to protect himself.

Therefore, we thought that there was really no harm in these cases where the Government really felt that it could prove the case to take a plea, but to defer the entry of judgment and sentence. That is what we have done in San Francisco for several years now.

I have kept records on these cases. We have not had a single one that has failed under this probationary program. When the probation office reports satisfactory fulfiillment—and in some cases, of course, we just have court probation with monthly reports written to the court—at the end of the 6 months period or whatever it might be, what we do is to allow the individual to withdraw his plea of guilty.

We then dismiss the charge, as we would in a deferred prosecution case, and we accomplish the same result.

Should there be a slip-up, we do not have the problem of a delayed trial. Instead, we simply have to enter the judgement and sentence, because it is all prepared. That is the end of the case.

Then the man, of course, can be charged with his probation violation. He is entitled to his full hearing. We have a safeguard, then, in case we do not prosecute promptly.

I think that this is why Mr. Hewitt thought it would be desirable to have a proceeding in supplementation of this diversion program where we utilize the San Francisco plan.

Before we adopted it in San Francisco we had it cleared with the U.S. attorney's office, the public defender, the probation department, the clerk's office, and the judges. They all approved it.

I might state that when we were asked to justify it we prepared a memo about a year or so ago. It went to the administrative office. They felt that it was constitutional, but it would be preferable if we had legislation on the subject. Therefore, we would hope that this committee or its sister would adopt such legislation at this time and make proper what we have long been doing in San Francisco.

Senator DeConcini. I am advised that we have a copy of that memo. We thank you very much. The constitutional problem disturbed me, too.

Judge Goldsmith. All right. Mr. Hewitt, did you bring a copy of that memo? I brought one with me if you do not have it.

Senator DeConcini. We have it.

Judge Goldsmith. I would be happy to submit it to you.

Senator DeConcini. We have it, I am advised. Thank you.

Judge GOLDSMITH. You do have one?

Senator DECONCINI. Yes; I am advised that we do have one.

Judge GOLDSMITH. L. C. Reed is the author of this. It was based on the memo that we prepared for our own judges at that time. Mr. Hewitt transmitted it to the administrative office.

We felt that we had much justification for what we were doing because it is similar, as Mr. Hewitt said, to the 21 U.S.C. 844(b) procedure. It is very much like it. In California we have 1203.4 of our Penal Code, which had an expungement procedure. We felt that these were parallels and we could utilize them. We feel that it is not going to be too difficult to——

Senator DECONCINI. Excuse me, Judge. Let me clarify something. Under the San Francisco Federal diversion plan the accused is brought before the magistrate, enters a plea of guilty, and judgment is held in abeyance.

Judge GOLDSMITH. Yes.

Senator DECONCINI. If the divertee then for some reason does not comply with the diversion program, what happens?

Judge GOLDSMITH. Then the probation office would ask for a warrant or a summons issue. The man or woman is brought before the court. In effect, we would have a probation revocation hearing.

The result would be, if we find that there had been a failure to meet the conditions of probation, then we would actually enter the judgment sentence.

Senator DECONCINI. So there would be no trial?

Judge GOLDSMITH. No trial at all. Just to determine what had happened to require that he be brought before the magistrate.

We have never had one of these people fail, so the procedure would have to be, perhaps, improvised the first time we have one. We are quite selective, I might say.

Senator DECONCINI. That system takes care of the problem Mr. Hewitt mentioned, of having any statements of things that the defendant might have said to counselors in the diversion program being used against him.

Judge GOLDSMITH. Yes. I might say that we do this not only for pleas, but we have actually used this San Francisco plan diversion program for a person convicted after the trial, where it was the type of case in which we would have used it initially. We felt that despite the trial we could still use it. It worked out quite well.

If you would like me to, I can give you some illustrations of the kinds of cases we have.

Senator DECONCINI. I would like to have that.

Judge GOLDSMITH. I can think of one case in which a man was charged with obstruction of mail. It was a postman. He was taking some course at college in international relations. He was stealing the foreign news section of the New York Times. This is most unusual. He was not taking something of great value, but the people were quite chagrined when they found out that he was taking this.

We felt that it was not such a serious offense that it justified stigmatizing him with a record, but he still needed straightening out. He should not take anything. We used the San Francisco plan. We just gave him court probation. He wrote very intelligent letters, and he completed it satisfactorily.

Another case I can think of was an embezzlement charge where a young woman was charged in our jurisdiction, although it was a larger sum. It seems that she had been a teller for some years in one of our banks.

Her father had suffered cancer and needed an operation. She did not have the funds to pay for it. They were not eligible for medicare or medical. So she went to the bank initially to ask if she could take out a loan to pay for this. They refused, so she engaged in a little cheating there in order to pay for the operation.

However, she had an impeccable record. We felt that to make her a criminal permanently was just too much, so we used the San Francisco plan. That worked out quite well in that case.

Frequently we get people who maybe have a change of life—women in their fifties or sixties—who engage in some petty theft. They have have never done anything before. We do not like to stigmatize them, so we have used the San Francisco plan in these cases. Then, when they fulfill probation we clear the record. It is a much easier way than clarifying these matters and, say, using the provisions of 5021 where you have to go through certain steps. Even then you do have a certain record.

Here it is much clearer so long as we can avoid having something get in the computer initially. That is a very crucial point, and we must make provision for that.

We find that this works out quite well in San Francisco. It does eliminate the need of lots of trials because people are less hesitant when they know that they will not have a record in coming forward and saying, "Yes, I am involved, and yes, I did do this."

Of course, we do have the benefit of many local institutions for drug cases. We have such places as Newbridge in Berkeley and Walden House in San Francisco where we can place individuals, and then they can be straightened out in a year's period or whatever the time may be.

Senator DECONCINI. Do you divert any drug cases?

Judge GOLDSMITH. Yes, we do occasionally where it is not a major user. This is another thing. Some of these places where the people are eligible to go will not take someone who actually has a conviction and goes there because he is placed on probation.

However, if he is charged—as he is under our plan—but does not have this kind of record they will take him. From that standpoint it is very effective to do it this way, too.

Senator DECONCINI. Thank you for the illustrations.

Judge GOLDSMITH. As far as the analysis of the bill itself is concerned, I have put in my paper some new language that I thought would be appropriate. Mr. Hewitt has pretty well covered that.

I do think that our probation office is well qualified to handle it right now. We have this pilot program in San Francisco with one officer designated to help us with our pretrial work. He can do this kind of thing as well as anyone else. It seems to me that it is a natural function to be placed in the hands of the probation department.

We also think that this pretrial group that we now have working in San Francisco could undertake the supervision of this kind of program as well with very, very little change. It would mean that we would not have to set up another committee. As far as the other de-

tails are concerned it is a matter of just changing a little language here and there to accomplish these results. I have suggested some of the language, but I have no pride of authorship. The committee could probably do a better job than that.

I think that that just about covers what I had in mind. I would say that I am authorized to speak on behalf of our U.S. attorney in San Francisco, who subscribes to these sentiments. I talked to Mr. James Browning, and he urges the committee to adopt this bill and the San Francisco plan variant of it, because he feels that it is working quite well. More and more his office is relying on it.

As far as some of the details are concerned I think that while the U.S. attorney should initiate these matters and exercise his own discretion, frequently the magistrate may be the first person to realize it is an appropriate case in these situations. Of course, I think we should take it up with the prosecutor and require him then to agree that it is the proper way of disposing of the case.

Senator DeConcini. Your feelings, then, are similar to Mr. Hewitt. You feel that it should primarily be the prosecutor's discretion.

Judge Goldsmith. Yes

Senator DeConcini. Not only for the constitutional reasons that we have talked about, but also for actual implementation of the program.

Judge Goldsmith. I think so. In those cases that we have had before us, where he was not present but one of his externs was and we have suggested it and then the extern has conferred with the U.S. attorney and we have always gotten cooperation and agreement.

Senator DeConcini. Do you think the prosecutor in your jurisdiction and others that you might know of are using it to the fullest extent?

Judge Goldsmith. I know we are in San Francisco now. When it reaches 8 percent that is a substantial number. I have yet to find a case that I have been aware of where it was appropriate where he declined to do so.

Senator DeConcini. If the diversion program were used prior to arrest, where the Federal arresting authority decided that this should be considered by the prosecutor and brought to the prosecutor at that time, is it your judgment that counsel should be provided at that stage of the hearing? Defense counsel?

I meant to ask Mr. Hewitt this question too, and I would appreciate it if you would comment also on this, Mr. Hewitt.

Judge Goldsmith. I am not so certain it is necessary if prior to arrest the prosecutor concludes that it is appropriate that we use the diversionary plan. The man, of course, is waiving certain rights. From that standpoint, I am sure that Mr. Hewitt would feel, even then he should confer with counsel despite the fact that there is not going to be a prosecution but that it would be deferred.

Since we have an office that is well equipped to do this I think it might be appropriate. I might also say that in all of these cases even if there is no arrest, if they are more than petty offenses, at least there is a complaint before the court. When the person appears in court, if he does so, we advise him of his right to counsel, and we appoint the public defender's office in San Francisco. Mr. Hewitt has an outstanding staff. I think they are the first ones to realize the beneficial results of diversionary treatment.

Senator DECONCINI. Mr. Hewitt, would you care to comment?

Mr. HEWITT. Magistrate Goldsmith and I do have some differences as to when counsel should be appointed. While he may very well, at times, feel that no counsel is necessary because of the way that he fairly handles the cases, I would prefer to see counsel injected into the process at the earliest possible moment even were there no arrest.

It would not be too difficult if the U.S. attorney felt that a person was suitable for diversionary treatment and no formal proceedings were required he could arrange to have the person appear before the magistrate to determine eligibility for counsel or their desire to have counsel appointed to represent them.

Senator DECONCINI. Are you permitted to represent a potential defendant without any court order?

Mr. HEWITT. That is a problem under the present phraseology of the Criminal Justice Act. We are permitted where there is a *Miranda* problem or in a lineup, and the person feels that he needs counsel in a lineup.

We had made some suggestions in connection with the Criminal Justice Act that it be made broad enough that whenever the interests of justice dictates and the court finds good cause the court can appoint counsel to represent a person prior to their arrest.

It may take some conforming amendments to the Criminal Justice Act, but I do not anticipate——

Senator DECONCINI. When you return to San Francisco Thursday morning, for instance, let's say the Federal Prosecutor's Office calls you and says, "I've got a defendant here and I am thinking of diverting him. Would you come over and be sure that his rights are preserved while we make this decision. Can you do that?

Mr. HEWITT. Well, it has been done.

Senator DECONCINI. You do not feel prohibited from doing so?

Mr. HEWITT. No. We feel that it is silly to say. "Go file a complaint just to have the technicality of an arrest and charge."

Senator DECONCINI. Sure.

Mr. HEWITT. However, we have to keep in mind that there are only 30 or so districts with organized defender offices out of the 100 in the United States. We have to think in terms of those districts where we have private counsel being appointed and then arrangements being made to have someone talk to the divertee.

I do not think that most prosecutors feel comfortable in talking to a person who may potentially be charged with a crime in the absence of counsel. I think the average prosecutor would much prefer to communicate with a lawyer than directly with the defendant. If this requires a conforming amendment to the Criminal Justice Act I would certainly recommend that.

Senator DECONCINI. Judge, let me ask you another question.

Judge GOLDSMITH. Before we go to that, is it along the same line as this?

Senator DECONCINI. No; it is not. Go ahead.

Judge GOLDSMITH. I notice under section 5(a) of your bill it refers to the fact that the individual makes an intelligent waiver of his rights with the advice of counsel. I think this somewhat covers this point.

I was going to comment that since we have so many petty offenses where there is not going to be an attorney involved at any stage of the proceedings, that we might have a clause to the effect that it would be in a case other than a petty offense.

What I have in mind is a calendar we have on a Thursday where we have an installation such as the Presidio of San Francisco present a number of people before us. We might have someone charged with some kind of petty offense where it is clear that we are not going to have to apply arduous principles. We are not going to consider having anyone sent to jail. It is quite expeditious to move rapidly without requiring the public defender's office to send someone to be present.

In those instances I had in mind that we might proceed to utilize these plans without requiring that we have counsel present. In the more serious ones, such as the embezzlement case that I mentioned or even obstruction of mail, which stem initially from a forging and uttering charge, I think that there should be counsel.

Mr. HEWITT. I would agree with that observation, Senator.

Mr. Mackin reminded me that we do have provision in the guidelines for the administration of the Criminal Justice Act for the appointment of counsel for pretrial diversion. Those guidelines are adopted by the Judicial Conference based upon recommendations by a subcommittee of the Conference. We do have those guidelines available.

The statute is not specific, but the committee felt that it was appropriate to have counsel in pretrial cases.

I agree with Judge Goldsmith. If it is the kind of case in which no counsel would be appointed for the charge, certainly there would be no need to have counsel appointed for pretrial diversion.

Senator DECONCINI. Can we get those guidelines? Would you be so kind as to send those to us?

Mr. HEWITT. Certainly.

Senator DECONCINI. Thank you very much.

Judge, let me ask you one other question. In your opinion, has the prosecutor—I do not mean to refer this specifically to the Federal district attorney in San Francisco, so let me just rephrase it.

Do you believe that prosecutors use diversion programs now for dumping their cases that are bad cases? Have you ever had any experience with that occurring?

Judge GOLDSMITH. I have not. I was rather surprised when I heard the exchange between you and Mr. Hewitt The cases that I am familiar with are legitimate cases that are met under the standards of the northern districts of Illinois. That is, they are cases where we have a defendant who has not been in trouble before and who has not committed a very serious crime, and who is obviously a good candidate for probation and who should be protected without a record.

They have not been serious criminals who have violated the law but who are cooperating and therefore should be treated under this plan. I have not had that experience and I would hope that it would not be used for this purpose.

Senator DECONCINI. I would, too. I think Mr. Hewitt's observations are very realistic. With as many districts as we have it may very well be used for that purpose. It is interesting to note that in your experience you do not feel it has happened.

Judge GOLDSMITH. I know that the cases that we have initiated ourselves have not been of this type.

Senator DECONCINI. One of my greatest concerns is that in my experience with diversions on the State level that is not what they are for. It is a great temptation, being a former prosecutor, to do that. It took great discipline on a number of the prosecutors in my office not to do it. I cannot honestly say that we never did use it for that purpose. I would just like to be able to minimize that temptation.

Judge GOLDSMITH. I think there is a safeguard, because the magistrate must dismiss these cases eventually. At the time of dismissal we can inquire into the circumstances if we have not found out already.

Under your bill I think we will know far earlier than that why a person is being handled under the diversion program. We can at least be consulted.

That is why some of the suggestions I made have to do with the probation office having a certain input in conferring with the U.S. attorney as to whether the person is a fit subject.

Senator DECONCINI. You apparently have a very enlightened prosecutor or U.S. attorney in San Francisco who is very realistic about his priorities.

Judge GOLDSMITH. Yes, I think so. I can give you one more example of why this plan works well. I recall one young man who was in an assault case. His temper got the better of him and I think he was throwing some rocks at a fishing boat that came within his territory, or something of the sort. He happened to hit a passenger aboard. It could have been fairly serious.

We used the San Francisco plan in this case and cleared the record. He wanted to go to medical school. If he had this kind of assault record, there was no question about his eligibility to get in and practice his profession.

This way, he was protected because the record was clear and he did not have such a record.

Another instance was one in which there was a passport forged, which can be quite serious, for a young doctor, He was a man who hoped to be a doctor, who had completed his medical education. He was having some problems protecting his identity, because he was mistaken for a leftist in Bolivia where there are terrorists who were putting them out of the way. This is why he had engaged in this.

Once again, we used the San Francisco plan with good results. Therefore, I feel that it is a very useful device.

Senator DECONCINI. Judge, thank you very much for your testimony. It has been extremely helpful. We appreciate, once again, your traveling this distance.

Judge GOLDSMITH. I appreciate the opportunity of appearing.

Senator DECONCINI. Our next witness is Charles G. Bernstein, Federal Public Defender of Baltimore, Md.

Mr. Bernstein, thank you for coming over this morning. We appreciate your participation. Your statement will appear in the record in toto if you will please either summarize it or proceed as you so please.

[Material follows:]

PREPARED STATEMENT OF CHARLES BERNSTEIN FOLLOWS

Mr. Chairman. My name is Charles Bernstein. I was appointed Federal Public Defender for the District of Maryland when the office was created in January 1974. I very much appreciate the Subcommittee's invitation to present the Maryland experience with regard to pretrial diversion.

For many years, the only type of diversion available in Maryland was the so-called "Brooklyn Plan," used only with juveniles. For adult offenders, there was no diversion.

This began to change in 1974. I attended my first Federal Public Defender Conference in Phoenix, Arizona, in January 1974. At this Conference, I learned from other public defenders, primarily in the Ninth Circuit, of various diversion plans that existed, sometimes informally, in their respective jurisdictions. I brought some of these ideas back to Maryland and later on in 1974, we began to obtain a few diversions. Initially, all such diversions were handled by the Probation Department. In contrast to the normal Porbation caseload of 1,600 persons, no more than 20 persons per year were placed on diversion status.

The Pretrial Services Agency became operational on or about January 19, 1976. Beginning January 1, 1977, Maryland adopted a somewhat unique posture with regard to diversions when it was agreed that the Pretrial Services Agency, as opposed to the Probation Department, would handle these cases. Before such a diversion of responsibility can be effective, there must be harmonious relationships between the two agencies. In Maryland, we are fortunate to have such a situation.

Since the first of the year, when Pretrial Services began to handle diversions, approximately 50 persons have been placed on diversion status. I am informed that all 50 have been unqualified successes and that none of them have been removed from diversionary status.

The feeling in Maryland was, and continues to be, that diversion might be better performed by the Pretrial Services Agency. While admittedly there is nothing magical in which agency performs the function, it is felt that Pretrial is in a better position to spot a potential diversion case early in the proceedings. The Pretrial Services Officer is in a unique position to go to the United States Attorney, and even in some instances the defense attorney, and point out why this would be an appropriate case for diversion. Furthermore, some of us feel that the predisposition of a Pretrial Services Officer may be somewhat better attuned for diversion than regular Probation/Parole Officers who are accustomed to dealing with hundreds of persons, all of whom have already been found guilty. Thus, the Pretrial Services Officer is working with individuals who are still presumed to be innocent and he may have a somewhat less jaunticed view of his clients than does the Probation/Parole Officer.

The Chiefs of the Probation and Pretrial Services organizations are unanimous in their praise of the Maryland situation. Their only comment, which they asked me to convey to the Subcommittee, is that prosecutors should make much more extensive use of this procedure. They both feel that each case should be reviewed by the prosecutor with an eye toward determining whether or not it has diversion potential. In short, they feel much more should be done to stimulate the prosecution into making use of this tactic.

They also share my concern that diversion should not be used as a means of bringing more people within the criminal justice orbit. All of us feel there is some danger that diversion, rather than being an alternative to prosecution, will turn out to be an alternative to declining prosecution. Thus, instead of a person being kept out of the criminal justice system by diversion, people who heretofore would not have been prosecuted will be brought into it. Obviously, such a result would run counter to the Bill's stated purpose of reducing the caseload in our Federal Courts.

STATEMENT OF CHARLES G. BERNSTEIN, FEDERAL PUBLIC DEFENDER, BALTIMORE, MD.

Mr. BERNSTEIN. Mr. Chairman, thank you for the opportunity to be here.

I had been informed, sir, by Mr. McPike that you had had ample testimony on what everybody and his brother thought about the bill and the wording and what have you. I thought I would not burden you with any more of that.

The remarks that I did prepare, sir, deal with something that I think is somewhat unique in Maryland and which may be, hopefully of some interest to you. Maryland is one of the 10 demonstration areas under the Speedy Trial Act with setting up pretrial services agencies. We are one of the five, I believe, that has Board control.

In terms of diversion, what has happened is that we have allowed the Pretrial Services Agency to handle diversion rather than the Probation Department. This came about, I think, probably somewhat accidentally. Maybe it was a bureaucratic situation where Pretrial Services was, frankly, looking for things to do.

We are fortunate in having a good relationship between Pretrial Services and the Probation Department. There is no jealousy between them, which I understand is not the situation everywhere. We do have that in Maryland, however.

We all think it has worked pretty well. The advantage of having Pretrial Services handle it is that they are into it early. They can many times spot a case. They are trained and instructed not to be shy, but to go to the prosecutor and say, "Mr. Prosecutor, what about a diversion in this type of situation?"

That may or may not have some more impact than a defense attorney who is prone to say that, perhaps, even in a first degree murder case, in the prosecutor's eyes. He might listen a little more impartially.

Additionally, the Pretrial Services officer is perhaps not quite as jaundiced. I do not use that in a derogatory sense, but he may not be as jaundiced as the Probation Parole officer who is used to dealing with clients all of whom have been found guilty, and all of whom have done time in jail and who are now out on parole. He may not have the openness toward pretrial diversion that the Pretrial Services officer may have.

As I say, it kind of evolved as sort of an accident, but I think it was a happy accident. Everyone is happy with that arrangement.

Senator DECONCINI. Let me ask you a question. Is it fair to say, in your judgment, that probation and parole officers are more involved with far more serious clients or defendants under their control, and just out of human nature are not liable to devote the time that a Pretrial Services Organization might to this?

Mr. BERNSTEIN. Mr. Chairman, they have that problem, although I guess the Pretrial Services people would come into contact with every defendant who comes into court. They have to do an interview of each new person, so they would be meeting the serious and the not so serious.

I just think that the outlook is a little bit different when the officer is working at the intake stage as opposed to the far end where the probation is.

As I pointed out in my testimony, there is nothing magical about this. I am not suggesting to you, sir, that it cannot work with Probation doing it. This is not the only way to do it. However, we have tried it this way and we like it.

Senator DECONCINI. Thank you.

Mr. BERNSTEIN. That, basically, is what I have prepared for you. Do you have any questions?

Senator DECONCINI. Do you have any evidence or fears of—if this were a national program—the District Attorney's office dumping cases into diversion and using it for plea bargaining?

Mr. BERNSTEIN. I have fears both ways, Mr. Chairman. I have fears—and I suppose it comes from my cynicism—that people will be dragged into the system who might have had a declination, or where the case might have been a declination previously. I think there are some fears that way, where a prosecutor might decline, but now he has got a slightly more finely tuned instrument that he can use.

I agree with Mr. Hewitt completely. I think it is going to happen. Once we are into plea bargaining—and we are—it is part of the system that is reality. I think that there are going to be situations where the prosecutor, for laudable reasons—because of the pressures on him—is going to have to use pretrial diversion. It may be used because of help that the defendant may be giving, or for other valid reasons. This is a less than ideal context for pretrial diversion, but I think it will happen.

Senator DECONCINI. Mr. McPike of the staff has a few questions he has drawn up. He would like to address them to you if you do not mind responding to them.

Mr. BERNSTEIN. I would be glad to.

Mr. MCPIKE. Mr. Bernstein, regarding that last remark, do you feel that injecting the defense counsel at an early stage is going to prevent that from happening? In other words, do you feel that you can go to the court and say, "Look, this is not a case that can be prosecuted."

As our bill is drafted now it requires a prosecutor to avow to the court that it is a prosecutable case.

Would that be an advantage, or do you still see this happening?

Mr. BERNSTEIN. I do not mean to dodge your question, but as a practical matter I think the average defense attorney—unless it is a really unusual situation—is going to take a deferred prosecution and run with it, even though he may think that it should not be used either as a plea bargaining technique or pulling up what would be a declination. He may think that it is wrong, but I think he is still going to take the diversion and run. That is the way I see that.

Senator DECONCINI. Excuse me.

It is so advantageous from the defendant's point of view——

Mr. BERNSTEIN. You have just got to be awfully cocky as a defense attorney and have just an awful lot going—which we generally do not have in the Federal system—to say, "No, we are not going to take a diversion."

Mr. MCPIKE. Mr. Goldsmith?

Judge GOLDSMITH. May I shed a little light on this?

Mr. MCPIKE. Please.

Judge GOLDSMITH. I have had a couple of cases in which people refused to accept the diversion program. They were adamant in their innocence and they wanted the record to be cleared.

Despite the fact that the prosecution is prepared to utilize the plan and insistent upon going to trial, I might say that in each instance they were convicted. However, they were people of principle who felt that they would not accept this. They had to be acquitted. Therefore, despite the offer they declined it.

I have not had much experience with people who have said, "Well, I think I am innocent, but nonetheless I will do it," or that there had been a plea bargain where the U.S. attorney has then cut the thing down.

Maybe the cynicism is not justified. At least in my experience it is not.

Senator DECONCINI. Thank you, Judge.

Mr. BERNSTEIN. I have not had that experience.

Mr. MCPIKE. That is a real danger, though, that we must be aware of.

What types of cases have been diverted in your district?

Mr. BERNSTEIN. A great deal of them are cases that are handled by the magistrate. We have a magistrate who functions outside of Baltimore, down in Hyattsville. He is somewhat separate. We refer to him as the only law west of the Baltimore beltway.

A lot of the cases come in similar to, I think, Judge Goldsmith's or young people who may be shoplifting at a PX or this type of thing.

I think the prosecutors have, thus far, not used it as a plea bargaining technique—the danger that we have spoken of. I guess maybe I tend to see ghosts.

I remember one case very vividly where we had a woman who had worked 20 years at the same job. She let a man live in her house and pay money. He did not pay his money 1 month. His welfare check came in. She took the check, forged his name, cashed it, and took her money out of it. This is the kind of case that is put on diversion.

Some of us felt that the case should not have been prosecuted at all. That is the other danger.

Generally they are petty offenses that are nonviolent—for example, little girls who work in banks, kids who may commit some minor infraction in a Federal park within Maryland, and that type of thing.

Mr. MCPIKE. Have you had any experience with felonies being diverted?

Mr. BERNSTEIN. It has happened. I think we only have 50 on now in Maryland. I could not tell you just off the top of my head, but I think there have been some felonies.

Again, as Mr. Hewitt points out, a felony can be a relatively small amount of money. Serious felonies or aggravated felonies I would doubt.

Mr. MCPIKE. We have a real problem here deciding how far the court should be involved in the process. Can you give us your feelings on that?

Mr. BERNSTEIN, I have some ambivalence about it. I tend to side with my brother, Mr. Hewitt. He and I are both former prosecutors. This is the prosecutor's baby. He has to make the call. He has to decline or prosecute or not.

I would think that the court should be involved when a decision is made later to terminate the diversion. I think at that point we ought to be back to the judiciary. As I understand Judge Goldsmith, that is pretty much what they do. It is similar to a violation of probation situation.

When you have gotten into diversion you have called upon either the Probation Department or the Pretrial Services Agency to supervise. They are court agencies. They are under the administrative office of the courts and they serve the court.

If you are going to terminate it using their report—saying that the guy has fouled up and he has not done what he is supposed to do—I think a judicial officer ought to hear that.

Initially, they are split on our bench. Some judges want it in front of them. They want to know every detail of diversion. It takes as long as a guilty plea. Others do not care. I tend to feel that initially it should be the prosecutor's call. I do not have any problem with that.

Once we terminate it, if there is a foul-up, then I think it should be in front of the judge.

Mr. McPIKE. You feel that having the court involved at the stage where the decision to divert is made would help alleviate the problem of dumping?

Mr. BERNSTEIN. It might. Prosecutors do not want to be quoted on this, but they have told me—and I think that it is a perfectly legitimate and proper concern of theirs—"Look, if we are going to make this into a full-blown proceeding I may as well hang tough and get a guilty plea. If you are going to make me take everything in front of judges for diversion I may as well go in and get the guilty plea on the guy."

I am afraid that it may sort of unofficially cut the other way. I tend to feel that we ought to leave it with the prosecutor initially.

Mr. McPIKE. That is a good point. We are not saving much court time when we go that way.

Mr. BERNSTEIN. That is right. That is his attitude: "Why should I go through all of this rigamarole in front of a judge and everything else for diversion when I have got a pretty good case and I can just hold out and get a plea?"

I think then the defense might be losing something in the guise of judicial protection.

Mr. McPIKE. There has been a real dispute about the proper function of diversion. Could you give us your feelings about use of diversion as a rehabilitation technique?

Mr. BERNSTEIN. I am sorry. I missed your last phrase.

Mr. McPIKE. How do you feel about use of diversion for rehabilitation?

Mr. BERNSTEIN. "Rehabilitation is a sometime thing," to quote the Porgy and Bess line. Again, perhaps my cynicism is showing. I certainly do not speak for other defenders who are not as jaundiced as I am.

I do not think that diversion helps in rehabilitation so much in the sense that we are showing him the light and getting him a job and getting him on a drug program and that kind of thing.

I think a diversion is helpful for somebody who basically is not a criminal and made a mistake. The lady I mentioned to you took this man's check. She had been working 20 years. She is not a criminal. She does not have to be rehabilitated. I think what we want to do is spare her from having a black mark on her name. I do not see that as rehabilitation.

It is conceivable that it might help where pretrial services is involved in placing people in jobs and counseling and drug and alcohol and that type of thing. It could play a role there. I do not rule it out.

However, I tend to think of diversion cases being so attractive that you really do not need rehabilitation. You really need somebody to say, "You are a good person, but you made a bad mistake here." That is pretty much the end of it.

Senator DECONCINI. Mr. Bernstein, is it your judgment that in your district the prosecutor is using the diversion program as much as he could?

Mr. BERNSTEIN. No, sir.

In my prepared testimony both the Probation Department and the Chief of the Pretrial Services Agency are agreed completely that they are not. They do not attribute any nefarious attitudes to this. It is just that it is new and something to be thought through.

Both of them, in fact, Mr. Chairman, urge me to impress upon you their feelings on both probation and pretrial. It is not being used enough. Every case, when a prosecutor views it, should be viewed with an eye toward its potential for diversion.

Senator DECONCINI. Thank you, Mr. Bernstein, very much for your testimony. We greatly appreciate it.

Mr. BERNSTEIN. Thank you for the opportunity to be here.

Senator DECONCINI. The next witness is Mr. David Freeman, Federal Public Defender from Kansas City, Missouri.

Mr. Freeman, thank you for being here today with us. Your statement or your letter will appear in the record in toto. If you would please express your views we would appreciate it.

[Material follows:]

PREPARED STATEMENT OF DAVIS R. FREEMAN

I am pleased to respond to the request of the Committee for information regarding the organizational structure of the Pretrial Diversion Program as it currently exists in the Western District of Missouri. For the most part, the operation of the Program follows the suggested outline contained in Chapter 12, United States Attorney's Manual, with exceptions as will be noted.

The initial determination that a person suspected of violating federal law may be eligible for pretrial diversion is made by an Assistant United States Attorney before a complaint is authorized. The information upon which the United States Attorney makes his initial decision is therefore based primarily on information contained in the investigative file or obtained from the case agent along with other information not infrequently gained from the suspected person by way of an informal conference usually arranged at the instance of the Assistant United States Attorney. Once the initial determination is made by the Assistant United States Attorney, the case is referred to the United States Probation Office for a recommendation on the advisability of pretrial diversion along with recommendations regarding a program of supervision. It is at this stage that counsel is ordinarily obtained for those suspects who have not theretofore been represented.

In those cases where the office of the Federal Public Defender for the Western District of Missouri is appointed, we try to accomplish two purposes. First of all, we advise the potential pretrial divertee of his or her rights under the Speedy Trial Act which will necessarily be waived by agreeing to participate in a pretrial diversion program. Secondly, and primarily by examination of the investigative file. we make some judgment regarding the sufficiency of the evidence and give the client our best judgment in that regard.

In addition to the general criteria outlined in the Manual for United States Attorneys, a prerequisite to admission to pretrial diversion in this District is an admission of guilt on the part of the suspect. Since there is no unsupervised pretrial diversion, the United States Probation Office must concur with the Assistant United States Attorney in a decision to place an offender in the Pretrail Diversion Program.

Most cases are diverted before filing a complaint or seeking an indictment. However, there have been a number of cases where the facts suggesting that pretrial diversion should be considered were not developed until after an indictment had been returned or a complaint filed. I have personally had an experience in one case where the client was placed in the Pretrial Diversion Program after the jury had been selected, but before presentation of any evidence.

The primary problem with the existing structure in the Western District of Missouri is the lack of continuity. Any one of a handful of Assistant United States Attorneys may review a case for purposes of determining whether prosecution should be authorized. Some are more lenient than others in considering a case for possible diversion. By the same token, a review by the United States Probation Office may be conducted by any one of sixteen or seventeen probation officers. There, although we may have some broad-brush guidelines for use by the persons involved in making the determination as to whether or not a person should be placed in a pretrial diversion program, the guidelines are subject to varying interpretations. The result not infrequently is a dispartity of treatment based largely on differing views of either an Assistant United States Attorney or a particular probation officer or both.

In this context, it would seem to me that any legislation by the Congress which gives approval to a concept of pretrial diversion would eliminate some of the disparity and thus be an improvement in the overall administration of justice.

I would also like to address myself briefly to one part of S–1819. Subparagraph (b) of Section 5 of this legislation requires the agreement of the victim of the crime before a person charged with a criminal offense could be released to a pretrial diversion program. It seems to me that this provision gives to the alleged victim of a particular crime a license for extortion and vengeance. It would generally strip the prosecuting attorney of his discretion and leave the treatment of a particular offender largely to the whim of his victim, thus compounding one of the most serious problems in our system of justice, i.e., disparity in treatment.

I am grateful for this opportunity to respond to the Subcommittee and wish you well in your continuous search for viable improvements to our judicial system.

STATEMENT OF DAVID R. FREEMAN, FEDERAL PUBLIC DEFENDER, KANSAS CITY, MO.

Mr. FREEMAN. Mr. Chairman, I have no desire to reiterate the comments that are mentioned in my letter here today. I join my fellow Federal public defenders generally in the sentiments they have expressed.

I would like to address myself to some of the questions that you have raised and that you have indicated are the concern of the committee here today.

Senator DECONCINI. Please do.

Mr. FREEMAN. With respect to when diversion should be used, I feel that it should be available to the United States attorney at any stage. I have mentioned in my prepared statement that I have had the unusual circumstance—at least, I think it was an unusual circumstance—of diverting a case after a jury was selected.

The circumstances of the case need not be reiterated, but it was only at that stage in the proceedings when the prosecuting attorney became convinced that his decision to indict in the first place had been inappropriate. If diversion is a proper tool I do not think that it should be denied to the prosecuting attorney because he may not have seized upon it at the appropriate stage of the proceeding.

We have a rather unique circumstance in our district with respect to discovery. The United States attorney's office has the uniform practice of disclosing or giving the defense counsel the opportunity to review the investigative file.

I hope that I do not create shudders by making this disclosure here, but in this context we do not have cases in our district that are being diverted because they are weak. If my office is appointed on a case that is under consideration for diversion we go into the United States attorney's file and we at least determine from that file—the investigative portion of the file—if they can make a paper case. If

they cannot, then the decision to enter the program is entirely up to the client.

Of course, that decision is always with the client, but I have yet to experience the circumstance where diversion was being used because the evidence was weak.

Senator DECONCINI. Do you believe that it would be used in the area of plea bargaining? Even though the case may be strong they may try to get something from the defendant.

Mr. FREEMAN. I really do not think it is going to be used unless you have got one of those human cases where you have got an appealing defendant who has never been in any trouble before and whom the United States attorney has never seen until you have an omnibus hearing or an arraignment or something like that. He gets a look at the defendant and he hears him talk to the court and respond. He figures, "If this guy testifies I am probably going to lose."

I do not think in the ordinary circumstance you would, at least in our district. I don't think in the ordinary circumstance the government is going to have any trouble.

Senator DECONCINI. Do you believe that in your district it is used to the fullest extent now?

Mr. FREEMAN. No, I do not.

Senator DECONCINI. If I read your statement correctly, I notice that the probation officer must concur with the District Attorney.

Mr. FREEMAN. That is one of the biggest problems that I see in this operation.

Senator DECONCINI. Do you think that should not be the case?

Mr. FREEMAN. Well, if I had my choice and if it were my decision to make pretrial diversion cases would be handled as they are in the district of Maryland. They would be handled by the Pretrial Services Agency.

Senator DECONCINI. That was my next question.

Mr. FREEMAN. The Pretrial Services Agency in our district, in my judgment, has done a magnificent job. Most of the people in the agency were selected not only because of their experience and their skill, but I think they were selected because they were willing to take some innovative approaches to the manner in which they deal with people who come not only under their pretrial supervision but who are ultimately going to go to the probation office.

I like the idea of having a program that is administered by people who are not constantly dealing with those who have either been convicted or who are coming out of some joint.

I have been hearing now for 3 years that the Pretrial Services Agency administered by the board of directors, as we have it in Missouri and Baltimore, is going to go down the drain in another 2 years. I hope that is not true.

Senator DECONCINI. What has been your experience on the severity of crimes that have been diverted in your district?

Mr. FREEMAN. Most of ——

Senator DECONCINI. Have any felonies been diverted?

Mr. FREEMAN. Oh, yes. I might add that drug users have also. They are very minor drug cases. Of the cases that I have personally handled two of them have been drug cases. There have been some thefts from the mail and what have you. I have yet to convince the

assistant U.S. attorney to use it with the one time bank embezzler in small sums. However, we do have them in felony cases.

Senator DECONCINI. In your district, does the U.S. attorney have any written criteria or standards that you know of as to when and where they will not use the diversion program?

Mr. FREEMAN. The only criteria I am aware of are those that have been published in the United States Attorney's manual I was not even aware of the criteria until they were provided for me for this morning.

Senator DECONCINI. Do you think it would be advantageous to have them set down either in statutes or to mandate the Attorney General to set forth some criteria?

Mr. FREEMAN. I am leery of guidelines generally. Guidelines often become rule.

Senator DECONCINI. Are you indicating guidelines in the statute as well as guidelines promulgated by——

Mr. FREEMAN. I think that if you publish guidelines in the statute they are going to have the effect of a rule.

Senator DECONCINI. Even if they are not in a statute?

Mr. FREEMAN. I think so.

Senator DECONCINI. Do you see any advantage in having mandated rules to district attorneys that they shall divert first-time nonviolent offenders?

Mr. FREEMAN. I think that in those districts where the U.S. attorneys philosophically have a reluctance to use pretrial diversion in any case, that yes, there is going to be an advantage. You are not, then, going to be clogging the district court dockets with cases that should not be filed in the first instance because of a minimal degree of severity.

Senator DECONCINI. Do you concur with Judge Goldsmith and Mr. Bernstein as to the involvement of the court upon termination or considered termination of the diversion program?

Mr. FREEMAN. I do. I am a former State prosecutor. I can certainly understand the desire of the prosecuting attorney to preserve his discretion in the first instance. Nevertheless, I also feel that once he decides that somebody has flunked pretrial diversion at that point safeguards should be implemented so that there is some minimal review, anyway.

Senator DECONCINI. Prior to termination of the program, you are of the opinion that it should be solely in the discretion of the prosecutor, but at termination the court should have some input?

Mr. FREEMAN. Yes, sir.

Senator DECONCINI. Did you work for Mr. Martin?

Mr. FREEMAN. No, I worked for his predecessor. I worked for Mr. Teasdale, who is now the Governor.

Senator DECONCINI. I know Mr. Martin.

Thank you, Mr. Freeman.

Mr. FREEMAN. Thank you, I appreciate this opportunity.

Senator DECONCINI. We appreciate your coming today.

The next witness is Mr. Don Phelan, pretrial diversion administrator of Trenton, N.J.

Mr. Phelan, thank you for being patient. We appreciate your coming here this morning. Will you please proceed?

STATEMENT OF DON PHELAN, PRETRIAL DIVERSION ADMINISTRATOR, TRENTON, N.J.

Mr. PHELAN. Thank you, Senator.

I wish to thank the committee for the invitation and the opportunity to share with you both the administrative development and the experience that we have encountered in New Jersey in the development of Statewide pretrial diversion intervention systems.

The approach that New Jersey has taken is somewhat different than that contained in S. 1819. Some of my remarks may not be compatible with those of other witnesses. Nevertheless, I would like to share where we are at in New Jersey with regard to this subject.

Intervention was first introduced into New Jersey back in 1971 through the development of a Department of Labor employment model. The Department of Labor model was a city program. Thereafter, at the county level, a multimodality counseling and employment rehabilitative model was set up.

In January of 1974 the present chief justice of our New Jersey Supreme Court, Richard J. Hughes, and the administrative director of our courts, Judge Arthur Simpson, created within the administrative office of the courts the office of pretrial services and mandated the development of a uniform proposal for implementation statewide of pretrial diversion.

In December of 1974 the supreme court reviewed, adopted, and reaffirmed in a later decision, the unfiorm proposal. They mandated that programs started either at the local city level or at the county level had to follow the procedural manual.

To date, there have been 19 counties given approval for pretrial diversion in New Jersey. New Jersey has 21 counties. We expect the two remaining counties to develop programs hopefully by the end of the year.

In July of 1976 the supreme court in New Jersey rendered a decision known as *State* v. *Leonardis*, which I understand my predecessor, Mr. J. Gordon Zaloom—who has already appeared before this committee—has discussed to some degree with the committee.

Basically, the decision requires that every defendant who is charged with a crime in the State of New Jersey and where within that county there resides a pretrial diversion program, that defendant may make application for admission to the program. The review mandated under New Jersey procedure by first the program director and then by the county prosecutor is reviewable by the court.

I would like to correct a typographical error that appears on page 4 of my written statement. I would like to read into the record this correction: "Initial reaction to the court's holding that defendants regardless of the crime charged were eligible for admission to a program and the judicial requirement of review of a prosecutor's consent and/or refusal to consent to diversion was that it signaled the opening of the flood gates, because every defendant now"—rather than "not" as appeared in my written statement— "be diverted or at the very least our trial courts would be inundated by appeals."

The Leonardis I decision of July 1976, also availed, as I mentioned, judicial review at the trial court level of decisions either favorable or unfavorable by the county program director and/or the prosecutor. The

decisionmaking process is, if you will, a committee decision after the application is filed with the program. That application can be filed only after a formal complaint or indictment has been returned.

The program director, under court rule, must make an initial recommendation. If the recommendation is favorable, then a report substantiating that recommendation is supplied to both the defendant, his attorney, and to the prosecutor.

The prosecutor then must give his consent to the diversion. If he does, the recommendation of the program director coupled with the consent of the prosecutor is presented to a single judge within the county who is designated by the county's assignment judge to handle all PTI matters.

If the program director initially rejects the defendant's application, then the defendant is notified along with his counsel and given a statement of reasons for that rejection. That rejection in New Jersey is appealable before the county designated judge to handle PTI matters. Likewise, if the county prosecutor refuses to consent to the enrollment, then he must supply the defendant and his attorney with a written statement of reasons for that denial. Likewise, that denial is appealable at the trial court level before the designated county PTI judge.

In May of this year the court came down with a clarification on the Leonardis decision, which really dealt with the issue of separation of powers and whether the court was within its right to review prosecutorial refusals to consent to diversion.

Mr. McPIKE. Excuse me, Mr. Phelan.

Would you state whether that was based on a State constitutional doctrine of separation of powers or Federal constitutional doctrine of separation of powers?

Mr. PHELAN. I believe it was on the State constitutional doctrine.

The New Jersey Supreme Court ruled in its clarification that there was no separation of powers issue and that courts could, after review, overrule the prosecutor's decision not to permit or not to consent to diversion.

However, they did promulgate a very strict standard. That standard is patent and gross abuse of prosecutorial discretion.

As I mentioned a few moments ago, the State now has 19 county programs. During the court year just completed—the court year runs from September 1 through August 31—as of July 30, 1977, 10,906 applications had been filed for diversion on complaints charging indictable offenses.

Additionally, the program carried over 550 applications from the previous court year that had been filed but initial enrollment or rejection decisions were still pending.

Therefore, of the total of 11,456 potential applications for diversion to the programs as of July 30 of this year, 7,122 of those, or 62 percent, had been rejected either by the program director and/or prosecutor, or by the court's own motion by the designated judge.

I might note that the vast majority of the rejected applications emanate directly from the program director and constitute approximately 92 percent of the 7,122 rejections.

There was some concern immediately following Leonardis I that the designated trial courts would be inundated with appeals at the

local level since under New Jersey rule a defendant can appeal a final interlocutory order of the trial court, or at least request permission of the appellate division to appeal that order. The appellate division likewise, it was feared, would be inundated with PTI issues.

In September of 1976, mainly due to the reaction that had been generated as a result of Leonardis I and pending the clarification decision of Leonardis II, the court developed a committee and mandated that committee with the responsibility to develop some guidelines that the committee felt would be consistent with the Leonardis dictum.

That committee consisted of court, public defender, and prosecutorial representation. One of the eight guidelines that were promulgated as a result of that committee's work and issued under court order by the Chief Justice reads that "applications for PTI should be made as soon as possible after commencement of proceedings, but in indictable offenses no later than 25 days after an original plea has been entered to that indictment."

This means, then, that a defendant in New Jersey has an opportunity to file a formal application with a diversion program at any time after a complaint has been instituted against him, up until 25 days after he has entered a plea to that indictment.

There was a flurry of appeals that were entered at the trial court level as well as at the appellate division level following Leonardis I. A vast majority of those appeals dealt with this specific guideline—the time limit for filing the applications.

Eleven county programs have been developed since Leonardis I. In order to be as fair as possible, without opening up the floodgates to the program for applications, most of the programs adopted with the approval of the county assignment judge a relaxation period which was extended to 25 days prior to the operational date of the program.

This meant that the 25-day rule had been extended at least for some indictments for a period of 50 days.

Most of the appeals that were filed against this guideline were requests for relaxation of the rule beyond the 50 days. Only in rare instances and when good cause was shown was this guideline or rule relaxed.

Initially, the hearings were extensive. In some cases they lasted 45 minutes to an hour. We attribute this mainly to the newness of the privilege or right that a defendant had to enter an appeal as well as the fact that program directors, prosecutors, and designated judges were new in the diversion area and really were probing for some common ground.

Since that time, however, the length of hearings has been reduced. The average length of time devoted to hearings in New Jersey at this stage is anywhere from 5 to 10 minutes. Defendants, under court rule, are also entitled to a hearing after they have been accepted for enrollment in the program and subsequent termination action has been instituted against them.

With regard specifically to the Federal Diversion bill, aside from the other recommendations that have been presented to this committee, I would strongly recommend that the committee play on the experience that we have had in New Jersey and that a uniform proposal be developed either by the Department of Justice or by the

Judicial Court Administrator's office which not only encompasses guidelines for eligibility criteria, but also sets out uniform case processing, staff development, and an issue of uniform processes so that the Federal program can be implemented uniformly across the State.

Thank you.

Senator DECONCINI. Thank you, Mr. Phelan.

We have had some excellent testimony regarding the New Jersey program. I am very impressed with the success of it and the in-depth scrutiny that it has come under through the court system there.

Let me ask you this question: With all the structure involved in the New Jersey system, do you feel that there is a cost savings in time and money through this process? Are there any statistics?

Mr. PHELAN. Yes, I do, although we have no statistics to bear this out at this time.

As of July 30, 1977, there were 3,000 defendants actively participating in 18 of the 19 county programs. As I am sure you are aware, the rule limits participation in the program to a maximum period 6 months with the exception of drug addicted offenders, wherein an extension of an additional 6 months can be made.

It is the general feeling in New Jersey that these programs have saved considerable amounts of time, especially at the trial court level. Today the prosecutors can devote more time to those cases that really need to be tried. The courts can spend additional time on those cases.

Senator DECONCINI. Do you have some questions, Mr. McPike?

Mr. MCPIKE. Yes.

Mr. Phelan, do you have any idea how many prosecution denials of diversion have been overturned by the court?

Mr. PHELAN. No, I do not. I could give you a listing of the various appeals as they now stand in the appellate division. During the court year just completed 940 issues were filed within the appellate division. Of those 940 issues, 116 of them dealt with pretrial intervention. Of those 116, 13 cases have been granted leave to appeal and various issues contained in those cases hopefully will be resolved.

Of those 13, 10 deal with abuse. I do not have an accurate breakdown as to how many of those 10 deal with prosecutorial abuse with regard consent denial as opposed to program abuse.

I would say that very few prosecutorial decisions to withhold consent have been overturned at the trial court level.

Mr. MCPIKE. Thank you.

Senator DECONCINI. We have no further questions, Mr. Phelan. Thank you for your statement. It will appear in the record in full. We appreciate your bringing it to our attention.

[Prepared statement of Donald F. Phelan follows:]

I wish to thank this committee for the opportunity to share with you the experience realized in the New Jersey Pretrial Intervention System. Most criminal justice practitioners are most eager to see developed a viable diversion alternative in the Federal Systems so that deserving citizens of our States who have the misfortune of being caught up in Federal offenses are offered similar types of "second chances" available in local jurisdictions.

After having spent 13 years in New Jersey's Criminal Justice system, in a variety of positions including law enforcement, criminal justice planning, directing the State's first county PTI program and currently as Chief of Pretrial Services with the New Jersey Administrative Office of the Courts directing the administrative development of our statewide diversion programs, I can assure you that pretrial diversion offers one of the most human, economical and successful means of dealing with selected, motivated citizens accused of committing criminal offenses.

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My predecessor, Mr. J. Gordon Zaloom who appeared before this distinguished committee on July 15, 1977, outlined the historical development of Pretrial Intervention in New Jersey and shared with you some of the legal developments and recent New Jersey Court cases on diversion; *State v. Leonardis, et al,* 71 *N.J.* 85 (1976) [hereinafter *Leonardis I*]; and *State* v. *Leonardis, et al,* 73 *N.J.* 360 (1977) [hereinafter *Leonardis II*]. Accordingly, I would like to share with this committee the administrative development of Pretrial Intervention in New Jersey and discuss the impact both Leonardis I and II have had on our system.

ADMINISTRATIVE DEVELOPMENT IN NEW JERSEY

In January 1974, after observing the successful operation of the Newark Defendant's Employment Program [hereinafter NDEP], a diversion program fashioned on the Department of Labor-Employment Model; and the Hudson County N.J. PTI Program which emphasized multi-modality counseling in addition to vocational and employment adjustment, New Jersey's Chief Justice Richard J. Hughes and Judge Arthur J. Simpson, Jr., the Administrative Director of the Courts created the office of Pretrial Services within the Administrative Office of the Courts and mandated the development of a Uniform Program of Pretrial Intervention, and through the cooperation of Assignment Judges and Chief Probation Officers in the State's twelve vicinages the establishment of such programs. The *NDEP* and Hudson Pretrial Intervention Program are both joint court-prosecutor programs with authority to divert cases authorized through Court Rule (*R.*3:28). The constitutionality of such a scheme was explored and affirmed in *Leonardis II.*

The initial concern in the development of a diversion process is the identification of the type of diversion process that works best. Keeping foremost in mind the accepted national purposes of pretrial diversion—namely:

(1) To provide defendants with opportunities to avoid ordinary prosecution by receiving early rehabilitative services—when such can reasonably be expected to deter future criminal behavior; [N.J. Guideline 1(a)]

(2) To assist in the relief of presently overburdened criminal calendars in order to focus expenditure of criminal justice resources on matters involving serious criminality and severe correctional problems. [N.J. Guideline 1(d)]

I urge this committee to look very closely at the construction of *S. 1819* and give considerable deliberation and weight to what has developed in New Jersey. In this regard, I support Mr. Zaloom's recommendation to this committee that the proposed Federal Diversion Act be amended to establish a joint prosecutor-court model which would serve the criminal justice system best.

In December 1974, the Administrative Office of the Courts developed a *Uniform Proposal for the Development of PTI in New Jersey* which has served as the blueprint for diversion program development. The Proposal contains detailed developmental guidelines, program operating procedures, case processing information, administrative evaluation and fact gathering forms, as well as required staff size. Each County program developed in the State must conform to the proposal. In this way uniform and consistent administrative and programmatic processes and procedures have been implemented which has lessened confusion and fostered even application of standards.

Leonardis I and the subsequent issuance of uniform eligibility guidelines developed by a committee representing program, prosecutor and defense interest and promulgated by the New Jersey Supreme Court in September 1976 have had a profound impact on the N.J. Diversion Process. Initial reaction to the Court's holding that *all defendants regardless of the crime charged were eligible for admission to a program and the judicial requirement of review of a prosecutor's consent and/or refusal to consent to diversion* (*Leonardis I, supra*) was that it signaled the opening of the flood gates, because every defendant would not be diverted or at the very least our trial courts would be inundated by appeals. This has not materialized. To the contrary, although time is now being spent in the trial courts, time heretofor excluded under prosecutorial discretion, is minimal. Moreover, there appears to be building a greater bond between rehabilitative interest on the one hand [probation] and law enforcement on the other. Before *Leonardis I,* a distinct division between the PTI decision makers was apparent. [New Jersey Court Rule provides for initial recommendation by the program director, consent of the prosecutor and approval of a judge designated to handle these matters.] However, both *Leonardis I and II* seem to have cleared the air with regard to many of these concerns. Applications in New Jersey are evaluated according to a defendant's amenability to correction, responsiveness to rehabilitation and the nature of the

offense. (*Leonardis I*) This test has merged together often dissimilar, but more often similar, interest with a meshing of fair and equitable evaluation and determination for diversion based on uniform standards.

NEW JERSEY PROGRAM EXPERIENCE

Presently there are 19 county PTI programs approved for operation in New Jersey. These programs avial pretrial diversion to approximately 98 percent of the State's population. During the last New Jersey court year, which runs from September 1, 1976 through August 31, 1977, as of July 30, 1977 there had been 10,906 applications filed for diversion on complaints charging indictable offenses. Additionally, programs carried over from the previous court year 550 applications that had been filed but initial enrollment/rejection decisions were still pending. Of the 11,456 applications for initial diversion as of July 30, 1977, 7,122 or 62 percent had been rejected by either the program director, prosecutor and/or designated judge. I might point out that the vast majority (92 percent) of all rejections are decisions made by program directors. Of the 7,122 applications that were rejected, approximately 5 percent have filed and/or resulted in court hearings on the rejection.

The rejection hearings, as provided for under *Leonardis I and II* are procedurally defined under N.J. Guideline 8. The hearings are informal in nature and procedurally compatible with parole and probation revocation hearings. The (NJ) Guidelines provide that:

"*applications for PTI should be made as soon as possible after commencement of proceedings, but, in an indictable offense, no later than 25 days after original plea to the indictment.*" (*Guideline 6*)

A large portion of the initial flurry of PTI rejection hearings were the direct result of defendant seeking relief against this guideline. However, this is most attributable to the period immediately following *Leonardis I* during which we experienced the rapid development of 11 county PTI programs; and in all cases applications to these programs were limited to defendants who had entered pleas on indictments within 25 days immediately preceding the operational date of the program. Therefore, many defendants who were arraigned prior to the programs operational deadlines attempted to persuade the courts to relax the deadline contained in Guideline 6. Although in rare instances and for good cause shown the courts did relax the guideline such was the exception rather than the rule.

New Jersey Court Rules provide that a single judge, except in certain instances wherein the Assignment Judge must act, to be designated to handle all PTI motions. The underlying philosophy behind this is to enable specialization within the judiciary so that judges are knowledgeable in the diversion process and the guidelines and other applicable procedures are applied equally and uniformly. Although some hearings before designated judges immediately following *Leonardis* were time consuming, and in some instance both rejection and eligibility application hearings lasted an average of 45 minutes to one hour, such is no longer the case. Across the State the average length of time devoted to both enrollment and rejection hearings is approximately 5–10 minutes. To my knowledge, there has been no undue time spent nor has there been any adverse effect placed on the courts as a result of these hearings. To the contrary, it is my opinion that cases are being handled expeditiously with a minimal amount of burden being placed on strained court calendars and in the final analysis, appropriate assistance and relief is being given through PTI in New Jersey to overburdened criminal calendars.

The New Jersey System has a built-in mechanism to determine program participant recidivism. Each PTI application filed is "flagged" in the State's criminal history identification system and subsequent updates to that record are made available to county programs. Although most of the programs are relatively new and not experiencing a great deal of recidivism, figures compiled on the three or four programs that have been in existence in the State for up to five years gives a fairly reliable indication as to the success generated through diversion. The average recidivist rate, based solely on re-arrest without conviction, of successful program participants who have had their complaints, indictments or accusations dismissed ranges from two to ten percent. Comparatively, the rate of recidivism among applicants who were initially rejected from participation is about 22 percent while recidivism among the small percentage of participants who are removed from programs because of faulty participation is approximately 37 percent. Moreover, it is especially refreshing to note that in the first category the re-arrests among the successful PTI participants is generally for an offense or crime less serious than the one for which the defendant had initially participated in the

program. Although New Jersey programs are not limited for first offenders, the guidelines contain a presumption that previously diverted defendants should not ordinarily be re-enrolled. At the present time, in order to service the needs of programs to identify re-application we are in the process of developing a statewide central registry.

RECOMMENDATIONS ON FEDERAL DIVERSION BILL

Based on our experiences in New Jersey, I would urge this Committee to carefully consider the following recommendations.

1. Sec. 8(a) authorizes the chief judge of each district to appoint an advisory committee, and subsection (b) delegates to that committee, among other things, the responsibility to plan for the implementation of a federal diversion program. I would strongly recommend that this bill be amended to include a provision which would require the Attorney General, with the concurrence of the judicial conference, to develop a uniform Federal Diversion Proposal including evaluation, eligibility and case processing criteria so that the Federal Diversion Program can uniformly developed and implemented with uniform standards and eligibility criteria applicable to all Federal Diversion Programs established.

2. I recommend that Sec. 3(4) "committing officer" be redefined to mean the chief judge of the United States district court in each federal district shall appoint a single judge or magistrate to act on all federal diversion matters arising in their respective trial jurisdictions. This recommendation is fashioned after the designated judge system adopted in New Jersey which has directly contributed to lessening burdensome and expensive hearings. Moreover, such a designation engenders a greater "team" effort between the diversion decision team.

3. Finally, I strongly endorse Mr. Zaloom's recommendation that this bill be amended to include a provision wherein a defendant be permitted to apply to the committing officer to challenge the final decision of administrative heads of the prosecutor's refusal to recommend diversion and that the act provide for limited judicial review of such decision through the adoption of the "patent and gross abuse of discretion standards" contained in *Leonardis II*.

Thank you.

Mr. PHELAN. Thank you very much.

Senator DECONCINI. Our next witness is Ms. Doris Meissner, Deputy Associate Attorney General of the Department of Justice.

Ms. Meissner, thank you for taking the time in preparing your statement with some of the details of the analysis of the program. It will appear in the record in toto. We appreciate your testifying today and the Justice Department interest in this very important area.

Please proceed.

[Prepared statement of Doris Meissner follows:]

TESTIMONY—S. 1819

THE FEDERAL CRIMINAL DIVERSION ACT OF 1977

My name is Doris Meissner and I am Deputy Associate Attorney General, Department of Justice. Our testimony today will report on the preliminary research results we have obtained from monitoring pretrial diversion programs established in U.S. Attorney's offices during the past two years.[1]

In direct response to legislative proposals on diversion which were pending before both the Senate and the House, the Attorney General in 1974 directed that federal diversion programs be instituted in U.S. Attorney's offices on a test basis. The purpose was to determine the applicability and impact of diversion in the Federal system. I have directed the effort which took place during 1975 and 1976. The data and information we have gathered are being analyzed and the final report and recommendations will be submitted to the Attorney General in the near future. A copy will be made available to this committee as well.

[1] The Justice Department's effort in diversion predated and has been separate from the pretrial services agencies authorized in Title II of the Speedy Trial Act. Previous testimony before this committee frequently referred to the programs as one. That is not the case.

Prior to 1975 the Department of Justice had utilized diversion, with scattered exceptions, only in juvenile cases through a procedure known as the Brooklyn Plan. In setting out to divert adults, we established careful guidelines for the U.S. Attorneys to use. The guidelines are based on the premise that diversion is an appropriate exercise of prosecutorial discretion properly vested with the Executive Branch.

The basic outlines of the program have been as follows:

1. The U.S. Attorney decision to divert is made at the precharge or preindictment stage except in unusual circumstances.

2. Defendants must be represented by counsel at each step in the diversion decision and enter the program voluntarily.

3. U.S. Attorneys may only divert individuals against whom there is a prosecutable case. Eligibility criteria are broad including any one who is *not*:

Accused of offenses which would otherwise be referred for state prosecution;

A twice-convicted felon;

An addict;

A current or former public official accused of violating the public trust;

Accused of national security, civil rights, or tax offenses.

4. The U.S. Attorney requests a recommendation from the probation officer regarding the suitability of a defendant for diversion and a program of supervision and services.

5. The defendant, counsel, the prosecutor and the probation officer institute diversion by jointly signing a written agreement which outlines conditions of the diversion period.

6. The period of supervision is not to exceed twelve months except in some cases. Defendants who are arrested or otherwise fail to meet the conditions of the Agreement are returned to prosecution.

All 94 U.S. Attorneys are authorized to divert adults according to these guidelines. About one-third have elected to do so. For research purposes we identified five districts in which diversion was emphasied as a priority activity and closely monitored. The remainder of our presentation is based on the information developed in those five test districts.[2]

Our discussion covers two broad categories: (1) the characteristics of the diverted defendants, and (2) the impact of diversion on the criminal justice system.

The typical divertee in our test districts is a white, male, high school graduate who is married and employed, most likely in a sales or clerical job. However, slightly over one-third are black, exactly one-third are female and a like proportion are single. These characteristics, including education, are nearly identical to those of the federal prison inmate population with one exception. That is in the number of females. Less than one percent of federal prisoners are women. Most likely, therefore, we are seeing a situation where discrimination is working in favor of women. In other respects. the diversion population does not seem to be skewed.

For all but two percent, this is the first federal offense. However slighly over one-fourth of the divertees have a local record meaning that a significant number have brushed up against the criminal justice system at a previous point in their lives. Still they have been evaluated by both the prosecutor and the probation officer as individuals how have not adopted a criminal lifestyle. In response to our question of why a particular individual was placed on diversion, prosecutors answered "sincere remorse" of the defendant in over 90 percent of the cases.

A range of offenses were allegedly committed by the diversion population.

The diversion program itself consisted of a standard probation supervision for 88% of the cases. The only significant innovation that we have seen has been an increased use of restitution among diversion defendants. We are therefore somewhat skeptical of claims that diversion offers the possibility for creative new forms of treatment and rehabilitation. Instead what we are seeing is a stable population with definite ties to the community. The individuals have made a mistake and some sanction is called for. Diversion offers a degree of punishment short of the full weight of prosecution.

With regard to the second category of information, the impact of diversion on the criminal justice system, the most telling results come from the eastern district, New York. In that district, we took a group of defendants all eligible for diversion. On a random basis half were granted diversion while the remainder were returned

[2] The five test districts were Oregon; northern district Illinois; northern district, Texas; eastern district, Virginia; and eastern district, New York.

to prosecution. Those prosecuted constituted a control group against which information such as time spent in the system can be compared.

Close to 90% of the defendants prosecuted entered a plea of guilty. Of those who were actually tried, none had jury trials and none were acquitted. The amount of time expended by a prosecutor on a diversion case is roughly equivalent to that involved in obtaining a guilty plea. Therefore if most diversions would otherwise plead out, diversion does not result in great savings in time for the prosecutor. Where it may save time, however, is in the courtroom. Arraignment, motions, hearings, and sentencing are avoided and time should thereby be available for other, presumably more serious cases.

In the eastern district, New York, the majority of divertees were given a one-year period of supervision and services. In contrast the majority of those prosecuted (65 percent) were sentenced to three years' probation. No one in the prosecution group received less than one year's probation and two were imprisoned for one month and four month terms, respectively. Thus, those prosecuted faced a far onger period of supervision and loss of freedom.

In summary, then, we believe we can draw the following overall conclusions about diversion:

Federal diversion is not simply a first offender program, however it definitely includes those individuals with the greatest potential for success among federal offenders.

A wide range of offenses has been allegedly committed by the divertees. The best evidence that they represent serious, prosecutable cases rests with the evidence that a random group, submitted for prosecution, were not acquitted and were sentenced to an average three years' probation.

Diversion provides a useful alternative to prosecution in certain cases. It has not tended to produce innovative new rehabilitation techniques because most divertees are not viewed as requiring such services. Instead they benefit from the opportunity for a second chance and lack of a criminal record.

Diversion may allow for certain savings in the criminal justice system. In a prosecutorial diversion system such as we have in the Department at present the sav'ngs are most significant in the court system due to reduced caseloads. To the extent that legislation draws the courts into diversion, such savings will be reduced.

Diversion does not offer a direct alternative to incarceration. A small percentage of federal convictions result in imprisonment; those individuals most likely to be diverted would by and large be sentenced to probation if prosecuted.

Individuals who are diverted spend less time overall in the criminal justice system than do those prosecuted. If the presence of a criminal record and the negative effects of time in the system are relevant factors in recidivism, then diversion may contribute to reducing recidivism.

At this time, I and my colleagues will be happy to answer whatever questions you may have.

Thank you.

STATEMENT OF DORIS MEISSNER, DEPUTY ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY LESLIE ROWE, EXECUTIVE OFFICE OF U.S. ATTORNEYS, U.S. DEPARTMENT OF JUSTICE; AND EDGAR BROWN, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Ms. MEISSNER. Thank you.

In turn, I would like to express our appreciation for your having scheduled these hearings in September rather than our appearing in July. As we explained to you at the time, we are just finishing up some work on this which we think is useful.

We do not have our formal report completed at this point. It will be finished probably early in October. It will be submitted to the committee at that time. We expect also then to have an official Departmental position on the bill to accompany that.

However, we do have a good share of our preliminary results at this time, so I think we can probably say some things about that.

I would like to begin by just making one distinction about which I think there may have been some confusion, at least out of the records that I have read from the previous hearings.

The diversion that has been going on in the Department of Justice over the last 2 years has been distinct from the diversion programs that were authorized under the Speedy Trial Act. The 10 demonstration districts that were set up under the Speedy Trial Act do exist in cities where, of course, U.S. attorneys are running diversion programs to some extent.

However, the diversion programs that are being used by the Department of Justice are prosecutorial programs and come under guidelines that were promulgated internally. Our views of diversion are based on the prosecutorial programs that we have been involved with, and not on the programs that have been done through the Speedy Trial Act.

It is interesting to note what has come out in the previous testimony about the Attorney General's talking about diversion on 1971 and our not having really started it until about 1974 or 1975. That is certainly the case. As a matter of fact, with certain exceptions, we have only gotten into diversion as a result or as a response to legislation that at that time passed in the Senate.

Senator DECONCINI. In your judgment, is that just preoccupation with other important things, or is it a philosophical——

Ms. MEISSNER. I think it has definitely been a philosophical question.

Senator DECONCINI. This is a philosophical disagreement with the principle?

Ms. MEISSNER. That certainly is my impression.

We have authorized all United States Attorneys to use pretrial diversion. This happened some time in 1974. Since that time, however, only one-third or so of the U.S. attorneys have used it.

Of that one-third that have used it we have identified five districts where we have monitored particularly closely what they have done. In addition to that we have given resources upon with which to use diversion so that we could get some kind of a careful test of what it really is that diversion offers us federally.

We are principally interested in diversion from two points of view: What happens to the defendants? What kinds of crimes? What kinds of recidivism, and so on from the defendant's point of view; second, we are interested in the criminal justice system itself and what the impact is. If there is a savings we want to know what the savings are. Is it purely an economic savings? We are interested in those sorts of questions.

We find in the first category of information, from the point of view of the defendants, we are typically talking about white males with high school graduation as a record who are married and who are employed in some kind of a sales or clerical kind of a position. However, that is just a very quick once-over within the group of defendants.

We find that about one-third of the defendants are black. About one-third of the defendants are female. About one-third of them are single.

That profile pretty well matches the Federal inmate population, with one exception. That exception is the percentage of women. It turns out that there is a tremendously greater proportion of women on

diversion programs that we have incarcerated federally. I am not sure what the reason for that is. It may have something to do with the offenses. We find that a large number of people who are diverted are involved in embezzlement in one way or another. That tends to be bank tellers, which is largely a female occupation. However, we do not really have an answer to that at this point.

However, in addition to that, most of the offenders—as you might expect—are in this situation committing their first Federal offense. However, they are not first offenders. Over one-fourth of them have a prior record at the State and local level. I must say, that was a bit of a surprise to me. I kind of suspected we were talking about first offenders almost across the board. I do not know whether a Federal offense is a higher level of sophistication of crime or what. I would not make that kind of a supposition.

However, I think it is true that a good number of these people have not been totally untouched by the criminal justice system.

However, the critical factor that we have used in our guidelines to U.S. attorneys is that the judgment be made upon the basis of their lifestyle or whether or not this behavior seems to be a recurring thing or is an isolated incident. Even though a substantial proportion have had some prior involvement it is pretty clear, as the Federal defenders have indicated, that these seem to be isolated incidents.

As far as the supervision is concerned, we of course have been using the services of the Probation Division for supervision for the Federal divertees. In almost all cases they have had a very standard supervision program. We have not really seen a good deal of innovative rehabilitative kinds of activities. The probation officers tell us that the population just does not lend itself to that. They just seem to be, in general, people who have made a mistake of one sort or another and need some kind of supervision. Maybe they need some basic services or some help with personal counseling, but nothing terribly unusual.

We have found, however, a great deal more use of restitution than we seem to find in our other work. The Probation Division seems to be quite willing to use restitution in relation to these cases.

While I cannot give you a total money amount recovered—and I am not sure that it is relevant—I think perhaps the only really unusual thing that we have noted on the services end has to do with that approach.

As far as the criminal justice system itself is concerned, and impact on the system, I think the most interesting information that we have comes out of what we have seen in Brooklyn, which is the eastern district of New York.

In Brooklyn we have done a random assignment diversion which simply means that we have had a category of people who, by the nature of their offense, have been eligible for a diversion but then randomly—accordingly to a random number system—half of them have actually been diverted and the other half of them have been prosecuted.

Therefore, the prosecution group becomes a control group. You can compare the two and see what would have happened to a person had he gone through prosecution in order to make some judgments.

What we have seen there is that the group that has actually been prosecuted—assuming of course that he was eligible to be diverted—

has had 90 percent of the cases resulting in a plea. Even of the 10 percent that have gone to trial, none of them have been jury trials.

That is really fairly convincing evidence to be able to make some statements about time saved and where the economies of diversion might lie.

It is failry clear to us that from the prosecutor's point of view there really is not a whole lot of difference between a diversion and a guilty plea. There are papers involved in each of them. Essentially, that about equals itself out. So from the prosecutor's point of view, if a large proportion of the people that he might divert would end up pleading guilty there is not all that much that is saved in the prosecutor's office.

However, there is definitely a savings for the court. There is a savings to some extent for the prosecutor, in that he does not need to spend the time in arraignment hearings and those sorts of things.

Most certainly the court does not have to spend the time that it would normally in the procedural matters that precede a trial. In these situations, however, most of them do not even result in a trial. Therefore, to the extent that time is saved we would say that it is not terribly great, but to the extent that it is saved it is probably saved in the courtroom.

From the point of view of the defendants, some of whom were prosecuted and some of whom were diverted, the defendants did end up spending significantly less time in the criminal justice system under diversion than they did when they were prosecuted.

Our general guideline is that a divertee will be supervised for 1 year. His diversion program is 1 year unless it is an unusual circumstance.

Of the people who were prosecuted, it turned out that a large majority was sentenced to 3 years of probation. Therefore, you have the diversion group having spent 1 year under supervision and you have the prosecution group having spent 3 years under probation. That obviously makes a big difference both for the system and for the defendant.

The other interesting thing to note about it is that of all of these people who were prosecuted instead of diverted, only two of them were sentenced to any time in prison at all. Those terms were 1 month and 4 months.

It has been quite clear to us for quite a long time—and I think this is the best evidence that we have—that diversion is in no way an alternative for incarceration. This is simply because the people who would be diverted would simply not eventually end up in prison. To that extent, we do not think that diversion should be looked upon as any kind of a great savings in the future to take pressure off the prison systems or anything like that. We are not talking about the same population of people.

Senator DECONCINI. Do you derive from that, then, more of a benefit to the individual who is diverted?

Ms. MEISSNER. Certainly, from the individual's point of view, his benefit simply comes with what kind of supervision he is going to have. He is either going to have supervision that has been decreed by a judge as a result of his having been found guilty of a crime, or he is going to have supervision and, in this case, as much as 2 years less of supervision in a circumstance where he does not have a conviction on his record.

Senator DECONCINI. Overall, is it your observation that that is beneficial?

Ms. MEISSNER. That is, of course, the ultimate question. It is unclear to us, really, what the answer to that is. If it is beneficial for people to spend less time in contact with the criminal justice system and if the very fact of less time has something to do with their ability to function in the future, then yes. It is beneficial.

However, if rehabilitation does not have a whole lot to do with time in the system then there would be no connection really.

Senator DECONCINI. Did your analysis indicate any benefit to an accused of having some supervision early—as they might in diversion—versus having it later or not having it, depending on the caseload of the probation department.

Ms. MEISSNER. That certainly is one of the theories. We just cannot speak to it. We do not know.

Senator DECONCINI. You do not know yet?

Ms. MEISSNER. We do not know how one would find out.

Senator DECONCINI. You do not anticipate being able to make a determination?

Ms. MEISSNER. I think we will be able to say something about what subsequent contacts, arrests, convictions, or whatever else have come about to those people who have gone through the diversion program. We really are not going to be able to compare that with anything else, though, because there just is not that kind of information on Federal offenders in general.

Let me just finish by commenting on a couple of things that have come out in earlier conversations today.

It has been very interesting to me that the Federal defenders have shared many common perceptions about what is going on in diversion. I would say that to a great extent we pretty much share those same perceptions.

A couple of questions you have raised—particularly that question about dumping cases—have been primarily in our minds since we have started this whole thing. I am not sure that anybody ever will have a definitive answer for that question.

I think there are a couple of things we might say, though. I think the most important is what we have found in this Brooklyn experience. When we randomly took a group of people who were recommended for diversion and sent half of them back into prosecution, all of them were prosecuted and none of them were acquitted.

That may have something to do with an initial selection that was made that is totally unrelated, but I think it is clear that a least in that district—and we would hope in a number of other districts—we are talking about cases that are real cases.

In addition to that, of course, we have fairly clear guidelines that the U.S. attorneys are supposed to be operating under. The very top statement is that this is to be a prosecutable case and is not to be recommended unless it is prosecutable.

The difficulty, of course—as you know if you have been a prosecutor—is simply: What is a case that is prosecutable? There are all sorts of cases that are prosecutable that never are prosecuted for one reason or another. Often, the reasons have not to do so much with the evidence of the case as they do with time that is available, scheduling,

and those kinds of considerations, It certainly is possible that cases would go into diversion as a means of—they would not be prosecuted simply because of those kinds of considerations.

I must say that as we have reviewed the case reports that have come in over the last year or two I think we feel a little more confident or a little less concerned about the dumping issue than we did when we first started.

Les, do you want to speak to that?

Mr. ROWE. One other encouraging statistic along there is that if someone fails in their diversion contract and the prosecutor then, 6, 8, 9 months later or whatever it is, can either overlook it and forget the whole thing or he can, in fact, reinitiate the original prosecution.

If you find that they are overlooking a whole lot of them the suspicion is that they never had a good case to begin with. We have been encouraged by the fact that where there have been failures a large number of prosecutions have been reinitiated. Therefore, the cases were good to begin with.

Senator DECONCINI. Were those prosecutions prosecuted and brought forward based on the original——

Mr. ROWE. Yes, on the original charge.

Senator DECONCINI. Or were some of them brought on new cases?

Mr. ROWE. Yes, there were a certain percentage also of those. It usually depends upon which of the two charges is the more serious.

Senator DECONCINI. For the most part, when they did bring some termination based on the fact that the defendant or the divertee was re-arrested, did they more than likely lean toward prosecuting that case? I would think they would, because they have the new evidence there and they do not have to try to restructure and worry about this.

Mr. ROWE. That is right, although often enough the failure is pointed out by the supervisory probation officer for such things as failure to participate in the program or to report in. In that case, the only alternative is to go on the original charge.

Mr. MCPIKE. May we have your name for the reporter, please?

Mr. ROWE. I'm sorry. It is Leslie Rowe.

Ms. MEISSNER. Just to interject, Les Rowe is with the Executive Office for U.S. Attorneys and Edgar Brown is also here, from the Criminal Division.

On the question of defense counsel,we have felt very strongly that defense counsel ought to be involved at every step.

Senator DECONCINI. Let me ask you a question on that. In your analysis—I did not see it in your statement—did you come across pre-arrest diversions?

Ms. MEISSNER. Yes; in fact, our guidelines state that diversion should be a preindictment procedure. Generally, there really are not all that many arrests. A Federal arrest is not as common as an arrest is on the State and local level. Most often these cases turn out to be non-arrest cases.

Senator DECONCINI. I believe your testimony is that there should be counsel involved at the very earliest consideration.

Ms. MEISSNER. Yes, and we have provided for that. I think we finally got to it with Mr. Hewitt's testimony that the criminal justice guidelines have allowed that.

I would say, though, that I think we would pretty strongly disagree with the idea of taking a guilty plea and having it available in order to use it if need be in the future. We have struggled long and hard with what kind of language to use in the actual contract or agreement that is signed by the prosecution, the defendant, the defense counsel, and probation, over that issue of what it is that the defendant ought to agree to.

We certainly do not feel that he ought to plead guilty. We think it raises constitutional questions. I think that we ought to be on record as——

Senator DECONCINI. Do you have any feelings about the expression or the admission of a violation of a statute by the divertee?

Ms. MEISSNER. We ask them to acknowledge responsibility for their behavior in regard to the situation.

Senator DECONCINI. Does that mean saying, "Yes, I broke the law."?

Ms. MEISSNER. It means less than that.

Senator DECONCINI. How much less is there?

Ms. MEISSNER. I am not sure how much less. The whole idea, of course, is to try to get some kind of—the idea is not to bring a defendant in kicking and screaming, "I am innocent." If a defendant really alleges innocence and wants to go with that, he ought to go to trial and have that taken care of.

Senator DECONCINI. Right; I do not think anyone would disagree with that, but if the defendant elects to be diverted isn't it better that he do it under one of two circumstances? The first circumstance is, "Yes, I broke the law and I want this opportunity. I accept the responsibility for what I did and I will accept the responsibility to fulfill my contract." The other circumstance is, "No, I did not break the law, but I want to go into diversion anyway because I do not want to take the chance of getting convicted if I go to trial."

Isn't that really the best way to do it—to be totally open?

Ms. MEISSNER. "No, I did not break the law, but I am afraid I might get convicted and so I will take this sort of a way out."——

Mr. ROWE. Which is the best deal he can get.

Senator DECONCINI. Right. Isn't that factually what is liable to happen?

Ms. MEISSNER. Well, maybe so. Maybe in a lot of defendants' minds that is the case. I do not think as the prosecution that we ought to be laying that out as terms upon which he ought to——

Senator DECONCINI. My quandary is this: If you find a defendant—first of all, the prosecutor does have a good case. He has eyewitnesses or whatever and it looks like he has a really cut and dried case. However, the defendant proclaims innocence. Then you start to use the diversion program.

It seems to me that one of the benefits of the diversion program from the testimony we have had is that the defendant admits responsibility, but also that they committed the act and they want to get another opportunity to make restitution and to show society that what happened is not going to put them onto some criminal track for the rest of their life.

Ms. MEISSNER. I would agree with that. It seems to me that that is what we are trying to say. The only point I was trying to make

was that we do not feel that the prosecutor ought to be in a situation where we are havnig a straight prosecutorial program. We are not asking the judge for anything in this regard. We do not feel that we ought to be in the position of saying, "Okay, you sign yourself up as guilty and then we will allow thus and such to happen."

Senator DECONCINI. Can I draw from that that you kind of are leaning towards more court involvement with diversions? Would you rather hold your recommendation until later?

Ms. MEISSNER. No, I do not think you could imply that at this point.

Mr. ROWE. We would clearly prefer that you did not draw that conclusion.

Ms. MEISSNER. There is one other point I would like to mention. There have been several references made to guidelines and whether guidelines are available and all that sort of thing.

I have brought along our guidelines. They certainly are available for your use and/or entry into the record.

Senator DECONCINI. We have those and I will put them in the record if you have no objection.

Ms. MEISSNER. I just want to be sure that there is not any question about the Department's being furtive with that. We are very happy to——

Mr. ROWE. Those appear in the U.S. attorney's manual, which is available to anyone in the public who wishes a copy. In fact, they can be purchased through the Government Printing Office.

Senator DECONCINI. The U.S. attorney's manual is available to anyone?

Mr. ROWE. Absolutely anyone. It is a common procedure for those to be put in the reception room of the U.S. attorney's office.

Senator DECONCINI. So there would be no problem for a Federal Public Defender or a defense lawyer in getting that?

Mr. ROWE. I have personally furnished them many copies. I know they have it in their headquarters office. It is my understanding that much of it is duplicated and sent out to their staff.

Senator DECONCINI. Thank you.

Ms. MEISSNER. Whatever questions you would like to ask we would be glad to answer.

Senator DECONCINI. Thank you very much, Ms. Meissner.

What was the size of the control group that you studied?

Ms. MEISSNER. I believe there were about 80 defendants in all. Because of the randomness, it did not go into a 40–40 split. I think it was 38 one way and 42 the other way or something like that. It was over a 6-month period.

Senator DECONCINI. Were some of the control group cases dismissed, or did you say they all——

Ms. MEISSNER. It occurs to me that two of them were dismissed. It was either one or two; I cannot remember the number.

Senator DECONCINI. Under the understanding that during your study in the eastern district of New York the Pretrial Service Agency was not used to screen arrestees for possibility, was the Pretrial Service Agency used in any other district study?

Ms. MEISSNER. No, as a matter of fact in the eastern district of New York we did use the Pretrial Services Agency to do the followup

work. They set up the supervision program and made sure the people got through quickly and so forth. That is the only district in which we worked with them that way.

Senator DECONCINI. Do you have any conclusions regarding the Pretrial Service Agency's involvement in this?

Ms. MEISSNER. Not at this time. We will get some information to you on that in terms of our views of how the two can work together, but we have not made any attempt to evaluate what it is that they have been doing.

Senator DECONCINI. I presume that you made a distinction between the "Brooklyn plan" and pretrial diversion?

Ms. MEISSNER. Yes. As a matter of fact, I am glad you asked that. As far as the Department of Justice is concerned, the Brooklyn plan is dead. It is very interesting to me that it continues to come up in the context of these conversations. I think at this point it is more a term of art than it is a particular plan or program.

Senator DECONCINI. Is there a directive in the Justice Department not to use the Brooklyn plan?

Ms. MEISSNER. The Brooklyn plan was specifically designed for juveniles. It was not very tight on procedures or what is to be done and so forth. We no longer, of course, have jurisdiction over juveniles except in some unusual circumstances. Therefore, that made it moot to some extent.

In addition to that, the pretrial diversion guidelines that we have just been talking about were issued to supplant the Brooklyn plan.

Senator DECONCINI. Let me ask you a question about the Brooklyn plan just for my own information. I was under the impression that the Brooklyn plan was when you held in abeyance the prosecution, usually of a felony, without supervision for a period of sometimes years, providing the defendant "stayed out of trouble." In other words, providing he was not re-arrested for another felony.

Is that your interpretation of the Brooklyn plan or am I just interpreting the way I saw it used?

Ms. MEISSNER. Les, why don't you answer that? I think that is about right.

Mr. ROWE. That is a fair interpretation, but I think the main thing is that it was strictly for juveniles. We are really out of the juvenile business now.

Senator DECONCINI. Do you mean when it was first initiated?

Mr. ROWE. Yes.

Senator DECONCINI. But, you——

Mr. ROWE. The Brooklyn plan is quite old. It has been around since 1949.

Senator DECONCINI. Right.

Mr. ROWE. It was never for anyone other than a juvenile, except in a very rare circumstance in perhaps the southern district of New York or some place. It was just inapplicable for anyone other than juveniles.

Senator DECONCINI. Of course, it has been used by Federal district attorneys. At least it has in Arizona been used for nonjuveniles.

Mr. ROWE. Yes.

Senator DECONCINI. Is that in nonuse by directive of the Justice Department?

Mr. ROWE. Yes. As Ms. Meissner stated, when the directive went out on the pretrial diversion program it, in effect, revoked the Brooklyn plan.

Senator DECONCINI. When did that go out?

Ms. MEISSNER. It was in July of 1974.

Senator DECONCINI. Therefore, to your knowledge the Brooklyn plan is not supposed to be used toward noniuveniles?

Ms. MEISSNER. If there is a need to do a diversion the guidelines are there with which to do that.

Senator DECONCINI. The process is there.

Ms. MEISSNER. That's right.

Senator DECONCINI. Even if it were a severe felony if the prosecutor——

Ms. MEISSNER. Absolutely. You see, what it was replaced with was the authority to divert adults.

Senator DECONCINI. You have really supplemented the Brooklyn plan with this diversion and with no restrictions as to what crimes could be considered.

Ms. MEISSNER. That is right.

Mr. ROWE. If I could revert back to one thing: You had asked a question about pretrial services agencies versus the probation office.

I think the department has tried as scrupulously as it could not to take sides in the contest over who got supervision of the services, except that I think that we—from our point of view—would prefer as much freedom to select as we could. The situations vary so widely among the 94 districts that that agency which may be superior in one would not necessarily be the best choice in another. I think our choice would be freedom of selection among those agencies to be included in any legislation.

Senator DECONCINI. That is a very good point. I am advised that that is the way the bill is drafted.

Would you envision being able to change your selection as time went on assuming that the Probation Department was very, very good at the time you instituted it, but then for one reason or another it did not get properly funded and the caseload got very high and you wanted to change?

Mr. ROWE. Clearly, problems of leadership or funding can change from year to year. The department, once again, would hope for the freedom to recognize those changes and change from one agency to another.

Senator DECONCINI. Under your study, Ms. Meissner, was the court involved in the majority of the programs on termination?

Ms. MEISSNER. No. What we have done on termination—we have not had that many terminations. However, where we have had terminations we have held an administrative hearing in the U.S. attorney's office. I believe it would not really be called an administrative hearing. We have done it administratively, but we have used a hearing type format.

We have brought probation officers, the defense counsel, the defendant, and a different prosecutor from the one who originally recommended that the person be put on diversion. A different U.S. attorney has been involved and the four of them have simply sat down and talked about it.

Senator DECONCINI. What is your experience with that?

Ms. MEISSNER. It seems to have worked out.

Senator DECONCINI. Were most of the cases not terminated?

Ms. MEISSNER. No; they generally were terminated. I am not sure whether one can say that there was agreement, but it was explained and the reasons were put forth. The idea was that it should not just be done blindly.

Senator DECONCINI. And the accused had an opportunity to refute what was put forth?

Ms. MEISSNER. That is right.

Senator DECONCINI. Did you feel that was adequate, or do you care to express an opintion?

Ms. MEISSNER. Yes. Again, this raises philosophical questions. I think we would agree with the statement that was made earlier by Mr. Hewitt, I believe—that if the prosecutor has the initial authority to bring the charge and initiate the process, then certainly he has the authority to reverse it.

Senator DECONCINI. Did your study or evaluation consult or consider any of the State programs?

Ms. MEISSNER. No.

Senator DECONCINI. Are you considering any of them for your final recommendation?

Ms. MEISSNER. We looked very closely at a lot of the programs before we ever got into diversion federally. At that time—about 2 or 3 years ago—there was probably a good deal less information around than there is now. There was perhaps a great deal more unevenness in programs, but most all of the programs that we looked at were court programs. We were really quite convinced that the appropriate thing to do in diversion was to run prosecutorial programs. Therefore, we have not really gone back to them.

Mr. ROWE. Doris and I and other representatives of the Department have attended and participated in National Pretrial Service Organization's convention, at which time we have had an opportunity to visit with many State and local people and hear descriptions of their programs.

One program, which was a non-court-oriented program that we studied somewhat closely was that run in Genesee County, which includes Detroit, Mich. It has received wide publicity and has been extremely successful.

Ms. MEISSNER. That was Bob Leonard's program.

Senator DECONCINI. Yes; Bob Leonard's program. I am glad to know that you have looked at that program, because it seems to be the grandfather of the State programs. It has constantly been overhauled or improved on, in my opinion. It seems to work very well.

Ms. MEISSNER. Yes; it does.

Senator DECONCINI. I have no further questions.

Mr. McPike?

Mr. ROWE. I would like to say one thing. This is a crucial question that came up with all of the other people. That is: Constitutional problems involved in court oversight or approval either at the initial stage or at the termination of the diversion.

That raises some serious constitutional and legal problems which had been ruled on back in the 1800's in favor of the Government, saying that it was purely a prosecutorial question of discretion. It was recently relitigated again when the Watergate litigation came about in *United States* v. *Cox and N. Ray Liddy* in which the Supreme Court once again said that that is purely an area of prosecutorial discretion.

Also, lawyers, like everyone else, seem to go in fads. For the last two terms of the circuit courts the most noticeable fad has been to attack selective or discriminatory prosecution. None of those cases have been won by appellants. Once again the courts have strongly said that the area of prosecutorial discretion is quite broad.

We would hope that the committee would seriously consider and review those cases and any thoughts with regard to changing that status.

Senator DECONCINI. Would you supply us with any memos or briefs of those cases, or at least a list of the cases? I would like to have them.

Mr. ROWE. I certainly would. I brought with me today the Georgetown Law Journals of the last 2 years, which contain circuit notes. I would particularly recommend those. I will include copies of the pertinent sections.

Senator DECONCINI. Would you please? I would appreciate it if you would share that with Mr. McPike.

Do you have any questions?

Mr. MCPIKE. No, I think your last statement spoke to the issue that probably most concerns us. We have an agreement that the Justice Department will provide us with a formal policy statement on the bill as we redraft it. Your comments this time were strictly addressed to the merits of your evaluation.

I would like to thank you.

Senator DECONCINI. When will that formal statement be ready?

Ms. MEISSNER. Early in October. It will certainly be in this session.

Senator DECONCINI. Thank you very much.

Ms. MEISSNER. Thank you.

Senator DECONCINI. That will conclude the hearings this morning. We thank all of the witnesses for their patience and participation.

[Whereupon, at 11:23 a.m,. the subcommittee was adjourned.]

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