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The Role of Traditional Pretrial Diversion in the Age of Specialty Treatment Courts: Expanding the Range of Problem-Solving Options at the Pretrial Stage

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October 2007

This document was prepared by the Pretrial Justice Institute, under Grant Number 2006-LD-BX-K001, awarded by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Introduction

Since the establishment of the first drug court in 1989 in Miami-Dade County, Florida, the number and types of specialty treatment courts has grown dramatically. By 2004, there were 1,621 drug courts in existence as well as 937 other specialty treatment courts, including mental health, domestic violence, community, and re-entry courts.[1] While these courts vary from jurisdiction to jurisdiction in how they are set up, there are two constants: they seek to address an underlying problem that led to the person's involvement in the criminal justice system, and there is a judge at the center of the problem-solving effort.

The history of specialty treatment courts has been well documented. After the Miami drug court experience showed promise, several other jurisdictions around the country started their own drug courts. This was followed by a massive infusion of Federal funding to help local jurisdictions plan and implement drug courts, the creation of a national drug court association, the release of numerous studies on the impact of these courts, the enactment of state statutes authorizing local jurisdictions to set up drug courts, and the expansion of the specialty treatment court concept to other populations, including persons with mental illness, drunk drivers, domestic violence offenders, juveniles, and inmates re-entering society after a period of incarceration.

With significant attention focused on these specialty treatment courts, another problem solving effort that has been in use for persons charged with criminal offenses since the 1960s has grown less visible. For decades, pretrial diversion programs have been operating in many

[1] C. West Huddleston, III, Karen Freeman-Wilson and Douglas B. Marlow, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States*, National Drug Court Institute, Alexandria, Virginia, 2005.

jurisdictions to address the needs of defendants who had underlying issues or problems that were contributing to criminal behavior. A traditional pretrial diversion program works in the following way: shortly after arrest, the diversion program identifies defendants whose arrest may have been associated with an underlying problem and who meet eligibility requirements for admission to the program. The matter is brought before a prosecutor who must agree to diversion before the defendant can be placed in the program. If placed, prosecution of the case is held in abeyance for a specified period while the defendant undergoes treatment. If the defendant completes treatment or other intervention designed to reduce the likelihood of recidivism, the charges are dismissed. If the defendant fails to successfully complete the diversion program, the case is placed back on the court docket and prosecuted in the normal course.

The history of this traditional pretrial diversion process has many parallels to that of specialty treatment courts. There were only a few pretrial diversion programs in operation in the United States in 1967 when the President's Crime Commission issued a report, which, among many other criminal justice initiatives, called for the expanded use of pretrial diversion.[2] Two Federal agencies, the Manpower Administration of the U.S. Department of Labor and the Law Enforcement Assistance Administration (LEAA) of the U.S. Department of Justice funded pretrial diversion demonstration programs in several sites over multiple years.[3]

[2] John P. Bellassai, "Pretrial Diversion: The First Decade in Retrospect," *Annual Journal*, Pretrial Services Resource Center, 1978, pp. 14-27.

[3] The programs funded by the Manpower Administration were targeted for the unemployed and underemployed and provided job counseling services. Those funded by LEAA were aimed at drug addicts and focused on providing drug treatment.

The 1970s was the decade of growth for traditional pretrial diversion just as the 1990s was for specialty drug treatment courts. During that decade, numerous states passed legislation establishing pretrial diversion as a dispositional option. State and national professional associations and organizations, including the National Association of Pretrial Services Agencies (NAPSA), were established. In 1978, NAPSA issued its first edition of Pretrial Diversion Standards. During the decade, hundreds of programs were started.[4] Such was the promise of these programs that in 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that pretrial diversion programs be established in all jurisdictions.[5]

Thus, both traditional diversion programs and specialty treatment courts had their start in local jurisdictions, conceived by officials who were seeking to challenge the conventional response of the court system to people whose problems were contributing to criminal behavior. Their growth was then fueled by Federal funding and guided by the development of professional associations and standards that had to decide such issues as: "Are we advocates for the defendants or a service to the court?"

Both traditional diversion programs and specialty treatment courts also had their start as dispositional alternatives for the pretrial population. What has been emerging in recent years is a change that stretches the definitions of both traditional pretrial diversion and specialty treatment courts – rather than admitting persons to a diversion or specialty treatment court before any plea is made, many programs are now post-plea.

[4] Bellassai, supra note 2.
[5] National Advisory Commission on Criminal Justice Standards and Goals, *Report on Corrections*, Washington, D.C., 1973, Standard 3.1, pp. 73-97.

This document addresses just the traditional pretrial diversion and specialty treatment court programs that do not require a guilty plea as the price of admission to the program. It seeks to show the continued benefit of and useful role for pretrial diversion in the age of specialty treatment courts. Through many recent evaluations of specialty treatment courts we are learning more about what works and – more importantly – for whom it works. Much of the research on traditional diversion is dated well before the advent of specialty treatment courts, leaving no empirical guidance on how traditional pretrial diversion and specialty treatment courts can complement each other to provide a range of problem-solving options to match the range of problems that are presented. By better understanding how traditional pretrial diversion and specialty treatment courts are similar and how they are different, the role that each can play will become more clear.

Since there is no one model for pretrial diversion or one model for any of the different types of specialty treatment courts, the practices of these approaches are described in general terms. These descriptions will not hold true for all jurisdictions.

Similarities of Traditional Diversion Programs and Specialty Treatment Court Programs

Traditional diversion programs and specialty treatment courts share several similarities that present a unique approach to dealing with criminal cases.

Both are designed to address the underlying problem that brought the defendant into the system.

Most traditional pretrial diversion programs are designed for persons coming into the system with charges that were possibly just a manifestation of some underlying problem.[6] The program could require drug or alcohol treatment, psychological counseling, attendance at anger management sessions, vocational training, community service, or restitution. While many specialty treatment courts target a higher risk population, they are also designed to address specific problems – drugs, mental illness, domestic violence.

Both traditional diversion and specialty treatment courts potentially have the benefit of getting defendants assessed and placed into appropriate treatment very early after arrest, rather than waiting many months until treatment could be ordered as part of a sentence, if convicted. For both approaches, the treatment that is ordered as a requirement of participation may be the first time the defendant has received treatment for the problem.

Both have the goal of reducing the likelihood of recidivism.

Both traditional diversion and specialty treatment courts operate under the theory that if the underlying problems are addressed the individual is less likely to recidivate. This, in turn, will lead to less crime and less future costs to the criminal justice system.

[6] Some traditional diversion programs are designed mainly to assure victim restitution. Defendants, usually first offenders who are charged with such property crimes as writing bad checks or food stamp fraud, may be placed in a diversion program with the only requirements being to make restitution to the victim and avoid any new charges.

Research on traditional pretrial diversion, while dated, does show that diversion can be effective in reducing recidivism. A 1978 study of the Monroe County (New York) Pretrial Diversion Program found that program participants had a 35 percent lower rearrest rate over a one-year period than a similarly-situated comparison group.[7] Likewise, a 1980 study of the Shelby County (Tennessee) Pretrial Diversion Program found that over a three-year follow up period 28 percent of program participants were rearrested at least once while the comparison group had a rearrest rate of 39 percent. In addition, less than 10 percent of the program participants were rearrested more than once during the three-year period, compared to 18 percent for the comparison group.[8]

There is also research showing the effectiveness of specialty courts in reducing recidivism. A review of evaluations of 37 drug courts completed between 1999 and 2001 found that drug court participants had lower rates of recidivism and drug use while in the drug court program than did comparison groups of non-participants. For example, the Chester County (Pennsylvania) drug court evaluation showed that 5.4 percent of drug court participants had a rearrest while in the program, compared to a rearrest rate of 21.5 percent for a comparison group of matched offenders sentenced to probation before the drug court was implemented. The Orange County (California) drug court evaluation found that participants had a rearrest rate of 17 percent while the comparison group was rearrested at a rate of 35 percent.

Six of the studies examined in the review also looked at recidivism rates after participants had left drug court. Four of those studies found a reduction in recidivism. In two drug courts,

[7] Donald E. Pryor, Pluma W. Kluess, and Jeffrey O. Smith, "Pretrial Diversion Program in Monroe County, NY: An Evaluation of Program Impact and Cost Effectiveness," in *Pretrial Services Annual Journal, 1978*, Pretrial Services Resource Center, Washington, D.C., 1978, pp. 68-92.

[8] Richard K. Thomas, "The Shelby County (Tennessee) Pretrial Diversion Program: An Evaluation," in *Pretrial Services Annual Journal, 1980*, Pretrial Services Resource Center, Washington, D.C., 1980, pp. 98-115.

Jackson County (Missouri) and Escambia County (Florida), the reductions were statistically significant.[9]

The prosecutor serves as the gatekeeper for both

The prosecutor can play a key gatekeeping role in both traditional pretrial diversion and specialty treatment courts in two ways. First, the prosecutor's charging decision can determine program eligibility. The prosecutor can file a charge that precludes a defendant's eligibility for either traditional pretrial diversion or specialty treatment courts.

Second, in many jurisdictions, the prosecutor has a say in whether otherwise eligible defendants are to be offered the opportunity to participate.[10] In many traditional pretrial diversion programs the prosecutor alone has the authority to decide whether a defendant can participate in diversion, with no judicial review of that decision.[11] In other jurisdictions, the court can review the prosecutor's decision, but can only overturn it if it finds evidence that the prosecutor acted arbitrarily.[12] In others, the court makes the decision to accept a defendant into pretrial diversion, but only with the consent of the prosecutor.[13] The National Prosecution Standards of the National District Attorneys Association say that the prosecutor's decision about

[9] Steven Belenko, *Research on Drug Courts: A Critical Review – 2001 Update*, National Center on Addiction and Substance Abuse at Columbia University, 2001.
[10] The courts have long recognized the authority of prosecutors to make these decisions. For example, as the Nebraska Supreme Court said in a case that looked at the prosecutor's authority to run a pretrial diversion program as he sees fit: "One of the key aspects of prosecutorial discretion is the charging function, the power to determine what, if any, charges should be brought against a person accused of a crime. As a result of the charging function, the prosecutor has the discretion to choose to charge any crime that probable cause will support or, if the prosecutor chooses, not to charge the accused at all." *Polikov v. Neth*, 270 Neb. 29.
[11] See, for example, South Carolina Code of Laws, §17-22.
[12] See, for example, Tenn. Code. Ann. § 40-15-105(a)(1)(B)(i)(a)-(c).
[13] See, for example, New Jersey Court Rule 3:28.

the "appropriateness of diversion in a specified case will involve a subjective determination that, after consideration of all circumstances, the offender and the community will both benefit more by diversion than by prosecution."[14]

In specialty treatment courts, the prosecutor is a part of the treatment team that also includes the judge, the defense attorney, the treatment provider, and others that reviews cases for admission to the specialty treatment court program. While in most specialty treatment courts the judge has the final say on admissions, the views of the prosecutor have significant weight.

Participation in both is voluntary.

Voluntary participation in both traditional diversion and specialty treatment courts is necessary for very important legal reasons. To participate, the defendant must waive several constitutional rights, including the right to a jury trial, the right to confront witnesses, and the right to a speedy trial. As a result, defendants considering participation in either traditional diversion or a specialty treatment court should first receive advice from counsel, who can help the defendant better understand the benefits and drawbacks of participation.

Voluntary participation is important for another, more practical, reason. As the Diversion Standards of the National Association of Pretrial Services Agencies state, "[s]ince one of diversion's primary goals is to minimize arrest-provoking behavior on the part of program participants, failure on the part of the participant to be interested in changing that behavior and

[14] National District Attorneys Association, *National Prosecution Standards, Second Edition*, Commentary to Standard 44, p. 136.

lack of motivation to do so would obviously hinder progressive change and thereby jeopardize successful completion of the pretrial diversion process. To eliminate free choice in opting for diversion is to negate the importance of participant motivation."[15] The same rationale applies for participation in specialty treatment courts.

To be voluntary, defendants considering whether to participate in either traditional diversion or specialty treatment courts need to be informed of all program requirements before making a decision. They also must be informed of the consequences of failing to meet the requirements.

Both rely upon the coercive power of the criminal court to motivate the individual to participate in treatment.

While participation in both traditional diversion and specialty treatment courts is voluntary, once admitted to the program there is an element of coerciveness involved. As has been pointed out, however, the term "coerced treatment" is "not a single well-defined entity; it in fact represents a range of options of varying degrees of severity across the various stages of criminal justice processing."[16] Even with the coercive authority available to the criminal justice system, those placed in traditional diversion and specialty treatment courts are not, by virtue of their voluntary participation, in the same category as those who are ordered into treatment as a condition of pretrial release, probation, or parole. They are also not in the same category as

[15] National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Diversion*, Commentary to Standard 1.2, p. 6, 1995.
[16] M. Douglas Anglin, Michael Prendergast, and David Farabee, *The Effectiveness of Coerced Treatment for Drug-Abusing Offender*. Paper presented at the Office of National Drug Control Policy's Conference of Scholars and Policy Makers, Washington, D.C., March 23-25, 1998.

those who, not facing the external pressure of criminal charges, volunteer for treatment due to internal desires to change.

Both provide the defendant with a legal incentive to successfully complete the program.

In traditional diversion, the legal incentive is usually dismissal of the charges, and could lead to expungement of the record.[17] In most of the early drug courts, dismissal of charges was the legal incentive. The more recently established drug courts offer charge reduction or sentence reduction.[18] Other specialty courts are mixed on the incentive to the participant for successful completion.[19]

Participants are identified in a similar fashion in both.

For both traditional diversion and specialty treatment courts there is typically a mechanism for screening defendants coming into the system to identify potential participants. It might be a separate pretrial diversion or specialty court program, or it might be under the auspices of pretrial services or probation. While most participants may be identified through this

[17] For example, under Kentucky Revised Statutes 431.076, a defendant who successfully completes a pretrial diversion program may file a motion with the court to have the arrest record expunged. Following the filing of such a motion, the court sets a hearing to allow the prosecutor the opportunity to object to the motion.
[18] Huddleston, supra note 1.
[19] For example, two of the four early mental health courts examined by Goldkamp and Irons-Guynn, offer no conviction for successful completion of the program. The other two, for most cases, sentence successful participants to time served. John S. Goldkamp and Cheryl Irons-Guynn, *Emerging Judicial Strategies for the Mentally Ill in the Criminal Caseload: Mental Health Courts*, Washington, D.C., U.S. Department of Justice, Bureau of Justice Assistance, 2000.

screening, referrals also can come from other system actors, including judges, prosecutors, and defense attorneys.

Differences Between Traditional Diversion Programs and Specialty Treatment Court Programs

While the two share many similarities, there are also several differences.

Traditional diversion seeks to move cases, and defendants, out of the court system; specialty treatment courts are judge-centered, involve intensive court system involvement, and replace the traditional processing of the case with a non-traditional approach.

One of the main objectives of traditional diversion is to move cases off busy court dockets. With many diversion programs, defendants who successfully complete program requirements do not have to come back to court at all, even for dismissal of charges. In fact, the initial appearance in court, right after arrest, may be the diversion participant's only appearance. Many diversion programs speak of trying to keep program participants from "penetrating too far into the system."

In specialty treatment courts, on the other hand, multiple court appearances are part of the therapy. Participants must report to court on a regular basis for status hearings on their progress in treatment. In addition, each court appearance involves a full team, including judge,

prosecutor, defense attorney, treatment provider, case manager, and pretrial or probation officer. Early drug court practitioners spoke in terms of a "marriage" between the courts and the treatment community – that they work together to address the needs of the participant.

Traditional diversion programs terminate more quickly for non-compliance; specialty treatment courts often expect failure and work longer with defendants through these failures.

Participants in either traditional diversion or a specialty treatment court program are given a treatment plan, and may even sign a contract, that outlines their responsibilities. The two differ in how they respond when defendants fail to meet their responsibilities.

Pretrial diversion programs generally employ intermediate sanctions, such as increased reporting or more intensive treatment, to address failures to comply with the treatment plan. Ultimately, though, in traditional pretrial diversion failure to comply leads to termination from the program and the reinstatement of charges. Decisions about a participant's progress in treatment are made by the treatment provider and diversion program.

One feature of specialty treatment courts is that, given the chronic nature of the problems they address, they expect setbacks in treatment and respond to violations by working harder with the defendant. They also use intermediate sanctions – judicial admonishings, increased reporting requirements, increased frequency of substance abuse testing, short jail terms, etc – but tend to

work longer with participants than do pretrial diversion programs. Decisions about a participant's treatment progress are made by the specialty court team, led by the judge.

Traditional diversion is usually for low-level, first-time offenders; specialty treatment courts take people with more extensive prior records or more serious current charges.

Participation in traditional pretrial diversion programs is usually limited, by statute, to first time offenders – or those with minimal criminal histories – charged with specific, often misdemeanor and low-level felony offenses. Given their limited criminal histories, for many individuals in pretrial diversion, their problems – whether they be drug, alcohol, or mental health-related – may not have reached a chronic stage. Moreover, these defendants typically would not be jail-bound, either during the pretrial period or at sentencing, so diverting them out of the court system and into the program is not viewed as having an added benefit of reducing the jail population.

Since specialty treatment courts work with people with more chronic problems, it is more likely that participants will have had more extensive criminal histories. In at least one mental health court, San Bernardino County, California, defendants must be in jail to be eligible for participation.[20] In that sense specialty courts can have an impact on jail crowding – although this has not been examined in evaluations of these courts.

[20] Ibid.

How Drug Court and Traditional Diversion Models Compare

To better define the role and functions of a drug court, the National Association of Drug Court Professionals has listed ten essential elements of a drug court model. Those elements are listed in the left hand column below. The right hand column shows how traditional diversion compares on each of the ten elements.

The Drug Court Model*	Traditional Diversion
Integration of substance abuse treatment with justice system case processing.	The processing of the case is suspended during treatment.
Use of a nonadversarial approach, in which prosecution and defense promote public safety while protecting the right of the accused to due process.	Prosecution and defense may work together to admit defendant to diversion; the case is then taken out of the adversarial process.
Early identification and prompt placement of eligible participants.	This is also a goal of diversion – standards call for identification and placement shortly after formal filing of charges and assignment of attorney.
Access to a continuum of treatment, rehabilitation, and related services.	Defendants should have access to the services they need to address underlying problem.
Frequent testing for alcohol and illicit drugs.	This can be part of the diversion plan as well if alcohol or drug use is involved.
A coordinated strategy among the judges, prosecution, defense, and treatment providers to govern offender compliance.	Program compliance is turned over to diversion program staff and treatment providers. The prosecutor's only involvement after placement is to decide whether charges should be dismissed based on program performance.
Ongoing judicial interaction with each participant.	There is little, if any, judicial interaction with the participant.
Monitoring and evaluation to measure achievement of program goals and gauge effectiveness.	This is done as well, by diversion program staff.
Continuing interdisciplinary education to promote effective planning, implementation, and operation.	The interdisciplinary interaction may not match the level present in specialty courts in some jurisdictions.
Partnerships with public agencies and community-based organizations to generate local support and enhance drug court effectiveness.	This should occur with traditional diversion programs.

*From *Defining Drug Courts: The Key Components*, National Association of Drug Court Professionals, 1997.

Traditional Pretrial Diversion and Specialty Treatment Courts: Expanding the Range of Problem-Solving Options

The main similarity between traditional pretrial diversion and specialty treatment courts is that they both attempt to address the underlying problems that may have led to criminal charges, with the shared goal of reducing recidivism. The main point at which these two approaches differ is that specialty courts place significantly greater demands on court system resources to reach that goal.

It is clear that specialty courts cannot accommodate all persons in need of problem-solving services. For example, in 1999, it was estimated that drug courts only handled about three percent of drug-using defendants nationwide.[21] In addition, specialty courts are getting overcrowded – Pima County, Arizona had to shut down new admissions to its drug court for three months in 2005 because it had reached its capacity.[22]

So what is the role of traditional pretrial diversion in the age of specialty courts? Some researchers have suggested that "substance-abusing offenders early in their criminal careers may be best served with briefer interventions, rather than mandating them to programs targeted for more impaired populations."[23] Others have noted that higher risk defendants "performed more favorably when they were provided with more intensive judicial supervision, and low risk

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[21] Jeff Tauber and C. West Huddleston, *Development and Implementation of Drug Court Systems*, National Drug Court Institute, May 1999.
[22] *Drug Court Annual Report: Calendar Year 2005*, Adult Probation Department of the Arizona Superior Court in Pima County, 2006.
[23] M. Douglas Anglin, Michael Perndergast, and David Farabee, *The Effectiveness of Coerced Tretment for Drug-Abusing Offenders*, Paper presented at the Office of National Drug Control Policy's Conference of Scholars and Policy Makers, Washington, D.C., March 23-25, 1998.

defendants performed more favorably when they were provided with less intensive judicial supervision."[24] Another researcher who has studied outcomes in specialty courts notes that "for low-risk offenders straight diversion may be less expensive (than specialty courts) and achieve similar outcomes."[25]

Jurisdictions across the country are experimenting with different problem-solving approaches that build upon the experiences of both traditional pretrial diversion and specialty treatment courts. For example, under Proposition 36 in California, persons convicted for the first or second time of drug possession must receive treatment rather than a jail sentence. Arizona, under Proposition 200, has enacted a similar law.

If it can be said that traditional pretrial diversion was the first generation of problem solving in the courts, and specialty courts the second, a third generation appears to be poised to assert its presence. This new generation recognizes the need for a wide range of problem-solving efforts in individual jurisdictions to match the wide range of problems that courts face. The range would begin with the least intrusive and the least expensive approach – traditional pretrial diversion, with its emphasis on intervention in low-level cases prior to a plea and with dismissal of charges upon successful completion. It would also include the more intrusive and more expensive approach of specialty treatment courts for those needing more intensive use of system resources. And it would include options in between. [26]

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[24] Douglas B. Marlowe, David S. Festinger, and Patricia A. Lee, "The Judge Is A Key Component Of Drug Court," in *Drug Court Review*, National Drug Court Institute, Alexandria, Virginia; Volume IV, Issue 2, p. 17.

[25] Steven Belenko, *Research on Drug Courts: A Critical Review – 2001 Update*, National Center on Addiction and Substance Abuse at Columbia University, June 2001, pg. 52.

[26] As has been stated in regards to persons with mental illness in the criminal justice system: "Mental health courts should be conceptualized as part of a continuum of community-based options to improve outcomes for people with mental illness involved in the criminal justice system….Communities should avoid having mental health courts as

But for traditional pretrial diversion to take its place in this continuum of problem-solving options, research on its effectiveness is needed. Very little research has been done on pretrial diversion in the past several decades, despite the fact that defendants are placed in these programs everyday. What pretrial diversion programs are successful, and what makes them successful? We do not know. By balancing the research commitment that has been made for specialty treatment courts with more research on traditional pretrial diversion we can better identify the appropriate target population for each approach. More importantly, we can begin to think about other options that need to be available to provide a wide range of problem solving efforts.

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the only available intervention for defendants with mental illness." Council of State Governments, *Essential Elements of a Mental Health Court (Third Edition, Draft)*, New York, NY: Council of State Governments, June 2005, p. 5.