



PRETRIAL DIVERSION AND THE LAW: A SAMPLING OF FOUR DECADES OF APPELLATE COURT RULINGS



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Acknowledgements

The genesis for this monograph was an idea that Brandon Haynes, Research Analyst with Kentucky Pretrial Services and John P. Bellassai, J.D., a long-time national expert on pretrial diversion, had for a workshop at the 2006 Annual Conference of the National Association of Pretrial Services Agencies. They wanted to do a session on the legal issues surrounding pretrial diversion. Expecting to find a few cases that they could highlight at the workshop, Mr. Haynes began his search. After painstaking and time-consuming research, he identified over 2,000 cases. The monumental task of reading brief summaries of these 2,000 cases then fell to Mr. Bellassai, who identified those with the most relevance. Through that effort, he was able to cull the list of cases down to about 200. Given the unexpected volume of cases, at the conference workshop, the two could speak only in very general terms about the types of legal issues relating to pretrial diversion.

Since the Pretrial Services Resource Center had a grant from the Bureau of Justice Assistance to provide technical assistance for pretrial diversion, an opportunity was available to take the work that Mr. Haynes and Mr. Bellassai had already done to produce this monograph. Writing up the case summaries was the easy part compared to the work that they had done. Once a first draft was written, Mr. Bellassai provided a very thorough review that improved the document significantly.

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I Introduction

The concept of pretrial diversion, developed during the 1960s, is that certain individuals coming into the criminal justice system upon arrest can be dealt with apart from traditional prosecution. Such individuals are those who may have underlying issues or problems that had contributed to their arrest, and if such issues or problems could be addressed they would be less likely to return to court on new charges in the future. Moreover, by diverting cases from traditional prosecution, pretrial diversion has the added benefit of reducing criminal court caseloads.

For the purposes of this monograph, pretrial diversion, also called pretrial intervention, is defined as a dispositional approach that has the following elements:

- 1) It offers persons charged with criminal offenses alternatives to traditional criminal court proceedings;
- 2) It permits participation by the accused on a voluntary basis;
- 3) It occurs no sooner than the filing of formal charges and no later than a final adjudication of guilt; and
- 4) It results in dismissal of charges, or its equivalent, if the divertee successfully completes the diversion process.

This is the definition adopted by the National Association of Pretrial Services Agencies (NAPSA) in its Standards on Pretrial Diversion.¹

Such a broad definition is needed because there is no one model of pretrial diversion. For example, in some jurisdictions the defendant must enter a guilty plea upon entering the diversion program; in others this is not required. In some jurisdictions, the diversion decision is made within days of arrest; in others it may take months. Some jurisdictions have pretrial diversion programs just for persons charged with a specific offense, i.e., drug possession, while others will have such programs available for persons charged with any non-violent offense.

Generally, the diversion process works in the following way. Eligible defendants will apply for admission into pretrial diversion. They will be screened by a pretrial diversion program and a decision made by either the prosecutor or the court to accept or deny the application. If accepted, participants enter into an agreement, usually with the prosecutor but in some jurisdictions with the court, to abide by certain terms, such as attendance at counseling, community service, or restitution to victims. Their criminal case is held in abeyance while they are in the diversion program. If they abide by the terms within the diversionary period the charge is dismissed. If they fail to do so, the diversion is terminated, and their case is reinstated to the court docket for prosecution.

¹ National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Diversion*, Frankfort, KY, 1995, page 1.

The first pretrial diversion programs began 40 years ago, and today they exist in hundreds of jurisdictions around the country. In the early days of pretrial diversion there was substantial literature being published on both research findings and program practices. Despite the growth of diversion, these topics have been receiving little or no attention in the literature over the past two or three decades.

Yet there is one aspect of pretrial diversion that has drawn continued and very thoughtful written analyses. Throughout the past 40 years, legal issues have surfaced on a regular basis, leading to a significant body of case law addressing all aspects of pretrial diversion.

The purpose of this monograph is to pull together those writings in an organized fashion. It summarizes approximately 80 state and federal appellate court rulings handed down over the past four decades in 21 different states plus the federal system. The document follows the diversion process, beginning with the legal issues that have arisen regarding eligibility determination and admission, then moves on to enrollment in the diversion program, the terms that are made part of the diversion agreement, dismissal of charges upon successful completion of diversion, dealing with non-compliance with diversion terms, and the use of diversion information outside of the diversion setting.

The cases summarized here do not represent all rulings related to pretrial diversion – there are far too many. Over 2,000 cases were initially identified as having some relation to pretrial diversion issues. These cases were culled through a multi-step process, keeping those that appeared to most directly address the stages of the diversion process.

As the cases included in this monograph demonstrate, there is great variety in how the courts approach legal issues relating to pretrial diversion. One precedent may be established in one jurisdiction, whether state or Federal, and a completely opposite precedent in another. This variance is not surprising since, as noted, there is no one model for pretrial diversion. Rather, each jurisdiction defines diversion procedures as it sees fit. For example, in some jurisdictions, the prosecutor is given almost complete control over all diversion matters, while in others the courts play a leading role.² In some jurisdictions, the statute or court rule establishing the diversion option sets forth specific procedures to be followed for terminating a participant from diversion. Other jurisdictions are silent on this issue, and it is up to the courts to define the due process requirements. In some jurisdictions, diversion is not authorized at all by statute or court rule. Instead, the local prosecutor, using inherent prosecutorial discretion, decides to establish a diversion option – and his or her own rules for how cases are to proceed through diversion.

Even within the same jurisdiction, courts may seem to come to conflicting conclusions. This can occur because some jurisdictions establish one diversion option for one type of crime – drunk

² Tennessee is unusual in that it provides by statute both of these models. The first, defined by Tenn. Code Ann. § 40-15-105(a)(1), gives prosecutors the authority to determine if eligible defendants should be offered the opportunity to participate in pretrial diversion. Courts can only intervene in that decision if they find that prosecutors abused their discretion in denying an eligible defendant admittance to diversion. The second, defined by Tenn. Code Ann. § 40-35-313, gives the court the sole authority to withhold entering a guilty plea or finding in specified situations to allow the defendant to participate in a diversion program, with charges dismissed upon successful completion. The first model, run by the prosecutor, is called “pretrial diversion.” The second, run by the court, is called “judicial diversion.”

driving, for example – and another for a different type of crime – for example, writing bad checks. Each of the options may have a completely different set of procedures, often leading to very different rulings on legal challenges.

Two other points must be kept in mind when considering the variance in the rulings presented here. First, the approach that an appellate court takes to a particular diversion legal issue may have nothing directly to do with diversion. Rather, the approach may be defined by legal precedent within the jurisdiction relating to other legal issues. For example, the precedents in a jurisdiction relating to separation of powers will dictate how an appellate court will approach a challenge that a court overstepped its authority in admitting a defendant into pretrial diversion over the objections of the prosecutor. Second, the legal culture of a jurisdiction plays an important part in how courts approach a case. Some jurisdictions are very pro-prosecution in all matters – not just those relating to pretrial diversion. Others are very protective of defendants' rights in all criminal justice matters.

As a result of these variances, readers should check the case law in their own jurisdiction before assuming that a particular ruling from another jurisdiction has any relevance in their own jurisdiction.

The target audience for this document is broad. It includes several discrete actors who need to be aware of the possible legal implications of participation in pretrial diversion. These actors are those who are most directly involved in the diversion process.

Defense attorneys must be in a position to give informed advice to their clients regarding whether it is in their best interests to participate in a pretrial diversion program and explain the benefits and drawbacks of participation. The cases presented here show that there can be major legal consequences in the future for defendants who enter and complete diversion with the understanding that they will be “wiping the slate clean.” Defense attorneys need to be knowledgeable of those consequences and communicate them to their clients.

Prosecutors need to be aware of the reaches and limits of their authority in both admitting and terminating defendants from diversion. As the cases presented in this monograph show, the authority of prosecutors in these matters is the topic of significant litigation.

Pretrial diversion practitioners – those who run the diversion programs, interact with clients, explain program requirements and benefits, supervise the progress of participants, and initiate termination procedures – need to make sure that their actions are consistent not just with statutes and court rules, but with case law as well.

The courts also have major roles to play in pretrial diversion, even in jurisdictions where significant authority is vested in prosecutors. The cases presented here may be helpful in showing how other courts have addressed legal issues related to pretrial diversion.

Another target audience for this monograph is policy makers at all levels – those who make decisions about whether pretrial diversion should be made available and in what situations. This includes local, state and federal legislators who define diversion authority by statute, courts that

establish diversion procedures through their rule making authority, and individual chief prosecutors who develop diversion as a disposition option using their inherent authority to decide which cases to prosecute. Knowledge of the case law on pretrial diversion can have a significant impact on the decisions these policy makers reach regarding the implementation and operation of pretrial diversion.

II Eligibility and Admission

The first step in the diversion process is to determine if a particular defendant is eligible for participation. Minimum eligibility requirements are often specified in statutes governing pretrial diversion. Typical requirements might include: 1) first offender or minimal prior record; 2) charged with a specific offense or offenses; and 3) likely to benefit from diversion from prosecution. Being eligible, however, is not a guarantee of admission. Regardless of what parties are involved in the admissions decision, controversies arise that must be settled by the courts.

Role of the prosecutor in relation to the court

In our criminal justice system, the decision of whether to prosecute a defendant has always been within the sole discretion of the prosecutor. Often, a prosecutor will decide that it is not in the best interests of justice to begin or proceed with a prosecution, and the matter is dropped. Prosecutors may decide that the evidence was weak or that nothing would be gained by any party involved by proceeding with a case to trial.

Pretrial diversion has been viewed in many quarters as being wholly within that same discretion, and this is a logical conclusion. Yet there is not complete agreement on the issue of who should have the authority to oversee the diversion process – particularly regarding admission. The National District Attorneys Association says that decisions about whether to divert a particular individual should not be subject to judicial review.³ The National Association of Pretrial Services Agencies, while acknowledging that it is the prosecutor’s prerogative to consider defendants as potential participants, says the courts should have a role in “monitoring the fair application of diversion eligibility guidelines.”⁴

At least eight state supreme courts have weighed in on this issue. Even in states where the statute seems clear as to which entity – prosecutor or the court – has what role in what situation, appellate courts have had to intervene. As seen in the following cases, some courts have ruled that there can be no judicial review of prosecutor’s decisions, others permit but limit judicial review, and at least one pronounces an active role for the judiciary.

State v. Leonardis, 363 A.2d 321 (1976), and its progeny

Issue: What is the appropriate level of judicial review of prosecutorial decisions regarding admission to pretrial intervention?

Rulings: Through a number of cases, the court has held that while these decisions must be accorded “enhanced deference,” they can be overturned for “patent and gross abuse of discretion.”

³ National District Attorneys Association, *National Prosecution Standards*, Alexandria, VA, 1991, Standard 44.1.

⁴ Supra note 1, Standard 2.6.

Court: Supreme Court of New Jersey

Through a line of cases dating to 1976, the New Jersey Supreme Court has been defining the limits of prosecutorial discretion in admissions decisions for the state's Pre-Trial Intervention (PTI) program. In New Jersey, the authority for establishing and operating PTI initially came not from a statute, but from a court rule. Supreme Court Rule 3:28 sets forth the broad procedural framework for PTI. To accompany this rule, the court implemented Guidelines for the Operation of Pretrial Intervention. These Guidelines list 17 criteria that prosecutors must take into account in making admission decisions. In 1979, the Legislature enacted a statute that for the most part mirrors Rule 3:28 and the Guidelines. N.J.S.A. 2C:43-12.

The first challenges regarding PTI to reach the state's Supreme Court were in 1976. In an opinion that consolidated three separate cases, the court ruled that, while the charge should be a major consideration, prosecutors cannot reject an application for PTI based solely on the charge. The court also ruled that when rejecting a PTI application, prosecutors must state in writing their reasons for doing so. *State v. Leonardis*, 363 A.2d 321 (1976).

A year later, the state's Attorney General asked the court to re-consider the *Leonardis* decision to clarify one point – the trial court's authority to order PTI when the prosecutor refuses to consent to diversion. In a decision that would become known as *Leonardis II*, the court ruled that trial courts do have that authority. "Unless we are able to adopt an interpretation which would render our enforcement powers under Art. VI, § II, par. 3 (of the New Jersey Constitution) meaningless, our rule-making power must be held to include the power to order the diversion of a defendant into PTI where either the prosecutor or the program director arbitrarily fails to follow the guidelines in refusing to consent to diversion. Conversely, where the program director or the prosecutor would subvert the goals of the program by approving diversion, meaningful judicial review must also be cognizable." The court went on to note, however, that "great deference should be given to the prosecutor's determination not to consent to diversion." Courts should only intervene when there is "a showing of patent and gross abuse of discretion by the prosecutor." Moreover, in these situations, the burden is on the defendant to "clearly and convincingly" establish such an abuse of discretion. *State v. Leonardis*, 375 A.2d 607 (1977).

To establish abuse of discretion, a party must show that the prosecutor's decision failed to consider all relevant factors, as defined in the Guidelines, was based on irrelevant or inappropriate factors, or constituted a clear error in judgment. *State v. Bender*, 80 N.J. 84 (1979). A prosecutor fails to consider all relevant factors when he establishes a policy that all persons charged with possession of drugs within a school zone are automatically rejected for admission to PTI. *State v. Baynes*, 147 N.J. 578 (1997). In considering which factors may be irrelevant or inappropriate, prosecutors may draw limited inferences from juvenile and adult criminal histories that contain dismissed offenses. "Those aspects of a defendant's history, if considered at all, may be reviewed solely from the perspective of whether the arrest or dismissed charge should have deferred the defendant from committing a subsequent offense." *State v. Brooks*, 175 N.J. 215 (2002). Decade-old traffic offenses do not constitute "part of a continuing pattern of anti-social behavior," under the Guidelines, and are thus irrelevant and inappropriate reasons to deny admission to PTI. *State v. Negran*, 178 N.J. 73 (2003). A "clear error in judgment" is one that is "based on appropriate factors and rationally explained" but "is contrary

to the predominant views of others responsible for the administration of criminal justice.” *State v. Dalglish*, 86 N.J. 503 (1981).

Prosecutor’s decisions regarding admission to PTI must be “individualistic in nature,” taking into account an individual defendant’s features that bear upon amenability to rehabilitation. *State v. Sutton*, 80 N.J. 110 (1979). The courts must accord “enhanced deference” to a prosecutor’s decision regarding a PTI application. *State v. Nwobu*, 139 N.J. 236 (1995).

State v. Hammersly, 650 S.W.2d 352, 355 (Tenn. 1983) and its progeny

Issue: What standard of review must the trial court apply in reviewing the prosecutor’s denial of a pretrial diversion application?

Rulings: The court must determine that the prosecutor weighed and considered all the relevant factors and put the reasons for denial in writing.

Court: Supreme Court of Tennessee

Tennessee law allows prosecutors to suspend a prosecution of an eligible defendant for up to two years. Tenn. Code Ann. § 40-15-105(a) (1)(A). Eligible defendants are those who have not been previously granted pretrial diversion, have no prior misdemeanor convictions for which jail time was served, have no prior felony convictions within five years, and are not charged with a Class A or B felony or certain Class C felonies. Tenn. Code Ann. § 40-15-105(a)(1)(B). Beyond these minimum eligibility requirements, the statute does not address what factors the prosecutor is to take into account in making the decision to agree to diversion. The statute does state that the court is to approve the prosecutor’s decision unless it finds that the prosecutor acted arbitrarily or capriciously, that the pretrial diversion agreement was obtained by fraud, or that the defendant does not meet the eligibility requirements. Tenn. Code Ann. § 40-15-105(b)(2). Moreover, defendants have the right to appeal to the court with the claim that diversion was denied as a result of an abuse of prosecutorial discretion. Tenn. Code Ann. § 40-15-105(b)(3).

The court has laid out the factors that the prosecutor is to take into account in deciding whether to admit a defendant into pretrial diversion. “Any factors which tend to accurately reflect whether a particular defendant will or will not become a repeat offender should be considered....Among the factors to be considered in addition to the circumstances of the offense are the defendant’s criminal record, social history, the physical and mental condition of a defendant where appropriate, and the likelihood that pretrial diversion will serve the ends of justice and the best interest of both the public and the defendant.” *State v. Hammersly*, 650 S.W.2d 352, 355 (1983). If the prosecutor denies pretrial diversion, reasons for the denial must be in writing and must include “an enumeration of the evidence that was considered and a discussion of the factors considered and weight accorded each.” *State v. Pinkham*, 955 S.W. 2d 956 (1997).

The “failure of the prosecutor to consider and articulate all of the relevant factors constitutes an abuse of discretion.” *State v. Curry*, 988 S.W. 2d 153 (1999). It is also an abuse of discretion for a prosecutor to deny an application for diversion based on the prosecutor’s “own opinion of

what should and should not be a divertable offense.” *State v. McKim*, 2007 Tenn. LEXIS 27. The correct remedy for abuse of discretion is for the trial court to reverse the prosecutor’s decision and remand to the prosecutor “for further consideration of all of the relevant factors in a manner consistent with this Court’s decisions.” *State v. Bell*, 69 S.W.3d. 171 (2002). In reviewing the prosecutor’s decision to deny diversion, “the trial court must not re-weigh the evidence, but must consider whether the district attorney general has weighed and considered all of the relevant factors and whether there is substantial evidence in the record to support the district attorney general’s reasons for denying diversion.” *Tennessee v. Yancey*, 69 S.W.3d 553 (2002).

***Flynt v. Commonwealth of Kentucky, and
Commonwealth of Kentucky v. Elliott, 105 S.W. 3d 415 (2003)***

Issue: *Can the trial court permit a defendant to participate in a pretrial diversion program over the objections of the Commonwealth?*

Ruling: *The Commonwealth must give its consent before the court has the authority to approve a pretrial diversion application.*

Court: *Supreme Court of Kentucky*

Two cases were consolidated to address the issue of the court’s authority to approve pretrial diversion over the objections of the Commonwealth. In one of the cases, *Flynt*, the trial court held that it had no authority, and in the other, *Elliott*, a different judge from the same trial court held that it did. In addressing the issue, the supreme court first turned to the statute governing pretrial diversion, KRS 533.250. A provision of that statute reads: “The Commonwealth’s attorney shall make a recommendation upon each application for pretrial diversion to the Circuit Judge in the court in which the case would be tried. The court may approve or disapprove the diversion.” The statute is silent on how the court is to respond when the Commonwealth’s attorney objects to diversion.

The court noted that the language of the statute “is susceptible to reasonable alternative interpretations.” It must be interpreted, however, in light separation of powers. The court concluded that to interpret the language “as permitting a trial court to approve pretrial diversion applications over the Commonwealth’s objection – and thus conferring upon circuit courts the discretionary authority that we have previously held to be within the exclusive province of the executive branch – would construe it in a manner inconsistent with Kentucky’s constitutional separation of powers provisions.” The court ruled that the trial court can only approve a pretrial diversion application when the Commonwealth Attorney has recommended approval.

State of South Carolina v. Tootle, 500 S.E.2d 481 (1998)

Issue: *Does the chief administrative judge have the authority to admit an applicant to the Pre-Trial Intervention Program over the objections of the prosecutor?*

Ruling: *Under separation of powers, the judge has no such authority.*

Court: Supreme Court of South Carolina

When Kenneth Tootle, an attorney, was charged with failure to file state income taxes for eight years he applied to the chief administrative judge of Beaufort County for admission to the Pre-Trial Intervention (PTI) Program. The Attorney General objected on three grounds: that the chief administrative judge has no authority to admit a defendant to PTI; that since Tootle is an attorney, admission to the program is not appropriate; and that the South Carolina Department of Revenue opposes PTI for persons charged with tax violations. The chief administrative judge rejected these arguments and ordered that Tootle be admitted to the program. The Attorney General appealed to the state Supreme Court.

That court began its discussion of the issue by noting that the statute authorizing PTI (S.C. Code Ann. § 17-22-100 (Supp. 1997)) provides that “[a]pplications received by the chief administrative judge of the court of general sessions under this section may be preliminarily approved by the judge pending a determination by the pretrial office that the offender is eligible to participate in a pretrial program pursuant to sections 17-22-50 and 17-22-60. Applications received by the chief administrative judge of the court of general sessions must be forwarded to the pretrial office.”

This language makes it clear, the court noted, that while the court can grant preliminary approval, final determination is “left to the ‘pretrial office,’ which is under the direct supervision of the circuit solicitor.” Invoking separation of powers, the court concluded that “a determination of PTI ineligibility is a completely discretionary executive decision and is not reviewable by the judicial department.”

Clayton v. Lacy, 589 N.W. 2d 529 (1999)

Issue: Does a court have jurisdiction over a prosecutor’s decision to deny admission to a pretrial diversion program?

Ruling: The pretrial diversion decision is an exercise of prosecutorial discretion and is not a judicial function.

Court: Supreme Court of Nebraska

Zachary Clayton filed an appeal after he was denied admission to the Lancaster County, Nebraska pretrial diversion program. Under Nebraska law (Section 29-3603(7)), defendants who are denied admission to diversion have a right to administrative review of that decision, which in Lancaster County is held by attorneys in private practice who have been appointed as hearing officers by the local bar association. The decision of the hearing officer is not binding on the prosecutor and is limited to determining whether the prosecutor’s decision was arbitrary and capricious. The hearing officer presiding over Clayton’s appeal concluded that the prosecutor did act arbitrarily and capriciously in denying Clayton admission. The prosecutor still refused to admit Clayton and Clayton then filed a petition with the district court seeking the court’s review

of the decision. The court rejected the petition on the grounds that it had no jurisdiction over the prosecutor's diversion decisions.

On appeal to the Nebraska Supreme Court, that court concluded that a pretrial diversion decision "is an exercise of prosecutorial discretion," and the courts lack jurisdiction in intervening in that decision.

Cleveland v. State, 417 So. 2d 653 (1982)

Issue: Can the court review the prosecutor's decision to deny admission to pretrial diversion program to a defendant who meets the program criteria?

Ruling: Pretrial diversion is a prosecutorial function, not subject to judicial review.

Court: Supreme Court of Florida

After Ophelia Johnson was arrested for welfare fraud she applied for admission to the pretrial diversion program. Despite the fact that Johnson met all the statutory requirements for participation in the program, the state attorney denied her admission, citing its policy against admitting persons charged with welfare fraud. The trial court ordered that Johnson be admitted to the program over the objections of the prosecutor. The Fourth District Court of Appeals quashed that order. The case then went to the Florida Supreme Court.

That court accepted the case to address the question of whether the trial court can review a refusal by the state attorney to consent to a qualified defendant's admission to a pretrial diversion program. "The answer to this question primarily depends on whether the pretrial diversion decision is a judicial or prosecutorial function." The court concluded that "pretrial diversion is essentially a conditional decision not to prosecute....The pretrial intervention program is merely an alternative to prosecution and should remain in the prosecutor's discretion." Thus the court ruled that the prosecutor's pretrial diversion decision is not subject to judicial review.

People of California v. Superior Court (On Tai Ho), 520 P.2d 405 (1974)

Issue: Is the prosecutor's veto power over the court's decision to place a defendant in pretrial diversion a violation of separation of powers?

Ruling: The statute, as it pertains to the prosecutor's veto over the court's decision, is an unconstitutional violation of separation of powers.

Court: Supreme Court of California

California Penal Code §1000 authorizes the courts to divert first-time drug possession offenders. As defined in the statute, three parties play a role in this diversion process. First, the prosecutor conducts a preliminary screening for eligibility according to standards specified in the statute. Next, if the defendant is eligible, the probation department conducts an investigation into the defendant's suitability for diversion. In doing so, the probation department must consider the

defendant's age, employment, educational background, community and family ties, prior narcotics or drug use, treatment history, and any mitigating factors in determining whether the defendant would benefit by diversion. For those who are recommended by probation for diversion, the court must make a final determination of placement. The statute also declares that the case will not be diverted "unless the district attorney concurs." (Penal Code § 1000.2.)

A controversy arose when On Tai Ho was arrested for possession of marijuana. Prosecutors screened his case and declared that he met the statutory requirements for diversion eligibility. The probation department conducted its investigation and recommended that Tai Ho be placed in diversion. When the trial court announced its decision to place Tai Ho in diversion, prosecutors refused to give their consent. The trial court concluded that Tai Ho should be diverted anyway, and ruled the statutory provision giving the prosecutor veto power over the court's decision to be an unconstitutional infringement of separation of powers. Prosecutors appealed.

The case was taken up by the California Supreme Court, which observed that "if the decision to divert a defendant into a rehabilitation program pursuant to Penal Code § 1000.2 is an exercise of judicial power, it cannot constitutionally be subordinated to a veto of the prosecutor." The task before the court, then, was to determine if that decision was an exercise of judicial authority. The court concluded that "when the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility." The court ruled that while "the district attorney may screen for eligibility, [and] that probation department may investigate the facts,...it is the court which makes the decision."

Sledge v. Superior Court of San Diego County, 520 P.2d 412 (1974)

Issue: Does the court have the authority to overrule a prosecutor's decision that a defendant is not eligible for diversion.

Ruling: The authority to conduct the preliminary screening for diversion eligibility lies solely with the prosecutor.

Court: Supreme Court of California

This is a companion case to the one above, *People v. Superior Court (On Tai Ho)*, decided on the same day. In this case, Curtis Sledge was charged with possession of narcotics. After his arrest, he requested placements in the drug diversion program. (Penal Code § 1000.) Prosecutors reviewed his file and refused to initiate diversion proceedings. Sledge then moved the court for placement in diversion. The court rejected the motion, stating that the statute gives prosecutors the sole authority to initiate diversion, and Sledge appealed.

To address the issue of who has the authority to initiate diversion proceedings, the Supreme Court noted that the statute lists minimum eligibility criteria: that the defendant have no prior narcotics convictions and no probation or parole violations; that the offense charged must not have involved actual or threatened violence; and that there must be no evidence of commission of a narcotics offense other than those listed in the statute. The court noted that while the trial court may eventually learn whether these criteria are met "either in testimony taken at the trial or

in the probation report prepared after conviction. But none of it is known to the court at the time here relevant, i.e., before the trial, when the defendant seeks to invoke the diversion process. At that time, the necessary documents and reports are in the district attorney's possession, or can be obtained by him."

The court concluded that "the preliminary screening for eligibility conducted by the district attorney pursuant to section 1000, based on information peculiarly within his knowledge and in accordance with standards prescribed by statute, does not constitute an exercise of judicial authority and hence does not violate the constitutional requirement of separation of powers."

Commonwealth of Pennsylvania v. Lutz, 495 A.2d. 928, (1985)

Issue: Can the trial court order a defendant into pretrial diversion over the objections of the prosecutor in cases where the charge carries a mandatory sentence?

Ruling: Absent evidence of abuse of discretion, the trial court cannot overrule a prosecutor's decision to deny entry into a pretrial diversion program.

Court: Supreme Court of Pennsylvania

In Pennsylvania, the pretrial diversion program is called Accelerated Rehabilitative Disposition (ARD). ARD was created by court rule (Pa.R.Crim.P 175-185) in 1972. Under that rule, the district attorney has the discretion to refuse to submit a case for ARD, and if the case is submitted, the court must approve it. This case was consolidated with eight others, each addressing the issue of whether the court can order a defendant charged with drunk driving into ARD over the objections of the district attorney.

The defendants had argued that since drunk driving carries a mandatory sentence, giving prosecutors the power to decide whether to divert such a case is an unconstitutional exercise of the judicial power to sentence. The court rejected this argument, stating that the decision of the prosecutor not to submit a case for ARD "does not, in itself, impose a sentence any more than the exercise of prosecutorial discretion in deciding to prosecute the case in the first instance imposes a sentence. After a prosecution is brought, the defendant may be acquitted, in which case no sentence at all will be imposed; and if the defendant is convicted and the sentencing structure is set forth by a statute, that is in the province of the legislature, not the district attorney." The court concluded that the trial court may intervene only when there is an abuse of discretion that is "patently and without doubt unrelated to the protection of society and/or the likelihood of a person's success in rehabilitation, such as race, religion, or other such obviously prohibited considerations."

Tennessee v. Ward, 2006 Tenn.Crim.App. LEXIS 278

Issue: Can trial court disapprove a pretrial diversion application based on the charge when the statute lists the charge as eligible for diversion, and the prosecutor has agreed to diversion?

Ruling: Remanded with instructions to approve the diversion application or state the reasons on the record for concluding that the prosecutor acted arbitrarily or capriciously.

Court: Tennessee Court of Appeals

Under Tennessee law, to be eligible for pretrial diversion a defendant must be charged with an offense lower than a Class C felony – with certain excluded charges, have no prior felony convictions, and have had no prior grants of pretrial diversion. If eligible, the decision to offer pretrial diversion rests with the prosecutor. The court must approve the prosecutor’s decision regarding pretrial diversion unless the court finds that the prosecutor acted arbitrarily or capriciously, that the diversion agreement was obtained by fraud, or that the defendant is ineligible for diversion. (Tenn. Code Ann. § 40-15-105(a)(1)(B)(i)(a)-(c).)

In this case, prosecutors agreed to pretrial diversion for two co-defendants charged with tax fraud for understating the value of a boat they had purchased. The matter was brought before the trial court for approval, and the court denied the defendants’ diversion application. In issuing the denial, the court acknowledged that the two defendants met the statutory eligibility criteria, but “if there ever was an offense that ought not be eligible, it is one based on the allegations of the indictment in each of these cases.” The court concluded that the prosecutor did act arbitrarily and capriciously.

On appeal, the defendant, joined by the prosecutor, argued that the trial court did not state any reasons for its ruling that the prosecutor had acted arbitrarily and capriciously. The court of appeals agreed, stating that “it appears that the trial court substituted its judgment for that of the District Attorney’s, and that of the Tennessee General Assembly. The trial court stated that this crime should not be subject to pretrial diversion, even though the legislature has decided that it is.” The court remanded the case to the trial court with instructions to approve the diversion application or state on the record the reasons for concluding that the prosecutor was acting arbitrarily and capriciously.

Equal Protection

Equal protection demands that similarly situation persons be treated in a similar manner. This next section describes how equal protection issues play out within the context of pretrial diversion.

The NAPSA Diversion Standards state that while it may be permissible to exclude certain defendants from participation in diversion based solely on the seriousness of the offense, there is “little benefit...derived from uniform exclusions that cannot be realized from selective exclusions, after preliminary review, on a case-by-case basis.”⁵ The NDAA Standards agree with a case-by-case approach. The Standards lay out the factors that prosecutors should consider in making the diversion decision, including the nature and severity of the charge.⁶ They go on: “Determination of the appropriateness of diversion in a specified case will involve a subjective

⁵ Supra note 1, Commentary to Standard 2.1.

⁶ Supra note 2, Standard 44.4.

determination that, after consideration of all circumstances, the offender and the community will both benefit more by diversion than by prosecution.”⁷

The first four decisions summarized below discuss the equal protection implications of blanket exceptions. In the final two, the courts address the issue of whether it violates equal protection to have pretrial diversion available in some counties within a state but not in others.

Federov v. U.S., 600 A. 2d 370 (1991)

Issue: Is the prosecutor’s office engaging in improper selective prosecution by denying pretrial diversion to persons charged with unlawful entry while exercising First Amendment rights to political speech?

Ruling: The government has the burden of rebutting the appellants’ showing of selective prosecution.

Court: District of Columbia Court of Appeals

The appellants in this case were individuals who were arrested for unlawful entry resulting from their participation in a political demonstration to raise awareness of homeless issues. They sought, but were denied, admission to the pretrial diversion program. They claimed that, as political protestors, they were being treated differently by the prosecutor’s office than other similarly situated defendants, whom they defined as all other first offenders charged with unlawful entry. The two trial courts hearing these cases both ruled that the correct comparison group of similarly situated defendants is all defendants participating in the protest who were arrested for unlawful entry that day. Since all those defendants were denied admission to pretrial diversion, the trial courts held, the appellants in this case were treated no differently.

The court of appeals noted that a party alleging selective prosecution based on impermissible classifications “must make a prima facie showing that (1) others similarly situated were not prosecuted, and (2) the selective prosecution being complained of was improperly motivated, i.e., it was based on an impermissible consideration such as race or a desire to prevent the exercise of constitutional rights.” The court concluded that “we are satisfied that the appellants have made such a showing.” In doing so, the court noted that the comparison group of similarly situated defendants used by the trial judges was under inclusive. “The trial judges focused their inquiry on whether there was disparate treatment within the class of alleged victims of discrimination, rather than on whether those alleged victims, taken as a group, were treated less favorably than others who were similarly situated except for the exercise of protected rights.”

The court held that for the selective prosecution/diversion analysis, the comparison group should be all first-time offenders charged with unlawful entry. The court remanded the cases for further proceedings in which the prosecutor’s office would have the burden of rebutting the appellants’ prima facie showing of selective prosecution. The court noted, however, that the prosecutor’s office may have “a straightforward, simple explanation of its diversion policy that would lead to a prompt resolution” of the cases.

⁷ Ibid., Commentary to Diversion Standards.

State of Kansas v. Greenlee, 620 P.2d 1132 (1980)

Issues: Are the Kansas statutes authorizing pretrial diversion an unconstitutional violation of separation of powers, and, if not, did the prosecutor violate the defendant's constitutional rights by denying diversion to all drug offenders?

Rulings: The statutes are constitutional and the prosecutor may have a policy denying diversion for drug offenders.

Court: Supreme Court of Kansas

Gerald Greenlee sought admission to the pretrial diversion program after his arrest for sale of marijuana. The district attorney denied the request, citing an office policy to exclude all drug offenders from the program. Greenlee filed a motion with the court asking the court to admit him to the program. In the alternative, Greenlee asked the court to require the district attorney's office to comply with the diversion statute by having written policies and guidelines. After a hearing on that motion, the trial court ruled the Kansas statutes authorizing pretrial diversion an unconstitutional violation of separation of powers. An appeal followed.

K.S.A. 1979 Supp. 22-2907 authorizes the district attorney to propose a diversion agreement to the defendant. The statute also requires the district attorney to establish written policies and guidelines for the implementation of the diversion program and to inform the defendant of those policies and guidelines. K.S.A. 1979 Supp. 22-2908 lists the factors that the district attorney is to take into account in making a diversion decision. The first question before the Kansas Supreme Court was whether these statutes usurp the powers of the executive. The court concluded that they did not. "What is the practical effect of the statutes? It would appear the decision to grant diversion still rests largely with the prosecutor. The statutes require certain procedures be adopted and certain factors be considered toward the goal that a more uniform system will prevail throughout the various judicial districts. We discern no detriment to the prosecutor and to the contrary uniformity and guidance have now been provided which previously did not exist." Having found the statutes to be constitutional, the court directed the district attorneys office to "take immediate steps to bring his program into compliance with the statutes" by establishing written polices and guidelines.

Turning to the issue of the prosecutor's policy of denying pretrial diversion to all persons charged with drug offenses, the court concluded that it is within the prosecutor's purview to do so. "Considering the seriousness of the drug problem in society today, particularly its devastating effect upon young people, we cannot say the district attorney abused his discretion in determining not to offer diversion to drug offenders. We find no violation of appellant's constitutional rights to due process and equal protection and no merit to any of appellant's constitutional arguments about the pretrial diversionary procedures as they affected him."

State of Ohio v. Rutledge, 1981 Ohio App. LEXIS

Issue: Does the prosecutor's policy to exclude from diversion defendants charged with welfare fraud allegedly occurring for over six months violate equal protection?

Ruling: The policy bears a rational relationship to the purposes and goals of the diversion program and to the legitimate interest of the fair administration of the welfare system.

Court: Court of Appeals of Ohio, Second Appellate District

Linda Rutledge was charged with illegally obtaining welfare payments over a nine-month period during which time she was employed. She sought admission to the pretrial diversion program, but was denied in light of the policy of the prosecutor to exclude from diversion defendants charged with engaging in welfare fraud for over six months. Rutledge filed a motion in court arguing that the prosecutor's policy violated her equal protection rights and asking that the court order her admission. The court denied the motion.

The question before the court of appeals was "whether the prosecutor's creation of a class of persons who commit welfare fraud for more than six months bears a rational relationship to the purposes and goals of the diversion program or whether it bears a reasonable relationship to the legitimate interest of the state in a fair administration of the county welfare program." The court held that "it does both." In doing so, the court noted that local, state and the Federal governments expend large sums of money to aid truly needy people, and Rutledge's actions, over an extended period of time, brought harm to needy people and to the government agencies seeking to help them. Moreover, it cannot be said that Rutledge was a first-time felony offender – an eligibility requirement of the diversion program – because she had committed a felony, "having committed grand theft, a felony, each month during a nine-month period."

State of Minnesota v. Hoernemann, 1998 Minn.App. LEXIS 916

Issue: Can the trial court stay adjudication of a defendant charged with soliciting a prostitute because the city provides pretrial diversion for prostitutes but not their patrons?

Ruling: The trial court's disagreement with the lack of diversion opportunities for patrons of prostitutes does not constitute a special circumstance allowing a stay of adjudication.

Court: Court of Appeals of Minnesota

James Hoernemann was arrested for offering money to an undercover police officer for sex, and was charged with solicitation of a prostitute. At a pretrial conference, Hoernemann offered to plead guilty in exchange for a sentence that would involve a stayed jail sentence and a fine. The court inquired about pretrial diversion opportunities for the defendant and was told that the city offered diversion for prostitutes but not patrons of prostitutes. Holding that this was a violation of equal protection, the court accepted the guilty plea but ordered a stay of adjudication. Under the terms of that stay, the court noted that it would dismiss the charge if Hoernemann were not arrested for the same or similar offense within the next year – in effect creating a diversion opportunity for the defendant. Prosecutors appealed, arguing that the court had no authority to stay the adjudication.

The appeals court cited two state supreme court decisions that addressed the court's authority to stay an adjudication. In *State v. Krotzer*, 548 N.W.2d 252 (1996), the supreme court held that a stay of adjudication is within the judiciary's inherent power to further justice if "special circumstances" are present. The court later clarified that holding, ruling that "the inherent judicial authority (to stay an adjudication)....be relied upon sparingly and only for the purpose of avoiding an injustice resulting from the prosecutor's clear abuse of discretion in the exercise of the charging function." *State v. Foss*, 556 N.W.2d 540 (1996). Based on these rulings, and noting that the legislature distinguishes between prostitutes and their patrons in the penalties for each, the appeals court concluded that "the district court's apparent disagreement with the lack of diversion programs for patrons of prostitutes does not constitute a special circumstance allowing a stay of adjudication."

Lamont v. Indiana, 852 N.E.2d 1002 (2006)

Issue: Does the unavailability of a pretrial diversion program in a particular county deny a defendant of equal protection when other counties in the state have such a program?

Ruling: The statute that enables counties to set up pretrial diversion programs does not create a program to which all citizens of the state have a right of access.

Court: Court of Appeals of Indiana

Daniel Lamont was arrested in Steuben County, Indiana on charges of driving while intoxicated and several other traffic offenses. He initially pled guilty to the drunk driving charge. The court stayed the conviction and ordered Lamont to participate in a diversion program. When the court learned that Steuben County does not have a diversion program it scheduled a hearing to allow Lamont to re-consider his plea. In the meantime, Lamont and his attorney investigated the availability of diversion programs in the state and found that only five counties have implemented such a program, which is authorized by state statute. Without access to a diversion program, Lamont withdrew his guilty plea and was convicted of the drunk driving charge at bench trial. Lamont appealed this conviction, claiming that the unavailability of a diversion program in Steuben County denied him of equal protection under the U.S. Constitution.

In assessing this equal protection claim, the court of appeals noted that "the forensic diversion program reflects a public policy determination by the legislature that when persons with a mental illness or addictive disorder are charged with or convicted of certain offenses and their criminal history is limited in certain ways, the criminal justice system should provide treatment for their illness or disorder as the preferred means of correction. Lamont does not dispute that this is a legitimate state objective. Rather, Lamont appears to contend that by failing to require all of the counties to establish (diversion programs), the statute has created two classifications: counties with forensic programs and counties without. Thus, the alleged equal protection issue is whether this so-called legislative classification is rationally related to the legislature's policy."

The court concluded that the statute enabling the creation of a diversion program (Ind. Code § 11-12-3.7-7) "does not create a program to which all citizens have a right of access. Rather, the

statute specifically states that the program's implementation is not mandatory and merely prescribes the minimal requirements for the program should a county choose to establish one." Because Lamont was treated no differently than any other similarly situated defendant in any of the counties that do not have a diversion program there is no violation of equal protection. The court affirmed Lamont's conviction.

People of California v. Superior Court (Skoblov), 195 Cal.App.3d 1209 (1987)

Issue: Does the unavailability of a pretrial diversion program in a particular county deny a defendant of equal protection when other counties in the state have such a program?

Ruling: If the county chooses not to have a statutorily-authorized pretrial diversion program, the defendant has no equal protection claim to be admitted to diversion.

Court: Court of Appeal of California, Sixth Appellate District

Yelena Skoblov was charged with one count of misdemeanor theft in the Santa Clara County municipal court. She moved that court to admit her to pretrial diversion, arguing that even though Santa Clara County did not have a pretrial diversion program, since other counties in the state did, thus violating her equal protection rights. The court denied that motion and Skoblov appealed to the superior court. That court granted the motion, ordering that Skoblov be admitted to diversion. The state appealed this ruling.

The court of appeals began by noting that there are two California statutes providing for diversion in misdemeanor cases. Chapter 2.7 of Penal Code § 1001.1 defines diversion as the procedure of postponing prosecution. No eligibility criteria are listed in that provision. Chapter 2.9 of Penal Code § 1001.51 does specify eligibility criteria and contains specific language that it is up to each county's board of supervisors whether to implement a diversion program. The court observed that the superior court "has indirectly ordered the county board of supervisors, a coordinate governmental branch, to do the very thing that the legislature expressly stated they need not do, namely establish a diversion program." Furthermore, "[n]either Chapter 2.7 nor Chapter 2.9 contains any language granting a defendant an express right to be diverted." The court concluded that "neither equal protection principles nor any other constitutional mandate require the legislature to make diversion uniformly available throughout the state."

More than one opportunity in diversion

In many states, by statute, defendants are allowed only one diversion placement. Once in diversion, whether ultimately successful or not, the defendant cannot be diverted again for any subsequent charges. As the next two cases show, determining what this means is not always a simple matter. In the third case described here, the statute allowed a second chance at diversion but the prosecutor had a policy against it. The court was called upon to decide whether this was an abuse of discretion.

New Jersey v. McKeon, 897 A.2d 1127 (2006)

Issue: Since New Jersey law allows a person to be in the diversion program only one time, is a defendant still eligible if he was in diversion in another state for a matter that is not a criminal offense in New Jersey?

Ruling: The defendant is to be considered eligible for participation.

Court: Superior Court of New Jersey, Appellate Division

In 2002, John McKeon, was charged in Pennsylvania with Driving Under the Influence of Alcohol, a misdemeanor under Pennsylvania law, and was admitted to that state's pretrial diversion program – Accelerated Rehabilitative Disposition (ARD). In 2004, McKeon was charged in Burlington County, New Jersey with possession of cocaine. He applied for admission to New Jersey's Pre-Trial Intervention Program (PTI), but was rejected by the prosecutor on the grounds that he was ineligible due to his earlier participation in ARD. He appealed this decision to a Superior Court judge, who sided with the prosecutor, ruling that "it was the legislative intent to limit defendants to one diversionary program regardless of where that diversionary program occurs." McKeon then took the issue to the Appellate Division.

Before that court, McKeon argued that N.J.S.A. 2C:43-12 applies only to diversion received in New Jersey. He further argued that he should be eligible since the offense he was charged with in Pennsylvania – DUI – is a traffic, not a criminal, offense in New Jersey.

Noting that the court, in construing the meaning of a statute, should assume that the legislature intended a reasonable approach, the appeals court found McKeon's argument "more consistent with the policies underpinning PTI than that of the State." The court concluded that the eligibility criteria for PTI "must be applied with the aim of furthering the purposes of PTI, [namely] to divert eligible defendants out of the criminal process to the advantage of the defendant, society, and the criminal justice system, to deter future criminal behavior through the receipt of early rehabilitative services, and to relieve overburdened criminal calendars." Since Driving Under the Influence of Alcohol is not a criminal offense in New Jersey, if the offense "had occurred in New Jersey rather than in Pennsylvania, the defendant would not have been charged with a misdemeanor, and would have been eligible for PTI." The court remanded the case with the instruction that McKeon be considered eligible for PTI.

State of Ohio v. Leisten, 166 Ohio App.3d 805 (2006)

Issue: Is a defendant who failed in Ohio's pretrial diversion program eligible for participation in that state's Intervention in Lieu of Conviction program?

Ruling: Nothing in the statute would make the defendant ineligible.

Court: Court of Appeals of Ohio

The State of Ohio offers two diversionary opportunities. Ohio Revised Code § 2935.36 gives prosecuting attorneys the authority to establish pretrial diversion programs that operate according to standards approved by the court. Revised Code 2951.0141 relates to Intervention in Lieu of

Conviction, in which the court is authorized to identify eligible defendants who, “in the trial court’s sound discretion” would benefit from substance abuse treatment and send those defendants to the probation department for treatment. If successful, the charges may be dropped.

In this case, Deborah Ann Leisten was placed in the prosecutor’s pretrial diversion program. When she failed to comply with the requirements of that program, her diversion agreement was terminated and her case was sent back to the court for prosecution. Leisten then moved to be admitted to Intervention in Lieu of Conviction. The court denied this motion, stating that she was ineligible because “she has had one diversion-like opportunity and therefore she is not eligible for Intervention in Lieu of Conviction.” Leisten entered a guilty plea and then appealed the trial court’s denial of her motion.

At the court of appeals, Leisten argued that the trial court erred in finding that she was not eligible for Intervention in Lieu of Conviction. Among the eligibility requirements are that the person “previously has not been through intervention in lieu of conviction under this section or any similar regimen.” (R.C. § 2951.041(B)(1).) Since Intervention in Lieu of Conviction is geared specifically toward substance abusers and the pretrial diversion program is not, the court of appeals concluded that the pretrial diversion program is not a “similar regimen” for the purposes of determining eligibility for Intervention in Lieu of Conviction. “In our judgment, the prosecutor’s diversion program is not a regimen similar to Intervention in Lieu of Conviction,....If the legislature had wished to make participation in any pretrial diversion program a precluding factor, it could have easily included that restriction” in the statute. The court reversed the trial court’s ruling and ordered the trial court to consider whether, in its “sound discretion,” Leisten would benefit from an Intervention in Lieu of Conviction placement.

Commonwealth of Pennsylvania v. Belville, 711 A.2d 510 (1997)

Issue: Is the prosecutor’s policy of denying pretrial diversion to any individual who has gone through diversion in the past an abuse of discretion?

Ruling: It is within the discretion of the prosecutor to have such a policy.

Court: Superior Court of Pennsylvania

When Suzanne Belville was arrested for driving under the influence of alcohol, her second such arrest within a nine-year period, she applied for acceptance into the pretrial intervention program. Prosecutors denied the application based upon the office’s policy not to grant diversion to the same defendant on more than one occasion. Since Bellville had successfully participated in diversion after her first arrest for driving under the influence – nine years earlier – she was, under this policy, ineligible. The trial court agreed with prosecutors and Belville appealed to the Superior Court.

That court noted that the statute pertaining to the charge of driving under the influence specifically prohibits prosecutors from offering diversion to defendants charged with this offense more than once within a seven-year period. Beyond that restriction, however, the court stated that the decision to admit a defendant to diversion “rests in the sound discretion of the district

attorney.” The court ruled that not only is the district attorney free to have a policy denying diversion to persons who have been through the program in the past, “we find it both proper and completely appropriate for the district attorney to have considered” Belville’s previous participation in diversion.

Payment of fee or restitution as eligibility criterion

Pretrial diversion programs typically charge defendants fees for participation. These fees are not designed to be punitive – as with fines imposed upon conviction; rather they are meant to offset program expenses. The NAPSA Standards state that potential participants should not be excluded based solely on the ability to pay this fee. At least one court has looked at this issue and agreed.⁸ At least one other court has ruled that inability to pay restitution cannot be used as the sole factor in denying placement in diversion.

Mueller and Evans v. Indiana, 837 N.E. 2d 198 (2005)

Issue: Can a defendant be denied admission to a pretrial diversion program solely due to inability to pay program fees?

Ruling: The prosecutor must make alternatives available, such as community service.

Court: Court of Appeals of Indiana

Jamie Mueller and Vicki Evans were both arrested on misdemeanor charges. The prosecutor offered both the opportunity to participate in the pretrial diversion program offered through the prosecutor’s office, with their charges being dismissed upon successful completion. Both, after consulting with their attorneys, were interested in participating, but neither could afford the \$230 fee required for participation. Since they could not pay the fee they were denied access to the program. They requested that the trial court intervene to require the prosecutor to allow them to participate, notwithstanding their inability to pay. The trial court declined, stating that payment of a fee for participation in a pretrial diversion program does not violate either the U.S. or the Indiana Constitutions.

On appeal of this ruling, court reviewed the state’s pretrial diversion statute, which states that a condition of participation in diversion “may” include that the person pay a user’s fee. (§ 33-39-1-8.) “The undisputed evidence before us is that at the time of Mueller’s and Evan’s cases, the prosecutor had implemented a policy of unconditionally requiring the payment of certain fees as a condition of participation in his pretrial diversion program. The question, therefore, is whether this was an unconstitutional application of an otherwise constitutional statute with respect to indigent defendants.”

To address this question, the court first acknowledged that the prosecutor has the sole discretion to determine who to prosecute. “However, it is also clear that a prosecutor’s charging decisions cannot be made in a way that violates the United States Constitution.” It pointed to a U.S. Supreme Court ruling that such discretion cannot be based upon “an unjustifiable standard such

⁸ Supra note 1, Standard 2.4.

as race, religion, or other arbitrary classification.” *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. (1978). It concluded that the courts “have the authority, and the duty, to assess whether it is constitutional for a prosecutor to decide to prosecute some individuals and not others on the sole distinguishing basis that some are able to pay pretrial diversion fees and others are not.”

The court found that “there is nothing in the record to suggest there was any other reason for Mueller and Evans to be excluded from the pretrial diversion program, except for their asserted inability to pay the fees.” The court cited a line of cases holding that inability to pay a fee or fine is not a justifiable reason for depriving individuals of their Fourteenth Amendment rights to due process and equal protection, beginning with *Griffin v. Illinois*, (351 U.S. 12, 76 S. Ct. 585 (1956)). In that case, the U.S. Supreme Court held that the State of Illinois was violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment by refusing to allow indigent defendants to obtain free trial transcripts. As Justice Hugo Black wrote in that case, “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”

Based on its review of the line of cases, the court concluded that “precluding Mueller and Evans from participating in the prosecutor’s pretrial diversion program based solely on their asserted inability to pay the \$230 in fees violated their rights under the United States Constitution.” The court held that alternatives must be made available to indigent defendants, such as waiver of fees, partial waiver, implementation of a reasonable payment schedule, substitution of community service for the fee, or a combination of these.

In conclusion, the court noted that “[t]he concept that our criminal justice system should be operated as far as reasonably possible without regard to a defendant’s financial resources is axiomatic and beyond dispute. Allowing some defendants and not others to completely avoid prosecution and a potential criminal conviction, based solely on their respective abilities to pay certain fees, violates this fundamental principle.”

Commonwealth of Pennsylvania v. Melnyk, 548 A.2d 266 (1988)

Issue: Can a defendant be denied admission to a pretrial diversion program based solely on the inability to pay restitution in full during the diversion period.

Ruling: Denying placement violates the fundamental fairness required by the 14th Amendment.

Court: Pennsylvania Superior Court

Prosecutors determined that Barbara Melnyk was eligible for admission to the Commonwealth’s pretrial diversion program, Accelerated Rehabilitative Disposition (ARD), except for one problem – it was clear that she would be unable to pay the \$10,789 in restitution during her two years in the program. As a result, she was denied admission. Following a non-jury trial she was convicted of welfare fraud, placed on probation for two years and ordered to pay the same amount in restitution as a condition of probation. She appealed her conviction, claiming that denying her admission to ARD violated the Equal Protection Clause of the 14th Amendment.

In taking up the appeal, the Pennsylvania Superior Court noted that court rules and case law make clear that the prosecutor “has the sole discretion to submit or refuse to submit a case for ARD,” and absent evidence of abuse of that discretion the court’s are not to intervene in that decision. The court stated that the prosecutor acknowledged that the sole reason for denying Melnyk’s admission to ARD was the inability to pay the restitution. The court referred to the U.S. Supreme Court case of *Bearden v. Georgia*, 461 U.S. 660 (1983), in which that court held that the state court erred in revoking probation for failure to pay restitution without first determining whether the probationer had the means to pay. “*Bearden* recognized that due process and equal protection principles converge in these types of cases, and proceeded to disposition by way of a due process analysis,” wrote the Superior Court in the present case. “We, too, will apply a due process analysis in deciding the present case.”

In doing so, the court stated that “[d]ue process encompasses elements of equality and provides the court with a vehicle for enforcing the constitutional principle that all criminal defendants are to be treated with ‘fundamental fairness,’ the touchstone of due process.” The court ruled that denying Melnyk admission to ARD deprived her of “her interest in repaying her debt to society without receiving a criminal record simply because, through no fault of her own, she could not pay restitution. Such a deprivation would be contrary to the fundamental fairness required by the 14th Amendment.”

Eligibility of illegal aliens

A standard requirement of any pretrial diversion program is to comply with all state and federal laws. What happens when an individual’s status – which in the case described here was as an illegal alien – is inconsistent with this requirement? Is such a person, by definition, ineligible for pretrial diversion?

The People of California v. Cisneros, 100 Cal. Rptr. 2d 784 (2000)

Issue: Since one of the conditions of pretrial diversion is to comply with the law, is an illegal alien, by that status, automatically ineligible for diversion.

Ruling: While trial courts are free to consider illegal alien status as a factor in determining whether a defendant is a good candidate for diversion, that status is not an automatic disqualification.

Court: Court of Appeal of California, First Appellate District

After his arrest as a first-time drug offender, the probation department recommended Juan Cisneros for the pretrial diversion program and the prosecutor had no objections. The court rejected this recommendation on the ground that as an illegal alien Cisneros violates the law every day by his presence in the country. Since compliance with the law is a condition of diversion, Cisneros would never, the court reasoned, be in compliance with diversion – and he was thus automatically excluded from consideration. Cisneros appealed.

The appeals court noted that the diversion statute does not preclude an illegal alien's participation in diversion. "Certain past or current criminality disqualifies a defendant from admission to the program, but a misdemeanor violation of immigration laws is not one of the listed disqualifiers." Furthermore, the court stated, interpreting the statute (Penal Code § 1000.3) as a categorical exclusion of illegal aliens "would create an inconsistency within the law. Lawfulness is required for both deferral and probation and yet illegal aliens would be excluded from only the deferral program. We are unable to discern the legal basis for the trial court's belief that an illegal alien is sufficiently obeying all laws for a grant of probation and yet is engaging in criminal conduct rendering him unsuitable for" pretrial diversion. The court ruled that trial courts can take alien status into consideration in decisions regarding admittance to diversion, but an illegal alien status cannot be a sole disqualification for diversion.

Point of eligibility

At least one court has been called upon to address whether there is any point in the processing of a case after which a defendant can no longer be considered eligible for pretrial diversion.

Morse v. Municipal Court, 13 Cal.3d 149 (1974)

Issue: How far in the criminal process can a defendant go before he can no longer have the right to consent to consideration for pretrial diversion?

Ruling: A defendant may provide that consent at any time prior to the commencement of trial.

Court: Supreme Court of California

After his arrest for possession of marijuana, prosecutors notified Kenneth Morse that he was eligible for participation in California's pretrial diversion program for persons charged with drug offenses. (Penal Code §§ 1000-1000.3) Rather than consenting to diversion at that point, however, Morse pleaded not guilty and filed a motion to suppress the evidence that led to his arrest. After that motion failed, Morse advised the court that he was consenting to be placed in diversion. The district attorney objected on the ground that Morse had not made a timely consent, as required by the statute. The trial agreed, finding that since one of the purposes of diversion is to avoid the utilization of the criminal justice system in appropriate cases, by filing the motion to suppress Morse had used the resources of the courts, and was therefore no longer eligible for diversion. Morse appealed.

The case made its way to the state's Supreme Court, which stated that there are two purposes of diversion under the statute. The first is sparing appropriately selected first-time drug offenders the stigma of a criminal record, and the second is relieving congested criminal courts of the burden of processing some minor drug offenses. The court noted that the second purpose is the most relevant in this case. In addressing this purpose and how the defendant's motion to suppress fit into this purpose, the court took a different view than the trial court. While the trial court held that the motion did nothing to relieve congested courts, the Supreme Court opined that if the motion to suppress had been successful, the case would have, in effect, ended – thus placing no further burden on either court or diversion resources.

The court also reviewed the wording of the diversion statute, which states that “[i]f the defendant consents and waives his right to a speedy trial the district attorney shall refer the case to the probation department,” which is to conduct an investigation to determine final diversion eligibility. (Penal Code § 1000.1) The court concluded that although the “clear wording” of this statute “precludes a defendant from initiating diversion proceedings by tendering consent after commencement of trial, there is nothing in the statutory language itself to indicate any specific point during the pretrial period beyond which an effective consent can no longer be tendered.” The court ruled that defendants may express their consent to diversion “at any time prior to the commencement of trial.” Furthermore, “[d]efendants eligible for diversion may tender usual pretrial motions prior to their expression of consent to consideration for diversion.”

III Enrollment

Once a defendant has been admitted to pretrial diversion, the next step is the enrollment. This chapter discusses the legal issues that have arisen regarding the enrollment of defendants in pretrial diversion.

Admission of responsibility

The NDAA Standards make clear that prosecutors must maintain the ability to re-initiate a viable prosecution at any point during the diversionary period if the participant fails to comply. This could be difficult as evidence might erode over the period that prosecution of the case is suspended. To guard against that, the Standards call for the diversion agreement to include an admissions statement by the defendant or a stipulation of facts or depositions of witnesses.⁹ The NAPSA Standards disagree. While those Standards recognize that an informal admission of guilt can have therapeutic value as part of the service plan, the admission should not be used against the participant if the case is returned to prosecution.¹⁰ In the first two cases summarized in this section, the courts accepted the use of pre-diversion statements later being used in prosecution of the case.

It is well-settled that the right against self-incrimination requires that defendants have the opportunity to consult with counsel before making any statements. This is particularly important when enrolling in pretrial diversion because of the requirement that the defendant admit responsibility. The defendant must also waive another constitutional right – the right to a speedy trial. Both the NDAA and the NAPSA Standards call for the presence of counsel during enrollment in pretrial diversion.¹¹ In many instances, defendants waive their right to an attorney – as occurred in the third case described below, when the defendant was offered the opportunity to participate in pretrial diversion.

The NDAA Standards also call for “a signed release by the accused of any potential civil claims against victims, witnesses, law enforcement agencies and their personnel, the prosecutor and his personnel,...”¹² In the last four cases described here, the courts have ruled that enrollment in pretrial diversion by itself is an implicit acknowledgement of guilt, therefore foreclosing any civil proceedings charging malicious prosecution.

The final case summarized in this section addresses the question of whether an attorney must lose her law license while participating in a pretrial diversion program.

State of Alabama v. Watters, 594 So.2d 242 (1992)

Issue: Should statement admitting guilt made to prosecutors upon enrolling in pretrial diversion be suppressed at trial after the participant failed to complete diversion?

⁹ Supra note 2, Commentary to Diversion Standards.

¹⁰ Supra note 1, Standard 3.3 and Accompanying Commentary.

¹¹ Supra note 2, Commentary to Standards. Supra note 1, Standard 3.1.

¹² Supra note 2, Standard 44.5.

Ruling: The participant had been fully advised that the statements he made could be used against him if he were prosecuted for the charge.

Court: Court of Criminal Appeals of Alabama

As part of the enrollment process in a pretrial diversion program, Rodney Watters was required to give a statement to prosecutors describing his involvement in the offense for which he was charged. With his attorney present, Watters made a statement admitting to possession of crack cocaine. One month after his enrollment in pretrial diversion, Watters was arrested on charges of rape, kidnapping and sodomy. On the basis of this arrest his pretrial diversion was terminated and the drug case was set for trial. Watters moved to suppress the statement he had made to prosecutors. The trial court agreed, ruling that any admission made by a defendant during the enrollment process must be suppressed if the defendant is either not accepted into the program or fails to complete it. The state appealed.

The appeals court noted that either a defendant agrees to the conditions of the diversion program or he will not be admitted. “The record shows that, without any doubt, those conditions, including the limited waiver of the constitutional right against self-incrimination, were known to Watters and his attorney before Watters requested acceptance into the program and before he made any statement.” Furthermore, the court noted, both Watters and his attorney were advised that any statements he made would be used against him if he was prosecuted. “With full knowledge of the consequences of his acts, Watters admitted his possession of crack cocaine and the circumstances surrounding his arrest...” The court reversed the trial court’s order suppressing the statement.

State of Oregon v. Porter, 123 P.3d 325 (2005)

Issue: When a defendant stipulates to the elements of a crime as a condition of enrollment in pretrial diversion, can that defendant, once diversion has been terminated and the charge re-instated, offer any evidence at trial that contradicts the stipulations already made?

Ruling: Once facts are stipulated they are conclusively proven.

Court: Oregon Court of Appeals

As part of the standard admission process to the pretrial diversion program, Monte Porter stipulated to the elements of DUI. When Porter failed to comply with the terms of pretrial diversion the charge was re-instated and a jury trial ensued. At the trial, the prosecution introduced Porter’s stipulation. Porter argued that, notwithstanding the stipulation, he should have the right to present evidence to the jury that he was not impaired by alcohol at the time of his DUI arrest. The prosecutor countered that Porter was precluded from presenting any evidence that was contrary to his signed statement. The trial court agreed with the prosecutor and the jury found Porter guilty. The court of appeals also rejected Porter’s argument, noting that “[a] stipulation....is a statement by which one party waives the right to require the other

party to prove a particular fact....Once stipulated, a fact is conclusively proven.” The court affirmed the defendant’s conviction.

Ludd v. The State of Texas, 2005 Tex. App. LEXIS 2233

Issue: Can a diversion participant who admitted guilt to a misdemeanor as part of an agreement to participate in a pretrial diversion program, after failing in the program, later have that admission suppressed on the grounds that it was made without an attorney being present?

Ruling: The record shows that the defendant knowingly and intelligently waived her right to an attorney before agreeing to pretrial diversion.

Court: Texas Court of Appeals, Fifth District

Yolanda Ludd was charged with misdemeanor theft by check for writing a check, knowing that there were insufficient funds in her bank account. She was found eligible to participate in the prosecutor’s Check Diversion Program. As part of the diversion agreement, Ludd signed a statement admitting to passing the bad check as well as five other checks for a total amount of \$147.15. As a condition of participation in the program, she was required to pay off the checks. She failed to make the payments on time and ultimately was prosecuted for the original Class B misdemeanor. Realizing that the statement she signed when she entered the diversion program would be used against her, Ludd argued that the statement should be suppressed because it was made without an attorney being present. The trial court disagreed and Ludd was convicted.

On appeal, the court reviewed the record and determined that before she made or signed any statements Ludd was informed of her right to remain silent, to have an attorney present, and to have an appointed attorney if she could not afford to hire one. The court ruled that the record showed that she clearly waived those rights.

Ludd also argued that her right to fair trial had been violated because the trial court refused to remove the prosecutor from the case. Specifically, Ludd claimed that the prosecutor was a material witness in her case with “regard to the events surrounding the confession” and as such should not be using that as evidence to convict her. The appellate court found that the prosecutor did not meet the criteria of a material witness, who is a person with “personal knowledge of the dealings with appellant...and as a direct party with appellant during the course of negotiations resulting in the evidence submitted in form on the jury.” According to the court, the prosecutor was merely the supervisor of the person who engaged in the negotiations and had no direct dealings with Ludd until after her placement in the diversion program, which was subsequent to her signed statement of guilt.

Jordan v. Deese, 317 S.C. 260 (1995)

Issue: Can a participant who enrolls in a pretrial intervention program later file suit against the complaining witnesses for malicious prosecution?

Ruling: Dismissal of criminal charges as a result of successful completion of pretrial intervention is not a result that is in the participant's favor, so the participant's suit may not go forward.

Court: Supreme Court of South Carolina

Thomas Jordan was placed in the Pre-Trial Intervention Program after being charged with making harassing telephone calls. He successfully completed the program and the charge was dismissed. Jordan then filed a suit against the victims alleging malicious prosecution. The trial court granted summary judgment in the victims' favor. Jordan appealed to the Supreme Court of South Carolina. That court noted that among the elements that must be proven in a malicious prosecution action is that the charges against the person bringing the malicious prosecution action must have been resolved in that person's favor. The court held that "dismissal of criminal charges as the result of the accused's voluntary entry into, and successful completion of a Pre-Trial Intervention Program is not, as a matter of law, a termination of the action in his favor."

Neshewat v. Salem, 1999 Fed App. 0119P, C.A. 6 (1999)

Issue: Can a defendant who enrolls in a pretrial diversion program later charge the complaining witness in a civil suit with injurious falsehood?

Ruling: The defendant's participation in the pretrial diversion program was an implicit acknowledgment of guilt, and under the principles of collateral estoppel, a guilty plea bars a subsequent civil action.

Court: U.S. Court of Appeals for the Sixth Circuit

This case arose over a bitter dispute between Michael Neshewat and his brother Maurice over the ownership of a car. Michael loaned Maurice money to purchase the car, which he registered in his name. The dispute began when Maurice failed to pay back the loan. When the car was stolen, Michael filed a claim with his insurance company. During a police investigation of this claim, Maurice stated that he never gave Michael permission to re-title the car in Michael's name. Based on that statement, Michael was arrested and charged with intent to pass false title on an automobile and false pretenses with intent to defraud. After his arrest, Neshewat participated in a pretrial diversion program. Part of the agreement was that he was to pay restitution to the insurance company he was accused of defrauding. He made the payments and the charges were dismissed. He then filed a civil suit against Maurice in federal court charging injurious falsehood. That court ruled that Neshewat's claim was barred by collateral estoppel, reasoning that Neshewat's participation in the pretrial diversion program operated as a guilty plea. Neshewat appealed.

The court of appeals agreed with the trial court. "While it is true that, in accordance with the term's of Michigan's Pretrial Diversion Program, upon his full payment of the \$40,000 restitution and his successful completion of the conditions of supervision while he was on diversion status, the case against Plaintiff was dismissed, the fact remains that Plaintiff's agreement to pay \$40,000 acts as an implicit, if not an express, acknowledgement of guilt no less

than a plea of *nolo contendere* operates,” the court held. “It is well settled in this Circuit that, under principles of collateral estoppel, a plea of guilty or *nolo contendere*, or a conviction, bars a subsequent civil action for damages for malicious prosecution, false arrest, false imprisonment or defamation claim.”

Swartsel v. Publix Super Markets, Inc., 882 So 2d 449 (2004)

Issue: Can a participant who enrolls in and completes a pretrial diversion program later claim malicious prosecution?

Ruling: Despite the participant’s claim of innocence throughout the pretrial diversion process, by participating in that process the defendant could not claim that evidence was lacking to bring prosecution.

Court: Florida Court of Appeals, Fourth District

Katherine Swartsel was arrested and charged with possession of hydrocodone and petit theft. She insisted that she was innocent, and maintained that insistence while she was in a pretrial diversion program. She was not required to admit guilt as a condition of participation in the program. Once she successfully completed diversion and the charges were dismissed she filed a law suit against the store that brought the criminal charges against her, alleging malicious prosecution. The trial court granted summary judgment in favor of the store, dismissing the suit.

On appeal, Swartsel based her argument on *Alamo Rent-A-Car v. Mancusi* (632 So. 2d 1352, 1355 (Fla. 1994)), which held that a malicious prosecution claim required that the party prove that the criminal case ended in a “bona fide” termination in that party’s favor. Swartsel claimed that since the charges against her were nolled following her completion of pretrial diversion, which acted in her favor, she should be allowed to proceed with her malicious prosecution suit. The Court of Appeals disagreed, ruling that a nolle entered after successful completion of diversion is not a result in the defendant’s favor for the purposes of bringing malicious prosecution action. “There is nothing about the pretrial intervention agreement suggesting that the nol pros would indicate innocence. To the contrary, it is equally capable of suggesting her guilt....As the statute plainly indicates, the resulting dismissal after successful completion of the pretrial intervention program is *without prejudice*, so that if the defendant later commits another offense the prosecutor is authorized to resurrect the charge dismissed. A charge thus hanging in suspense hardly seems to us a bona fide termination indicating innocence.” The court affirmed the trial court’s grant of summary judgment.

Roesch v. Otarola, et al., 980 F.2d 850 (1992)

Issue: Can a person who has successfully completed pretrial diversion maintain a malicious prosecution suit against those who he thinks were responsible for his arrest?

Ruling: Successful completion of the diversion program is not a disposition in the person’s favor.

Court: U.S. Court of Appeals for the 2nd Circuit

Carl Roesch was arrested and charged in a Connecticut court with harassment, threats, and breach of peace. The arrest stemmed from a dispute Roesch was having with his sister-in-law and his brother-in-law. Roesch applied for and was accepted into Connecticut's pretrial diversion program. As a condition of participation, Roesch was ordered to undergo psychiatric treatment and to stay away from his in-laws. While he was active in the program, Roesch's wife filed a complaint with police and with the probation officer supervising Roesch in the diversion program, claiming that Roach was not in compliance with diversion conditions. No action was taken on those complaints and Roach ultimately completed the diversion program and his charges were dismissed. Roesch then filed a law suit in U.S. District Court against his wife for trying to get his diversion revoked and against his in-laws and the police officer who arrested him for malicious prosecution. The district court entered summary judgment against Roesch.

In his appeal, Roesch argued that dismissal of his charges was a disposition in his favor. The court rejected this argument, ruling that “[a] person who thinks there is not even probable cause to believe he committed the crime with which he is charged must pursue the criminal case to an acquittal or an unqualified dismissal,...” Failure to do so, the court held, is tantamount to the person waiving any civil claims resulting from the initial arrest. As to the issue of the claim against his for trying to get his diversion revoked, the court held that there was no basis for the claim because no action was ever taken to revoke his diversion.

Kentucky Bar Association v. Haggard, 57 S.W.3d, 300 (2001)

Issue: Do Kentucky court rules require the automatic suspension of the law license of a defendant participating in a pretrial diversion program?

Ruling: Since a participant in diversion has pled guilty to the charge, the participant, at least temporarily, is convicted. Therefore, the participant should face automatic suspension.

Court: Supreme Court of Kentucky

Kentucky court rules (SCR 3.166(1) provides that: “[a]ny member of the Kentucky Bar Association who pleads guilty or is convicted by a judge or jury of a felony shall be automatically suspended from the practice of law in this Commonwealth. The suspension shall take effect automatically beginning the day following the plea of guilty or finding of guilt by a judge or jury or upon the entry of judgment which ever comes first. The suspension under this rule shall remain in effect until dissolved or superseded by order of the court.” Melissa Haggard, an attorney licensed to practice in Kentucky, pled guilty to three counts of Impersonating a Peace Officer, a Class D felony. She entered an Alford Plea as part of the admission requirements to the pretrial diversion program.

Haggard argued that her plea should not result in her automatic suspension from the practice of law because her convictions will be set aside and the charges dismissed if she successfully completes the diversion program. The Kentucky Supreme Court disagreed, stating that “[t]he General Assembly’s pretrial diversion statute does not prevent this Court from acting against

Respondent's license pursuant to Court Rule and SCR 3.166 does not provide any exception for Alford pleas or for diversion agreements." The court granted the Kentucky Bar Association's request to enter Haggard's immediate suspension.

IV Terms of Diversion Agreement

Once enrolled in a pretrial diversion program, participants must comply with whatever terms have been set. NAPSA Standards state that service plans – the terms set for successful completion of diversion – should be specific to the needs of the participant and be the least restrictive necessary to achieve program goals.¹³ In the first two cases summarized below, the courts strike down efforts to impose more restrictive terms. In the third case, the court considered whether the legislature can impose minimum terms in every case, or whether the prosecutor should retain the discretion to set the terms on a case-by-case basis.

Petty v. City of El Dorado, 19 P.3d 167 (2001)

Issue: Can a participant be required to serve a short jail term as part of a pretrial diversion contract?

Ruling: Requiring a jail term violates the intent of the Kansas legislature in authorizing the pretrial diversion program.

Court: Supreme Court of Kansas

The city of El Dorado, Kansas established a pretrial diversion program for first time DUI offenders. Those participating in the program have several requirements authorized by state statute (K.S.A. 12-4416(a)). The city later added an additional requirement not addressed in the statute – that participants serve either 48 or 72 hours in the county jail, with the number of hours dependent upon the person’s blood alcohol level at the time of arrest.

When Melissa Petty was arrested and charged with DUI, as a first offender she was offered the opportunity to participate in the pretrial diversion program. She agreed and signed a contract requiring her to perform community service, enroll in an alcohol safety program, and pay a fee – all of which are statutorily-authorized conditions. She was also required to serve 48 hours in jail, to be served within 120 days of the diversion agreement. Petty successfully completed all the other requirements, but then challenged the requirement that she serve the jail term. In doing so, she argued that requiring a jail term violates the legislature’s intent for pretrial diversion, which is rehabilitation rather than punishment.

The trial court agreed, and ordered that Petty did not need to serve the term. The court also, however, declared the entire diversion agreement void – relying on equitable estoppel and general principles of contract law, which holds that no party to an illegal agreement can continue to enjoy the benefits of the agreement. The city appealed the ruling pertaining to the jail term and Petty counter-appealed the ruling pertaining to the voiding of the diversion agreement.

As to the legality of the jail term requirement, the Kansas Supreme Court held that it did violate the legislative intent. After reviewing the legislative history of the diversion statute, the court

¹³ Supra note 1, Standards 4.2 and 4.3.

concluded: “A diversion agreement is the specification of formal terms and conditions which a defendant must fulfill in order to have the charges against such a defendant dismissed. Diversion is, therefore, a means to avoid a judgment of criminal guilt. Inasmuch as no judgment of guilt is entered when diversion is granted, the district court was correct in finding that the municipal court judge had no authority to order Petty to a period of jail confinement as a condition of diversion.”

As to the second issue, the voiding of the diversion agreement, the Supreme Court, citing contract law, stated that “it is the duty of the courts to sustain the legality of contracts in whole or in part when possible.” The court concluded that the trial court erred in voiding the diversion agreement.

Frederick v. Justice Court, 47 Cal.App.3d 687 (1975)

Issue: Does the court have the inherent power to add as a condition to its order of diversion an express waiver of a participant’s fourth amendment search and seizure rights?

Ruling: The court exceeded its authority in imposing that condition.

Court: Court of Appeal of California, Second Appellate District

In placing Robert Frederick into a drug diversion program, the trial court imposed as a condition that Frederick waive his right to be free from search and seizure without probable cause. Specifically, the court ordered that Frederick permit his person, residence, automobile and possessions to be inspected and searched for contraband at any time by his probation officer or any law enforcement officer without prior notice. Frederick appealed.

The court of appeals noted that other appellate courts in the state have ruled that since the diversion alternative is completely statutory in nature, neither the court nor the district attorney may deviate from it in any way. In one of those cases, it was ruled that the district attorney does not have the authority to add four conditions to the statutorily-defined eligibility for diversion. *People v. Fulk*, 39 Cal.App.3d 851. In another case, an appeals court held that the trial court erred in liberalizing the statutory eligibility criteria. *People v. Cina*, 41 Cal.App.3d 136.

The court concluded that the “situation presented in this case is much like the ones presented in the foregoing cases. The statutes authorizing diversion require that defendants in certain narcotic or drug abuse cases waive, as a condition to having their criminal cases diverted, one constitutional right – the right to a speedy trial. Respondent court here added as a condition to a diversion....a waiver of a second constitutional right – the right to be free from unreasonable searches and seizures. This it had no power to do with respect to a program wholly the creature of statute and unknown to the common law.”

Polikov v. Neth, 699 N.W. 2d 802 (2005)

Issue: Does it interfere with the prosecutor’s authority under separation of powers for the legislature to establish minimum conditions for the completion of pretrial diversion?

Ruling: While the prosecutor has authority over the charging decision, the legislature has the responsibility, under separation of powers, to define crimes and punishment.

Court: Supreme Court of Nebraska

In 1979, the Nebraska legislature enacted a statute (Neb. Rev. Stat. §§ 29-3601 through 29-3609) that specifies that county attorneys (as prosecutors are called in that state) have the authority to establish pretrial diversion programs, and have wide discretion in the operation of those programs. To assure fair treatment of the accused, however, the legislature placed some limits on that discretion, including: county attorneys must have written eligibility guidelines; defendants and their attorneys must have the opportunity to review program requirements before agreeing to participate in diversion; once in diversion, defendants must have the option of withdrawing from the program and returning to the court process; enrollment must not be conditioned upon a plea of guilty; and charges must be dismissed upon successful completion.

In 2002, the legislature amended this statute, creating a dichotomy between “minor traffic violations” and “criminal offenses.” The amendment addressed only those charged with the former and excluded from the definition of minor traffic offenses a number of traffic violations. It laid out several requirements if the county attorney decided to set up a diversion program for minor traffic offenders, including that the defendant complete an 8-hour driver’s safety program and that the fee charged must be approved by the state Department of Motor Vehicles. It also required the county attorneys to submit to the Department the names of all persons enrolled in the diversion program to assure that no person in the state be allowed to participate more than once in a three-year period.

The County Attorney from Sary County, Kenneth Polikov, challenged this amendment, arguing that it violated the separation of powers clause of the Nebraska Constitution. The trial court agreed and granted a permanent injunction forbidding the enforcement of the amendment. The Department of Motor Vehicles appealed to the state Supreme Court.

Before that court, Polikov argued that he is a member of the executive branch and that he, as county attorney, has the authority to design a pretrial diversion program as he sees fit. He argued that the restrictions placed on him by the amendment have prevented him from doing so. Specifically, he noted that prior to the amendment he was requiring defendants to complete four hours of driver training, as opposed to the eight hours required by the amendment. He also felt that there were times when, on a case-by-case basis, he might decide to let a defendant participate in the program more than once in a three-year period, and the amendment took that discretion away.

In addressing these arguments, the court acknowledged that prosecutorial discretion is an inherent executive power, and that prosecutors have the power “to choose to charge any crime that probable cause will support or, if the prosecutor chooses, not to charge the accused at all.” Included in that authority is the discretion to decide who should be offered the opportunity of diversion and who should be prosecuted. The court concluded, however, that “formal pretrial diversion does not represent a natural outgrowth of the charging function, but, rather, a

substantial change in the way that society responds to the challenge of crime. It is the legislative branch of government that is charged with defining crimes and punishments.” The court reversed the trial court decision, holding that the amendment was not an unconstitutional violation of the separation of powers clause.

V Dismissal

The outcome of a successful completion of diversion is the dismissal of the charge. As the cases described here attest, there are several difficult issues surrounding the dismissal of cases upon successful completion.

Consent of the prosecutor

Just as prosecutors play a significant role in the decision of whether to offer a defendant the diversion option, they also have a role in deciding whether, upon the participant's completion of the program, the case is ready for dismissal. The two cases summarized in this section, albeit with different fact circumstances, come to different conclusions about the prosecutor's role in dismissal.

State of Ohio v. Curry, 730 N.E.2d 435 (1999)

Issue: Can the court dismiss the charges upon completion of pretrial diversion without the consent of the prosecutor?

Ruling: The trial court violated separation of powers when it dismissed the case without the prosecutor's consent.

Court: Court of Appeals of Ohio, Ninth District

When Samuel Curry failed to complete restitution payments to the victim of a theft, as required as part of his pretrial diversion agreement, the prosecutor terminated the diversion. Curry, who had entered a guilty plea when enrolling in diversion, was scheduled for sentencing. At the sentencing hearing, Curry told the court that he would resume making restitution payments. The court continued the sentencing hearing for a month to give Curry more time to pay. At that second sentencing hearing Curry asked for more time, which was granted. Finally, five months after the original sentencing date, Curry appeared at sentencing with proof that he had completed his restitution payments. Rather than sentencing Curry, the court concluded that, since the restitution requirement was now fulfilled, Curry had completed diversion. The court vacated Curry's guilty plea and – over the objections of the prosecutor – dismissed the case. The state appealed.

The court of appeals cited Ohio Revised Code § 2935.36(D), which states: "If the accused satisfactorily completes the diversion program, the prosecuting attorney shall recommend to the trial court that the charges against the accused be dismissed, and the court, upon the recommendation of the prosecuting attorney, shall dismiss the charges." The court concluded that this wording "appears to condition the court's right to dismiss the charges on a recommendation by the prosecutor." Furthermore, the court noted that the sole matter before the trial court was the sentencing of the defendant on his guilty plea. The court ruled that "[t]he trial court violated the constitutional concept of separation of powers when it took the administrative and executive decision of whether to prosecute the defendant away from the prosecuting attorney

and terminated the prosecution without the consent of the prosecutor.” The court reversed the decision of the trial court and ordered that court to sentence Curry on the theft charge.

State of New Jersey v. Allen, 346 N.J. Super. 71 (2001)

Issue: Can the court dismiss the charges upon completion of pretrial intervention without the consent of the prosecutor?

Ruling: To compel the participant to stand trial after he had successfully completed the pretrial intervention program would be a denial of essential fairness.

Court: Superior Court of New Jersey, Appellate Division

After his arrest on forgery and fraud charges, but before his enrollment in the pretrial intervention (PTI) program, Christopher Allen was arrested on a marijuana possession charge in a different county. Prosecutors were unaware of this rearrest at the time of Allen’s enrollment in the intervention program, but learned of it one month prior to the time that Allen was scheduled to complete the program. Once Allen did successfully complete the program, prosecutors informed the court that they would object to a dismissal of the charges given the marijuana possession charge. The trial court, citing Allen’s successful completion of the program, dismissed the fraud and forgery charges over the objections of prosecutors.

On appeal, the State argued that the trial court erred in dismissing the case over the objections of prosecutors. The appeals court disagreed, stating that “such a case as this presents compelling circumstances to overcome the prosecutor’s objection. Here, defendant successfully completed the PTI program, acquired no new arrests during the PTI term, and as even the State acknowledges, fulfilled all the conditions of his supervisory treatment – including completion of fifty hours of community serves and payment of full restitution. He did so in good faith and in reliance on the expectation that there would be finality in his status at the end of his PTI term. On the other hand, during defendant’s twelve-month service in PTI, the State never moved for his termination from the program despite the ready availability of public record information concerning his unadjudicated arrest. The prosecutor’s belated withholding of consent therefore threatens to defeat defendant’s legitimate and reasonable expectations that, upon successful completion of PTI, his exposure to trial on the underlying charges would be at end.” In upholding the trial court’s ruling, the court held that compelling the defendant to stand trial now “would be a denial of essential fairness.”

Expunction of record

A number of state statutes explicitly authorize the expunction of the record of participants who have had their charge dismissed after successful completion of diversion. Other statutes are less clear on expunction. The cases summarized in this section involve both types of statutes.

Commonwealth of Pennsylvania v. Armstrong, 434 A.2d 1205 (1981)

Issue: Can the trial court deny a successful diversion participant's petition for expunction of the record?

Ruling: The court had to accept the petition because the government presented no information to indicate why the record should be retained.

Court: Supreme Court of Pennsylvania

Since Regina Armstrong was a first offender when she was arrested on a charge of theft by deception, prosecutors offered her the opportunity to participate in the state's pretrial diversion program – Accelerated Rehabilitative Disposition (ARD). She successfully completed the program and the charge against her was dismissed. A couple of months later, Armstrong petitioned the court to expunge her arrest record. In her petition, Armstrong noted that she needed the record expunged in order to be hired for a job that she had lined up that required that she have no prior record. Even though the prosecutor presented no information regarding the petition, the court denied it and Armstrong appealed. The appeals court affirmed the trial court's decision and the case went to the Pennsylvania Supreme Court.

That court noted that no information had been presented to suggest a state interest in retaining the record. Furthermore, the court concluded, to deny expunction would go against "the fundamental appeal of ARD for first time offenders [which] is the avoidance of a criminal record. Thus, to refuse expungement to those who successfully complete ARD would seriously deter participation in the program, undermine its rehabilitative purposes, and impose additional strain on the judicial system by eliminating prompt disposition of numerous minor charges." The court reversed the decision of the trial court and remanded the case to that court to expunge Armstrong's record.

Commonwealth v. Shouse, 183 S.W. 3d 204 (2006)

Issue: Should a participant who has successfully completed a pretrial diversion program have the arrest record expunged?

Ruling: It is clear that the legislature intended to allow persons who have successfully completed diversion to have their records expunged.

Court: Kentucky Court of Appeals

Under Kentucky law (KRS 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 is to set a hearing and allow the Commonwealth Attorney the opportunity to respond to the expunction request. In this case, the Kentucky Court of Appeals rejected an attempt by Commonwealth Attorneys to prevent a defendant who had successfully completed a pretrial diversion program from having his arrest record expunged.

After his arrest on a Class D felony, Orville Shouse entered a pretrial diversion program. The agreement he signed upon entering the program stated in part: "I understand that upon

successful completion of the terms and conditions of the Pretrial Diversion Program I may petition the court for expunction of the dismissed-diverted charge.” Shouse did successfully complete the program and the charge was dismissed. Three years later, Shouse moved to have the record expunged, which the court granted over the objections of Commonwealth Attorneys.

On appeal, Commonwealth Attorneys argued that allowing Shouse’s record to be expunged would undermine enforcement of the diversion statute, which allows a person to apply for pretrial diversion only once in every five years. If the record was expunged, they argued, there would be no way of knowing if Shouse were to apply for diversion a second time within the five year period. The court found no merit to this argument, noting that it is clear that the legislature, in passing KRS 431.076, intended that successful participants in pretrial diversion should have the ability to “wipe the slate clean.” “This legislative goal would be thwarted to a significant degree if a successful participant’s record were readily available to the public through court records.”

Hyatt v. Commonwealth of Kentucky, 17 S.W. 3d 121 (2000)

Issue: Is a participant whose case is dismissed after successful completion of pretrial diversion eligible to have his record segregated?

Ruling: It is clear that it was the intent of the legislature in establishing pretrial diversion that participants would have the opportunity to “wipe the slate clean.”

Court: Kentucky Court of Appeals

After William Hyatt successfully completed two years of a pretrial diversion program and his charges were dismissed, he moved to have the record of his arrest segregated, pursuant to KRS 17.142. That statute provides that law enforcement and public agencies in possession of arrest records shall segregate those records from records of convicted persons if the person: (1) is found innocent of the offense; (2) has had all charges relating to the offense dismissed; or (3) has had all charges relating to the offense withdrawn. Prosecutors objected, arguing that this statute was not intended to apply to charges dismissed as a result of participation in pretrial diversion. Rather, it applied only to cases where charges were dismissed due to innocence or insufficiency of evidence. The trial court agreed, refusing to order Hyatt’s arrest record segregated.

The court of appeals, in addressing the issue, reviewed the pretrial diversion statute. KRS 533.258 explains the effects of successful completion of diversion: “(1) If the defendant successfully completes the provisions of the pretrial diversion agreement, the charges against the defendant shall be listed as ‘dismissed-diverted’ and shall not constitute a criminal conviction. (2) The defendant shall not be required to list this disposition on any application for employment, licensure, or otherwise unless required to do so by federal law. (3) Pretrial diversion records shall not be introduced as evidence in any court in a civil, criminal, or other matter without the consent of the defendant.” The court concluded, based on this wording that “it is clear that the legislature intends for a successful pretrial diversion to, in effect, wipe the slate clean as to these charges....[I]n the absence of an express legislative directive to the contrary, we see no reason why a successful pretrial diversion participant is not entitled to qualify under KRS 17.142(1)(b).”

State of Minnesota v. J.Y.M., 711 N.W. 2d 139 (2006)

Issue: Can a person who entered a plea of guilty to a criminal charge and successfully completed a pretrial diversion program have his record expunged?

Ruling: Expunction of the record is not available.

Court: Minnesota Court of Appeals

The respondent in this case, J.Y.M., was charged with aiding and abetting theft and was admitted to the pretrial diversion program. As part of the admission process, J.Y.M. entered a plea of guilty. The trial court deferred acceptance of the plea while J.Y.M. was in the diversion program. Five months after J.Y.M. successfully completed the diversion program and the charge was dismissed he petitioned for expunction of the record under Minn. Stat § 609A.03 (2004) for “employment and license” purposes. The state opposed expunction on the ground that the case was not resolved in the respondent’s favor, a requirement under the statute. The district court concluded that the case was resolved in the respondent’s favor and that the interests of public safety did not outweigh the disadvantages to the respondent of not expunging the records. The state appealed.

On appeal, the respondent argued that since the district court deferred acceptance of the plea and the charge was ultimately dismissed, the case was resolved in his favor. In taking up this issue, the court of appeals noted that “the critical distinction in our analysis....turns on whether there has been an admission or finding of guilt.” Noting that it was indisputable that the respondent pled guilty, the court concluded that “the district court’s deferred acceptance of a valid guilty plea is not equivalent to a defendant not admitting guilt or pleading guilty to a criminal charge for purposes of the expunction statute.”

State of Ohio v. Andraserk, 2003-Ohio-32

Issue: Was the trial court correct in denying a person’s motion to have her record sealed after successfully completing pretrial diversion?

Ruling: Absent an overriding governmental need to maintain the record, the court must grant the request to have it sealed.

Court: Court of Appeals of Ohio, Eighth District

After her arrest for a fifth-degree felony, Rose Marie Andraserk was accepted into a pretrial diversion program. She successfully completed the program and her charge was dismissed. Shortly thereafter, Andraserk filed an application to have the record of her arrest sealed. The state declined to file an objection to this request. The trial court, in considering the request, asked the probation department to prepare a report on Ms. Andraserk. That report indicated that Andraserk had two misdemeanor convictions that had occurred prior to her enrollment in the pretrial diversion program. At a hearing on her application, the trial court noted that it had not been

aware of those two prior misdemeanor convictions, and had it been aware, it would never have referred the case to the diversion program. The court denied Andraserk's application, saying that "in the interest of society and the State of Ohio the government does have a legitimate governmental need to maintain these records and the court is not going to issue an order sealing these records." Andraserk appealed this ruling.

The court of appeals began its analysis by noting that it could only reverse the trial court's ruling if it determined that the trial court abused its discretion. "An abuse of discretion," stated the court, "implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable." Furthermore, the court noted that the burden of demonstrating that the interests in having the record sealed is equal to or greater than the government's interests in maintaining it. The court pointed out that Andraserk demonstrated a strong interest in having the record sealed – that as a single mother who has struggled with alcoholism but been gainfully employed, she hoped to better her employment prospects and advance her career. The court concluded that the presence of two prior misdemeanor convictions was "outweighed by Andraserk's demonstrated economic and career interest in having the felony record sealed....Absent a demonstration of an overriding governmental need to maintain the felony record, we conclude that the trial court abused its discretion in not sealing the record."

Texas Department of Public Safety v. Solis, 2005 Tex. App. LEXIS 9553

Issue: Was trial court correct in expunging arrest record of a person after completing pretrial diversion?

Ruling: Since there was no evidence that the charge was dismissed due to lack of probable cause there was no basis for expunging the record.

Court: Court of Appeals of Texas, Fourth District

Oscar Solis was charged with the felony of accident involving injury/death. He was entered into and successfully completed a pretrial diversion program and the charge was dismissed. The trial court then granted his motion to have the record expunged. The Texas Department of Public Safety challenged this ruling.

Citing statute, the court of appeals noted that to be eligible for expunction when criminal charges are dismissed, the petitioner must show that the reason for the dismissal of the charges was that they were brought by "mistake, false information, or other similar reason indicating absence of probable cause..." Tex. Code Crim. Proc. Ann. Art. 55.01(a)(2)(A)-(C). The court concluded that dismissal of charges due to completion of a pretrial diversion program does not meet this requirement. The court reversed the trial court's expunction order.

Double jeopardy

Double jeopardy protects against a second prosecution for the same offense. The following three cases show the issues facing the courts regarding double jeopardy and pretrial diversion.

State of Ohio v. Urvan, 446 N.E.2d 1161 (1982)

Issue: Does it violate double jeopardy to prosecute defendant in one county after he successfully completed pretrial diversion in another county for an offense that spanned both counties?

Ruling: When the first county brought charges and admitted defendant into pretrial diversion, it was acting as the agent for the state on the charges and no other county can subsequently bring charges.

Court: Court of Appeals of Ohio, Eighth Appellate District

After a lengthy investigation, detectives determined that Steven Urvan was stealing products from his employer in Medina County and then selling them in Cuyahoga County. He was arrested and charged in Medina County with receiving stolen property. He was enrolled in that county's pretrial diversion program. Several weeks after he had successfully completed pretrial diversion and the charge against him nolled, prosecutors in Cuyahoga County filed grand theft charges. Urvan moved the court in Cuyahoga County to dismiss the charge on double jeopardy grounds. The court refused and Urvan appealed.

The appeals court reviewed the pretrial diversion agreement and pointed to one section as being particularly significant: "As final terms of this contract, I have been assured by all signers of this document that successful fulfillment of the terms outlined above will result in nolle of the charges specified herein. Further, it is my understanding that required journal entries and court proceedings will be handled within 30 days of program completion, and at no time thereafter will I be subject to arbitrary prosecution or additional court appearances on charges covered by this agreement." The court also pointed out that the agreement mistakenly listed the charges as receiving stolen property and grand theft, whereas he was only charged in Medina County with the former.

The court concluded that by acting as it did to charge and then divert the defendant, Medina County "preempted venue and jurisdiction for the whole matter." Moreover, "[i]f pretrial diversion programs are to be effective, the state must live up to its agreements. It cannot avoid its obligation by splitting responsibilities between its agencies and pretending that it acts disparately. What it knew and did in Medina County through its agent it knew in legal contemplation in Cuyahoga County and was bound in both places by applicable federal and state constitutional principles." The court reversed the trial court and discharged the defendant.

Ragard v. U.S., 439 F.3d 1378 (2006)

Issue: Can a member of the U.S. Military be court martialled for the same behavior for which he was placed in and successfully completed pretrial diversion in a local court?

Ruling: Nothing in the diversion agreement bars the U.S. Army from bringing court martial proceedings.

Court: U.S. Court of Appeals for the Federal Circuit

Lawrence Ragard was a captain in the U.S. Army when he was arrested in the District of Columbia for indecent exposure. He was placed in the pretrial diversion program. He successfully completed the diversion program and the charge was dismissed. While he was still in the diversion program the U.S. Army began court martial proceedings against Ragard, charging him with sodomy, conduct unbecoming an officer, and commission of an indecent act. Ragard moved to have the charges dismissed, claiming that they were barred by the diversion agreement. The motion was denied, and Ragard ultimately pled guilty and was dismissed from the army.

On appeal, the U.S. Court of Appeals for the Federal Circuit rejected Ragard's argument. "Nothing in the diversion agreement even suggests, let alone provides, that performance of the agreement will bar the Army from court martalling Ragard for conduct that violates the Uniform Code of Military Justice," stated the court. "The agreement purports to deal only with the pending District of Columbia criminal proceeding, not with other criminal proceedings that might be brought by some other entity."

City of Cleveland v. Kilbane, 2000 Ohio App. LEXIS 923

Issue: Can the court place a defendant in a pretrial diversion program over the objections of the prosecutor?

Ruling: Since the defendant had already completed the pretrial diversion program and the charge was dismissed, the appeals court could offer no relief to the prosecutor due to double jeopardy.

Court: Court of Appeals of Ohio, Eighth District

Prosecutors objected when the trial court ordered Timothy Kilbane to be enrolled in a pretrial diversion program known as the Selective Intervention Program. As part of that program, Kilbane was ordered to attend Alcoholics Anonymous meetings and participate in a batterer's intervention program. When Kilbane completed the requirements of the program and the court entered a nolle in the case, prosecutors again objected.

On appeal, prosecutors argued that the trial court erred when it placed the defendant in the pretrial diversion program over their objections. The court of appeals could not address this issue, however, holding that, since Kilbane had completed the requirements of diversion and the case was dismissed, "[t]his court can no longer afford any relief to the prosecution. Double jeopardy prohibits further prosecution." The appeal was dismissed as moot.

Full faith and credit

Article IV, Section 1 of the United States Constitution reads: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other state." In the case below, the court in one state had to determine how to count a dismissal due to diversion from another state.

People v. Laino, 87 P.3d 27 (2004)

Issue: Must California give full faith and credit to the Arizona judgment to dismiss a criminal case upon successful completion of diversion and thus decide, under Arizona law, whether the defendant suffered a prior conviction for the purposes of California's three strikes law?

Rulings: The full faith and credit clause does not bar California courts from deciding this issue under California law. Under California law, the defendant did suffer a conviction.

Court: Supreme Court of California

Under California's "three-strikes-and-you're-out" habitual offender law, a person who has a conviction for a crime of violence and is then convicted of any subsequent felony is to be sentenced to twice the term he or she would otherwise receive. Cal. Penal Code § 667. In this case, James Laino pleaded guilty to grand theft from an elder, a felony. A controversy arose over the outcome of a previous case from Arizona. In that case, Laino pleaded guilty to aggravated assault with a handgun after assaulting his wife. The court accepted the plea but deferred entry of judgment. Laino was placed into the Pima County Adult Diversion Domestic Violence program, with the understanding that if he complied with the conditions of the program the charge would be dismissed. Laino did complete the diversion program and the charge was dismissed.

Upon his grand theft conviction in California, as the court was seeking to determine Laino's status under Cal. Penal Code § 667, Laino argued that the Arizona case should not count as a conviction because the charge was dismissed. The trial court agreed, the government appealed, and the appeals court reversed. The case then went to the California Supreme Court.

Laino asked the supreme court to give full faith and credit to the Arizona court's judgment of dismissal, which, under Arizona law, prevents a guilty plea from being used to enhance a sentence under that state's habitual offender law. The court declined to do so after a lengthy review of cases relating to the full faith and credit clause of the U.S. Constitution. Article IV, Section 1. "[T]here is general agreement that the full faith and credit clause....does not prevent a state from (1) enhancing a sentence based on an out-of-state conviction for which the defendant has been pardoned; and (2) determining under its own laws whether a guilty plea in another jurisdiction constitutes a prior conviction. In either instance, the treatment accorded by a sister state to a judgment or other criminal proceeding does not preclude our state from using that judgment or proceeding to enhance a sentence under our habitual criminal statutes."

Laino also argued that the Arizona case should not be counted as a conviction because the Arizona diversion statute, Arizona Revised Statutes §13-3601, former subdivision (H), is akin to California's deferred entry of judgment statute for drug offenders. Under that statute, a guilty plea, upon successful completion of the diversion program, "does not constitute a conviction for any purpose." Cal. Penal Code § 1000.1, subd. (d). The court rejected this argument as well, stating that "California has limited this statutory benefit to certain nonviolent drug offenders and....has specifically excluded such a benefit where the offender has committed a crime

involving domestic violence.” The court ruled that Laino’s plea of guilty to aggravated assault in Arizona constitutes a prior conviction under California’s three strikes law even though the charge was ultimately dismissed.

Dismissal and Subsequent Employment Opportunities

One of the goals of pretrial diversion is to provide an individual who has been charged with a criminal offense the opportunity to have the charge dismissed so as not to hinder future employment prospects. As the next two cases show, there can be negative implications for employment even after successful completion of diversion and dismissal of the charge.

State of Florida v. Dempsey, 916 So.2d 856 (2005)

Issue: Can a participant who has successfully completed pretrial diversion and had the charges dismissed later have the dismissal vacated and the charges reinstated, based on her misunderstanding of how her dismissal would be interpreted by potential employers?

Ruling: There is no legal basis on which the courts can vacate a dismissal after completion of pretrial diversion.

Court: Court of Appeals of Florida, Second District

In 1995, Twanna Dempsey was charged with exploitation of the elderly, abuse of the elderly, and grand theft. She entered a pretrial intervention program, successfully completed the program, and the charges were dismissed. Afterwards, Dempsey went back to school, completing a degree in education and becoming certified as a school teacher. She was rejected for employment by several school districts, which viewed her participation in the pretrial intervention program as an admission of guilt. As a result, in 2004 Dempsey moved the court to set aside the pretrial intervention agreement, vacate the dismissal, and reinstate the charges against her. In her motion, she claimed that she misunderstood her pretrial intervention contract with the prosecutor, and the dismissal of her charges was “ambiguous” and should be deemed void because third parties did not recognize the dismissal. Prosecutors opposed this motion arguing that they could not be returned to their pre-contract status since they did not have a victim and after such a long interlude their ability to prosecute the case was severely hampered. The trial court sided with Dempsey and ordered the dismissal vacated.

While it noted that it sympathized with Dempsey’s plight, the court of appeals ruled that “there is no legal basis upon which the trial court’s ruling may be upheld.” The court referred to the pretrial intervention agreement that Dempsey had signed years earlier. That agreement stated: “The person who is the subject of a criminal history record that is expunged may lawfully deny or fail to acknowledge the arrests covered by the expunged record, except when the subject of the record is seeking to be employed or licensed by the Office of Teacher Education, Certification, Staff Development, and Professional Practices of the Department of Education, any district school board, or any local governmental entity that licenses child care facilities.” Thus, the court concluded that Dempsey “cannot maintain that she mistakenly thought her record would be wiped clean.” As to her claim that third parties do not recognize the dismissal, the

court held that that has no bearing on the validity of the pretrial intervention agreement she signed since those parties were not parties to the agreement. The appeals court reversed the trial court's order.

Staten v. Dean, 464 S.E. 2d 576 (1995)

Issue: Does West Virginia law bar a former police officer from reinstatement to the police department after successfully completing a pretrial diversion program?

Ruling: Eligibility for reinstatement is governed by events that were extant at the time of the resignation – after the indictment - and not at the time of the reinstatement request – after the completion of pretrial diversion.

Court: Supreme Court of West Virginia

Kenneth Staten was a police officer in Huntington, West Virginia when he was indicted in federal court for mail fraud. He entered a pretrial diversion program. One of the terms of the diversion agreement was that he resign his position with the Huntington Police Department. Staten did resign and successfully completed the diversion program, leading to the dismissal of his charge. Staten then applied for reinstatement with the police department. Huntington Mayor Jean Dean refused the reinstatement request, and Staten filed suit against the mayor. The trial court ordered Dean to reinstate Staten. Dean appealed this decision to the West Virginia Supreme Court.

That court noted that state law makes it clear that a police officer who resigns in the face of charges of misconduct or misfeasance is ineligible for reinstatement. (W. Va. Code 8-14-12.) Staten had argued that this statute does not contemplate situations like his, where the charge was dismissed based on successful completion of pretrial diversion. The court rejected this argument. "We hold that under W. Va. Code 8-14-12, eligibility for reinstatement to a municipal police department is governed by events that were extant at the time of the resignation and not at the time of the reinstatement."

VI Failure to Complete Diversion

This chapter addresses the legal issues that arise when participants fail to complete the terms of their diversion agreements.

Rearrest

A standard term of a pretrial diversion agreement is that the participant abide by all laws. Many agreements state that a rearrest is grounds for termination. The first case in this section addresses termination in light of a rearrest. The remaining three cases relate to sentence enhancements arising out of a rearrest while on diversion.

State of Wisconsin v. Dawber, 659 N.W. 2d 507 (2003)

Issue: Does a finding of probable cause at the initial appearance establish sufficient grounds to terminate diversion of a participant who had as a diversion condition not to violate any criminal law.

Ruling: The finding of probable cause was sufficient.

Court: Wisconsin Court of Appeals

One of the conditions of diversion placed on Russel Dawber stated: “To commit no further violations of state or federal criminal law. For the purposes of this agreement a ‘violation’ will be found if a court of law finds probable cause to believe that the defendant has committed an offense.” While on diversion, Dawber was rearrested on new charges, these involving a family dispute. At his initial appearance on those charges, the court found probable cause but agreed with the defense attorney to hold in abeyance any decision regarding termination of the diversion agreement. Dawber went to trial on the new charges and, while the jury was deliberating, the court granted a motion by the prosecutor to terminate the diversion based on the rearrest. The jury then returned verdicts of not guilty. Dawber challenged the decision to revoke his diversion on several grounds, including due process, equal protection, the acquittal, and the state’s failure to establish at a hearing that a violation occurred.

In taking up these challenges, the Wisconsin Court of Appeals noted that “the question is whether Dawber violated the condition in this agreement relating to violation of criminal law.” The court agreed with Dawber that the definition of a violation was ambiguous, given the different standards that exist for “probable cause.” The court concluded, however, that the issue of the meaning of probable cause could not be addressed at the trial court level because Dawber never requested an evidentiary hearing when the prosecutor moved to revoke Dawber’s diversion. “Because Dawber never asked the court for an evidentiary hearing or presented an argument that would necessitate an evidentiary hearing to resolve factual issues, we conclude that the trial court did not err in failing to hold an evidentiary hearing. Without an evidentiary hearing, we are unable to resolve the arguments concerning the construction of ambiguous terms in the agreement that Dawber asks us to resolve.”

Alternatively, Dawber argued that it offends due process to apply a probable cause standard to establish a violation because that standard, however defined, is too low. He pointed to his ultimate acquittal on the rearrest charges as evidence of why the standard is too low. “However,” the court concluded, “the diversion agreement plainly does not require conviction of a crime for revocation but provides a lesser standard. Dawber does not provide any authority or argument grounded in due process jurisprudence that would support the invalidation of the condition to which he agreed solely because it did not require conviction of a crime.”

Christmas v. State of Indiana, 812 N.E.2d 174 (2004)

Issue: Is a defendant who has been granted a “withhold prosecution” disposition on pretrial release for the purposes of sentence enhancements for violating the terms of the “withhold prosecution” agreement by being rearrested?

Ruling: A defendant on “withhold prosecution” status is on pretrial release.

Court: Court of Appeals of Indiana

Ricki Christmas was arrested for trespassing and entered into an agreement in the Franklin City Court to withhold prosecution. Under the terms of that agreement, the trespassing charge would be dismissed if Christmas did not commit any new offense during the next two years. Christmas was rearrested, for resisting law enforcement, during the two-year period. He was subsequently found guilty of both the trespassing and the resisting law enforcement charges.

The trial court ordered that the sentence for the resisting law enforcement charge be served consecutively to the sentence for the trespassing charge. In doing so, the court relied upon Indiana Code, Section 35-50-1-2(d), which reads: “[i]f, after being arrested for one crime, a person commits another crime (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or (2) while the person is released (A) upon the person’s own recognizance; or (B) on bond; the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences imposed.” Christmas appealed, claiming that his “withhold prosecution” status was not the same as being released on personal recognizance or bond.

The Indiana Court of Appeals, in rejecting this argument, noted that “the General Assembly has determined that a person’s criminal actions merit enhanced punishment when the person commits a criminal act during a time when that person has another criminal matter which remains ongoing.” Since the terms of the “withhold prosecution” agreement require the resumption of prosecution if the agreement is violated, the charge remains open. Therefore, the court ruled, Christmas was on either personal recognizance or bond when arrested on the new charge, and the consecutive sentence was appropriate.

People of California v. Ormiston, 129 Cal.Rptr.2d 567 (2003)

Issue: Is a participant in pretrial diversion also on pretrial release for the purposes of sentence enhancements for rearrest while on pretrial diversion?

Ruling: An order of diversion is neither a release on bail or on own recognizance, thus sentence enhancements do not apply.

Court: Court of Appeals of California, First Appellate District

Michael Ormiston arrested on a new charge while he was enrolled in a pretrial diversion program. When he was found guilty of the rearrest charge he was sentenced according to Penal Code § 12022.1, which prescribes a mandatory two-year prison sentence enhancement where the defendant commits a second offense while “released from custody on a primary offense.” A primary offense is defined as one “for which a person has been released from custody on bail or on his or her own recognizance prior to judgment becoming final,...” Ormiston appealed on the grounds that he was not on bail or his own recognizance while enrolled in diversion.

In addressing this challenge, the appeals court noted that the sole issue at a bail or own recognizance hearing is the defendant’s appearance in court. Diversion, on the other hand “does not seek to assure appearance at subsequent criminal proceedings....Not only are criminal proceedings suspended, but the accused is required to enter a guilty plea, and formal judgment is deferred.” The court concluded that “[t]he legal effect of diversion is not the release of the defendant, but instead the suspension of criminal proceedings while the diversion program continues. In fact, according to the diversion order appellant’s bail was exonerated, such as occurs as a matter of law when judgment is pronounced or probation is granted.”

Jameson v. Commonwealth of Kentucky, WL 387861, Ky.App. (2005)

Issue: Is a participant in pretrial diversion “awaiting trial” for the purposes of Kentucky law requiring consecutive sentences for defendants who are rearrested while having a pending case?

Ruling: A participant in pretrial diversion status is awaiting trial for this purpose.

Court: Court of Appeals of Kentucky

Michael Jameson was on pretrial diversion when he was rearrested for a similar offense. One of the conditions of the pretrial diversion was that he not be rearrested. Prior to his diversion placement for the initial charge, Jameson entered a plea of guilty. When he violated diversion by being rearrested, diversion was terminated and the guilty plea was entered. Before sentencing on the initial charge, Jameson pled guilty to the rearrest charge. At sentencing for both convictions, the court imposed ten years imprisonment on the second charge and five years on the first, with the sentences to be served consecutively.

In doing so, the trial court relied upon a Kentucky statute (KRS 533.060(3)), which provides that: “When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial,

the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which the person is awaiting trial.”

Jameson appealed, arguing that with his status in pretrial diversion he was not awaiting trial. Considering the argument, the court concluded, “[b]ecause a violation of his pretrial diversion would have led to the voiding of his pretrial diversion agreement and sentencing pursuant to his plea agreement, we believe that pretrial diversion status must be construed as “awaiting trial.” The court affirmed the sentences.

Termination for prior criminal record

Many pretrial diversion programs are designed exclusively for first-time offenders. The case that follows addresses what should happen when prosecutors later learn that a pretrial divertee does have a prior criminal record.

Commonwealth of Pennsylvania v. Boos, 620 A.2d 485 (1993)

Issue: Can a defendant who is admitted to a first-time offender diversion program with the understanding that he had no prior criminal record be terminated after it is learned that he does have a record?

Ruling: The defendant was not eligible for participation in the program, so he could be terminated.

Court: Supreme Court of Pennsylvania

Three months after Drew Boos was arrested and charged with driving under the influence the district attorneys office sent him a letter instructing him to report to court for the purpose of having his charge diverted. The letter also explained that the diversion program was for first time offenders only. Boos appeared for the hearing and was placed in the pretrial diversion program under a local administrative procedure that allows individuals to be admitted to the program on a contingent basis pending completion of a full criminal record check. After Boos had begun the program it was learned that he had one prior conviction in Federal court and one driving under the influence conviction from Texas.

On the basis of this information, prosecutors filed a petition to terminate Boos from the program. The trial court granted that petition. Boos asked the court to reconsider that decision, which the court did, this time re-instating Boos in the diversion program. In doing so, the court relied upon a Pennsylvania Supreme Court case that held that an otherwise ineligible defendant who was nonetheless admitted to the diversion program cannot be terminated from the program once he has completed some of the conditions. (*Commonwealth v. McSorley, 485 A.2d 15 (1984).*) The government appealed.

The Pennsylvania Supreme Court held that the situation in the instant case differed from that in *McSorley*. “The defendant in *McSorley* was not found to have withheld information of his prior convictions, and his admission into the program was the result of what the Superior Court

characterized as the district attorney's office acting inadvertently. Neither factor was at work in this case." In overturning the trial court's decision to re-instate Boos to diversion, the court noted that Boos "knew that he did not qualify but attempted, nevertheless, to benefit from the program by concealing his prior convictions."

Diversion termination timing

The duration of the diversionary period is specified in the pretrial diversion agreement that the participant and prosecutor sign. The two cases summarized below show how courts have responded when termination takes place after the diversionary period expires.

United States v. Harris, 376 F.3d 1282 (2004)

Issue: Did the prosecutor violate the terms of pretrial diversion by bringing prosecution after the 12-month diversion period was over?

Ruling: The government could properly prosecute the participant after the 12-month diversionary period when it did not receive notice of a violation until near the end of the period.

Court: U.S. Court of Appeals for the Eleventh Circuit

Charles Harris was charged in U.S. District Court with fraudulent use of a Social Security number. On February 27, 1997, he was admitted into a 12-month pretrial diversion program. The first condition listed in his diversion agreement was: "You shall not violate any federal, state, or local law. You shall immediately contact your pretrial diversion supervisor if arrested and/or questioned by any law enforcement officer."

On February 10, 1998, the U.S. Attorney sent a letter to Harris stating that it had learned that he had been arrested the previous September on numerous drug charges, in violation of his pretrial diversion agreement. He was given 14 days to respond. When he did not respond, the government moved to proceed to trial on March 20, 1998 – 23 days after the 12-month diversion supervision period ended. Harris filed a motion in the trial court to dismiss the charge based on the fact that the diversion period was over. The court denied the motion and Harris was found guilty by a jury. Harris appealed.

Before the appeals court, Harris argued that bringing prosecution after the end of the 12-month diversionary period was a violation of the diversion agreement. As support, he cited a provision of that agreement, which read: "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 12 months....The United States Attorney may at any time within the period of your supervision initiate prosecution for these offenses should you violate the conditions of this supervision."

The court noted that Harris failed to address a second provision of his pretrial diversion agreement, which read: "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 offenses will be instituted in this District, and any indictment or information will be discharged.”

The court concluded that the second provision “explicitly envisions that the government retains its rights to prosecute Harris if it does not receive a favorable ‘pretrial diversion report’ from his program supervisor ‘upon completion of the period of supervision.’ Accepting Harris’s argument would render meaningless the language of the second provision because the government could not possibly receive such a favorable report of compliance until *after* the 12-month period had concluded.” The court held that the government did not violate the terms of the pretrial diversion agreement, and upheld Harris’s conviction.

Alder v. State of Tennessee, 108 S.W.3d. 244 (2003)

Issue: Can the court initiate judicial diversion revocation proceedings after the diversionary period is over?

Ruling: The revocation must be initiated during the diversionary period by the filing of a revocation warrant or by the filing of the state’s petition to revoke.

Court: Court of Criminal Appeals of Tennessee

On September 29, 1997, Shana Alder pled guilty to vehicular homicide. The court placed her in judicial diversion for three years. On August 23, 2000, a little over a month before Alder’s period of judicial diversion was set to expire, court officers filed a violation report with the court, stating that Alder had positive drug test results in June and July 2000. The court set a hearing for September 15, 2000. Alder was sent a letter directing her to appear at the hearing, but the letter did not state that a violation report had been filed. Alder appeared and the case was continued until November 3, 2000. Again, there was no indication in the record that Alder had been informed of alleged violations. On the November 3 hearing, the trial court revoked Alder’s judicial diversion, entered a judgment of conviction, and sentenced Alder to three years of probation. Alder did not appeal this decision at the time. However, several months later, when a probation violation warrant was issued for Alder, she filed a motion to dismiss the warrant arguing that that the judgment of conviction against her was void because it was entered after the diversionary period had ended. The court denied this motion and Alder appealed.

On appeal, the state argued that the trial court has continuing jurisdiction until it entered an order terminating judicial diversion. The court disagreed, stating that [i]f this were correct, the trial court could retain jurisdiction indefinitely and revoke diversion years after the expiration period, provided the infraction occurred during the diversionary period.” The court concluded that revocation must be initiated during the diversionary period by the filing of a revocation warrant or of the state’s petition to revoke. The filing of a violation report, the court ruled, is not sufficient. The court voided the trial court’s revocation of judicial diversion and resulting sentence.

Right to a diversion termination hearing

NAPSA Diversion Standards say that a participant facing termination should have “a mechanism” to challenge the termination. The six courts in the cases summarized below split on whether due process requires that a participant have a hearing to challenge a termination decision. In several of these cases, the diversion participants argued that diversion termination is analogous to probation revocation proceedings, and thus the same rights should be afforded. The courts split on this issue as well.

State of Washington v. Marino, 674 P.2d 171 (1984)

Issue: Does a participant in pretrial diversion have a due process right to a hearing to review a prosecutor's decision to terminate pretrial diversion?

Ruling: The participant has a right to a hearing at which the court must find the decision reasonable based on the preponderance of the evidence of a violation.

Court: Supreme Court of Washington

Mark Marino was charged with assaulting the four-year-old daughter of his fiancée, and was placed in a pretrial diversion program. Prosecutors notified Marino that his diversion was being revoked and prosecution recommenced due to his non-compliance with program requirements. Marino moved the trial court to set aside the diversion termination. The trial court held an evidentiary hearing on the revocation decision and concluded that there were reasonable grounds for the prosecutor's decision. The court, however, did not state on the record what those reasons were.

On appeal to the Washington Supreme Court, Marino relied upon a probation revocation case (*State v. Lawrence*, 28 Wn. App. 435, 624 P.2d 201), which held that the revoking court must determine (1) whether the conditions were violated and (2), if so, whether the violation warrants termination. The supreme court rejected the analogy of probation to pretrial diversion for two reasons: “First, the court has direct supervisory powers over a convicted person's probation, including its conditions and length. It follows, therefore, that the court must have primary control over reimposition of sentence. But under a diversion agreement, the prosecutor establishes the conditions and supervises the program. The court's role is less direct, consisting primarily of assuring procedural regularity throughout the criminal justice process. Second, the consequences of probation revocation are more serious to a defendant than termination of deferred prosecution to an accused. Following diversion termination, the accused still has the opportunity to clear him or herself of the charges at trial.”

Still, the court concluded that a participant facing revocation of pretrial diversion has a due process right to a hearing. At that hearing, “the court's review of a prosecutor's termination decision should consist of assessing its reasonableness in light of the facts the trial court determines at hearing,” and should be based on the preponderance of the evidence. In this case, the court found that while the trial court did not state the reasons for concluding that the

prosecutor had reasonable grounds to terminate, it was clear from the record of the hearing that such reasons existed. The court affirmed the decision to terminate diversion.

State ex rel Harmon v. Blanding, 644 P.2d 1082 (1982)

Issue: Is the court required to hold a hearing when the prosecutor decides to terminate diversion for non-compliance?

Ruling: While a hearing may not be necessary, the court must confirm that the prosecutor has made a finding of non-compliance, that the prosecutor has a reasonable basis for that finding, and that the prosecutor has terminated diversion.

Court: Supreme Court of Oregon

After being arrested and charged with theft, the defendant entered into a pretrial diversion agreement with the prosecutor. Part of the diversion agreement read: “at any time prosecution may be resumed at the sole discretion of the State upon filing written notice thereof with the court and serving a copy thereof upon the defendant through his attorney, said notice to specify the reasons for resuming prosecution.” Two months later, the prosecutor sent such a termination notice to the court and the defendant. The defendant filed a motion requesting a hearing on the termination. The motion was denied and the defendant appealed to the Oregon Supreme Court.

The supreme court noted that the statute governing pretrial diversion places “the responsibility for offering and terminating diversion in the district attorney. The responsibility assigned to the court is largely passive; the court holds proceedings in abeyance during the course of diversion, dismisses proceedings upon successful completion of diversion or resumes proceedings in the event of termination or unsuccessful completion.” ORS 135.881 to 135.901. Further, the court noted, the statutes do not require the court to find that the defendant failed to comply with diversion requirements, rather that authority is specifically provided to the prosecutor.

Based on its review of the statutes, the court held that “an evidentiary hearing for judicial fact finding....is not required, but some lesser procedure adequate for a fair determination of the existence of the requisite facts must be provided. If the district attorney notifies the court and the defendant that he has found non-compliance and has terminated diversion and the defendant makes no challenge, the court may resume the proceedings without further inquiry. If the existence of findings or termination is disputed, however, the court may follow such procedures as will enable it to fairly determine the existence of the two requisite facts (that the prosecutor has found non-compliance and has terminated diversion). That may be by submissions or testimony or in some other form appropriate to the nature of the case.” The court remanded the case to the trial court to provide such procedures.

Wood v. United States, 622 A.2d 67 (1993)

Issue: When a defendant is terminated from diversion after it was learned that he made a false statement on his diversion application, does the defendant have the right to a hearing on his termination?

Ruling: The defendant did not have the right to a hearing.

Court: Court of Appeals of the District of Columbia

After his arrest for simple assault, Warren Wood was accepted into the pretrial diversion program. Upon enrollment, Wood signed a pretrial diversion agreement that stated that diversion would be terminated and the charge reinstated if he had made any false statements in his diversion application or if he violated the terms of the diversion. Prosecutors thereafter determined that Wood had made a false statement in connection with his application for diversion, and Wood was terminated from the program. Wood filed a motion with the court to dismiss the charge against him, or, in the alternative, order his reinstatement in the diversion program. The court denied the motion and Wood appealed.

Wood argued that he had a right to a hearing on his termination on due process grounds. He cited two U.S. Supreme Court cases that gave parolees (*Morrissey v. Brewer*, 408 U.S. 471) and probationers (*Gagnon v. Scarpelli*, 411 U.S. 778) facing revocation the right to a hearing to verify the facts before revocation, and claimed that these rulings should apply to diversion terminations as well. The court disagreed, stating that there is a fundamental difference between parole and probation revocations and diversion terminations. Both parolees and probationers, stated the court, have already been tried and sentenced, and a revocation implicates the “loss of constitutionally protected liberty.” “In contrast, when diversion is terminated pursuant to the patent terms of an agreement, the divertee is simply returned to participation in the criminal process to stand trial instead of performing community service and possibly providing restitution. In our view, it cannot be said that a divertee who is terminated in strict compliance with such an agreement suffers a loss of liberty that rises to a constitutional level requiring procedural due process.”

Deurloo v. State of Indiana, 690 N.E. 1210 (1998)

Issue: Does a participant in a pretrial diversion program have the right to evidentiary hearing when being terminated from the program for non-compliance?

Ruling: Since the participant’s liberty interests were not at stake in the termination decision, the defendant had no right to a hearing.

Court: Court of Appeals of Indiana, Fifth District

Prosecutors filed a notice with the court stating their intent to terminate the pretrial diversion agreement with Debra Deurloo for non-compliance. Deurloo moved the court for an evidentiary hearing on the violation. The court denied the motion, stating that it “has no responsibility or authority over the prosecutor’s pretrial diversion program.” Deurloo was subsequently convicted of public indecency. She challenged this conviction on the basis that she was denied due process when she was not given a hearing on her termination from the pretrial diversion program.

Before the Indiana Court of Appeals, Fifth District, Deurloo argued that the prosecutor's discretion in administering the pretrial diversion program is restrained by the principles of due process, which require a hearing before a court to determine if a violation had occurred. In addressing this question, the court noted that "[w]hether an individual is entitled to procedural due process is dependent upon whether she is being deprived of property or liberty interest." In its analysis, the court cited two U.S. Supreme Court cases, *Gagnon v. Scarpelli* (411 U.S. 778), which applied due process requirements to probation violation proceedings, and *Morrissey v. Brewer*, which applied such requirements to parole violations.

In the instant case, the court distinguished pretrial diversion status from that of a parolee or probationer. In doing so, the court stated that Deurloo "had not yet come before the court to answer the charge against her prior to her entry into the pretrial diversion program and was not under court supervision. The consequence of her termination from the program was not that a suspended or deferred sentence would be imposed upon her by the court, depriving her of liberty, but only that she would be required to re-enter the formal criminal process." Thus, the court concluded that Deurloo's liberty was not directly at stake, and thus she did not have a due process right to an evidentiary hearing.

State of Florida v. Board, 565 So. 2d 880 (1990)

Issue: *Can the court order a defendant reinstated into pretrial intervention after prosecutors revoked the intervention agreement for noncompliance without presenting any evidence of the misconduct?*

Ruling: *The statute authorizing the pretrial intervention program places no limitations on the prosecutor's discretion to revoke the intervention agreement, and the court had no authority to order the reinstatement.*

Court: *Court of Appeal of Florida, Fifth District*

After the State's Attorneys Office notified Michael Board that it was revoking his pretrial intervention agreement he filed a motion with the trial court seeking the reasons for the revocation. The trial court granted the motion and reinstated Board in the intervention program until prosecutors presented evidence to the court Board's non-compliance. Prosecutors then appealed this ruling.

The court of appeals noted that the pretrial intervention program was created by the legislature, and, "[u]nder the statutory scheme, once a defendant is admitted to pretrial intervention, the decision to resume prosecution of the charges against the defendant lies solely within the state." (§ 9444.025(4).) Since the state has that sole discretion, "the trial court departed from the essential requirements of the law when it held that the state was required to reinstate the defendant's pretrial intervention pending a judicial review of the decision to revoke the agreement. A court can no more compel the state to reinstate a defendant's pretrial intervention status than it can compel the state to place the defendant on pretrial intervention in the first place." The court overturned the trial court's ruling. On the issue of whether the prosecutor can

revoke the pretrial intervention agreement without presenting any evidence of the reasons for the revocation, the court noted that that question “is not properly before the court at this time.”

State of Ohio v. Stafford, 2001 Ohio App. LEXIS 3663

Issue: Does a participant facing revocation of pretrial diversion have a right to discovery?

Ruling: Since the participant waived his right to a probable cause hearing and since a pretrial diversion revocation hearing is a civil procedure, the participant’s due process rights were not violated.

Court: Court of Appeals of Ohio, Fifth District

Prosecutors filed a motion in court seeking to revoke James Stafford’s participation in a pretrial diversion program. In the motion, prosecutors claimed that Stafford failed to make restitution payments, failed to complete community service requirements, and failed to remain a law abiding citizen by stealing from his place of employment. Stafford appeared in court, acknowledged receipt of the prosecutor’s motion, and waived his right to a probable cause hearing on the violations. A revocation hearing was scheduled. At the hearing, Stafford requested a continuance, arguing that he had not received discovery materials as requested. The court held that Stafford had no right to discovery, proceeded with the hearing, and terminated Stafford’s participation in the diversion program. Based on Stafford’s guilty plea, entered pursuant to his enrollment in diversion, the court found Stafford guilty and imposed a sentence.

Stafford appealed, arguing that the trial court denied him his rights under the 14th Amendment when it allowed evidence to be presented at the revocation hearing that was not supplied to him beforehand. He argued that a pretrial diversion revocation hearing is similar to a probation revocation hearing, thus giving him rights analogous to those provided to an offender in a probation revocation proceeding. Stafford cited the case of *Gagnon v. Scarpelli*, (1973), 411 U.S. 778, in which the U.S. Supreme Court held that persons facing probation revocation are entitled to written notice of the claimed violations, disclosure of evidence against them, the right to cross-examine adverse witnesses, and an opportunity to present their own witnesses and documents.

The court acknowledged that Stafford is entitled to due process rights analogous to those provided probationers facing revocation, but rejected his argument on two grounds. First, the court held that Stafford had the opportunity to obtain discovery information, i.e., the names of witnesses and a review of documents, if he had not waived his probable cause hearing. Second, the court held that a pretrial diversion revocation proceeding, like a probation revocation hearing, is a civil procedure, and the discovery procedures outlined in Ohio criminal rules do not apply. The court concluded that Stafford’s “due process rights were not violated and [he] received a fair hearing.”

Baxter v. United States, 483 A.2d 1170 (1984)

Issue: Was the trial court correct in denying participant's motion for dismissal after she failed to complete the pretrial diversion program in the specified time?

Ruling: The trial court correctly applied the law when it ruled that it lacked the authority to review the participant's termination from the pretrial diversion program.

Court: District of Columbia Court of Appeals

One of the terms of Donna Baxter's pretrial diversion agreement was that she complete 40 hours of community service by a specific date. When that date arrived, Baxter had completed only 29 hours of community service, and she was therefore terminated from the program. In the following weeks, without authorization from the prosecutor's office, Baxter completed the remaining service hours. She then filed a motion to dismiss her charge on the grounds that she successfully completed diversion. The trial court denied the motion, stating that it had no jurisdiction to review the decision to terminate her from the diversion program.

Before the court of appeals, Baxter argued that since she lived up to her end of the agreement, the government must do likewise, and dismiss her case. The court did not agree. According to the court, Baxter "does not contend that the government acted arbitrarily, capriciously, or discriminatorily in dismissing her (from the diversion program). She does not assert her dismissal deprived her of a constitutional right. Instead she invokes principles of contract law, arguing in effect that the government, having enjoyed the benefit of her performance, is bound to live up to its side of the agreement. What she fails to consider is that she herself did not perform according to the terms of the agreement, which imposed a deadline for her completion of the program. Thus it was appellant, not the government, who breached the agreement; when that breach occurred, the government was no longer bound." The court upheld the trial court ruling, stating that "there was no basis on which the court could interfere with, or even inquire into, the government's decision."

Determining compliance at diversion termination hearing

In the following two cases, the trial court did hold a hearing on the participant's alleged non-compliance. Both cases ended up in the respective state's supreme court and in both the supreme court ordered the trial court to take a different approach other than immediate termination.

State of New Mexico v. Jimenez, 810 P.2d 801 (1991)

Issue: Can a participant be terminated from pretrial diversion due solely to the inability to meet restitution requirements?

Ruling: Before terminating diversion, the court must determine whether any alternatives exist that would serve the state's interests in carrying out an effective pretrial diversion program.

Court: Supreme Court of New Mexico

Gilbert Jimenez was charged with embezzling approximately \$3,000 from Little League Baseball. He was enrolled in a pretrial diversion program with the requirement that he make restitution in monthly installments over a two-year period. Jimenez made the first two payments, but then missed his next several scheduled payments. After several months of trying to work with Jimenez on the restitution issue, prosecutors terminated the diversion agreement and reinstated the charge. Jimenez petitioned the court to review the termination. At a hearing, both the prosecution and the court agreed that Jimenez's failure to pay restitution was not willful, rather it was due to his financial situation. Nonetheless, the court upheld the prosecutor's decision to terminate diversion. The case then went to the court of appeals, which overturned the trial court. The New Mexico Supreme Court then took the case.

In approaching the issue in this case, the supreme court relied upon the U.S. Supreme Court's decision in *Bearden v. Georgia*, 461 U.S. 660 (1983), which held that a court must determine if alternatives exist to revoking probation solely on the basis of the financial inability of the probationer to make restitution payments that still meet the state's legitimate penological interests. In the instant case, the court held that "the principles of due process and equal protection considered in *Bearden* apply to the termination of preprosecution diversion....We hold, therefore, that in proceedings to terminate a preprosecution diversion agreement for failure to pay restitution, the court reviewing the termination must inquire into the reasons for the failure to pay....If the court determines that the defendant has not been at fault in failing to make restitution, then the court must consider whether there are alternatives to termination which will meet the state's legitimate penal interests. Only if the court determines that alternative measures are not adequate to meet the state's interests may the court uphold termination..." The court noted that such alternatives could be reducing the amount of restitution, extending the time for payments, working off the payments through service to the victim, or a combination of these.

State of West Virginia v. Maisey, 600 S.E. 2d 294 (2004)

Issue: When the pretrial diversion agreement is silent on how a participant is to demonstrate completion of the community service requirement, how is it to be determined how that requirement is met?

Ruling: The trial court needs to inform the participant exactly what evidence is needed.

Court: Supreme Court of West Virginia

Brian Maisey was required to perform 50 hours of community service as part of his pretrial diversion agreement for a charge of carrying a concealed deadly weapon. Prosecutors filed a motion with the court to terminate the agreement and reinstate the charge because Maisey failed to provide proof of completion of the community service. The pretrial diversion order did not require any affidavits proving that Maisey had completed his community service, and the court refused to accept Maisey's evidence that he had. The charges were reinstated, Maisey was found guilty at a bench trial, and sentenced to complete 50 hours of community service. Maisey appealed, claiming that he had completed his community service and thus his conviction and sentence constituted double jeopardy.

The West Virginia Supreme Court agreed that if Maisey had completed his community service he would have been exposed to double jeopardy. The question was, the court noted, whether Maisey had met this requirement. In oral argument, Maisey's attorney claimed that Maisey and his family lacked the sophistication to obtain notarized statements from every person for whom Maisey had worked. Recognizing that the pretrial diversion agreement did not require affidavits as proof that Maisey had completed the community service, the court noted that "it is not unreasonable for the State to require some proof that Maisey actually did what he said he did." The court concluded that the trial court abused its discretion in not accepting Maisey's evidence that he had completed community service, or giving him more time to do so. The court remanded the case back to the trial court with the instruction that Maisey be told exactly what evidence is needed and that he be given 30 days to provide that evidence.

Failure to appear at diversion termination hearing

What response is appropriate if a diversion participant fails to appear for a diversion termination hearing? The case below addresses this question.

State of Kansas v. Butler, 895 P.2d 204 (1995)

Issue: Is violation of a diversion agreement a civil or criminal matter?

Ruling: Violation of diversion remains a criminal matter.

Court: Court of Appeals of Kansas

Barry Dalton failed to comply with his pretrial diversion agreement and a hearing was scheduled on the violation. He failed to appear at that hearing, a warrant was issued and he was ultimately arrested. He was then charged with felony obstructing official duty as a result of failing to appear on a felony charge. Prior to his trial on that charge, Dalton filed a motion asking that the charge be dismissed because the failure to appear was for violation of a diversion agreement. He argued that violation of diversion proceedings are similar to violation of probation proceedings, which the Kansas courts have ruled are quasi-civil in nature. Consequently, Dalton could not be charged with felony obstructing official duty. The trial court disagreed and Dalton took the case to the court of appeals.

That court also disagreed, drawing a distinction between probation and diversion. "[A] probation revocation hearing is a separate proceeding which takes place after the criminal case has been terminated and thus obtains the status as quasi-civil in nature. The same cannot be said of a revocation of diversion proceeding....The prior felony charge was precisely the reason for the issuance of the warrant. Once a defendant's diversion status has been revoked, he or she must then answer to the exact criminal charges which were placed in abeyance pursuant to the diversion agreement."

Consequences of termination

In the first case summarized below the participant asked to get his guilty plea back after failing in diversion. In the second, the participant asked get her diversion fees back. Both were rejected.

State of Ohio v. Swank, 2002-Ohio-3833

Issue: Can a defendant who failed to complete a pretrial diversion program withdraw his guilty plea, which was made pursuant to his entry into diversion?

Ruling: Accepting a diversion program with the ultimate result being dismissal of the charge is tantamount to the trial court sentencing the defendant, and Ohio court rules do not permit withdrawal of a plea after sentencing.

Court: Court of Appeals of Ohio, Fifth District

Freeman Swank was indicted on one count of vandalism. He pled no contest to the reduced charge of criminal damaging. The trial court reserved a finding on the plea pending Swank's enrollment in and completion of a pretrial diversion program. Swank soon violated the terms of the diversion agreement and the case was brought back to court for sentencing. Swank filed a motion to withdraw his guilty plea, stating that he felt rushed into entering the plea. The court denied the motion and Swank was sentenced to a suspended jail term, ordered to pay restitution, and was fined. He appealed the trial court's denial of his motion to withdraw his guilty plea.

Citing Ohio Criminal Rule 32.1, the court of appeals noted that "a motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed." The court acknowledged that Swank "had not actually been sentenced prior to the motion," but held that accepting the diversion program "with the ultimate result being a dismissal of the charge is tantamount to the trial court sentencing appellant." Accordingly, the court held that the trial court did not abuse its discretion in denying Swank's motion.

State of Kansas v. Bullock, 849 P.2d 137 (1993)

Issue: Does contract law require reimbursement of diversion fees to defendant who was terminated from diversion due to non-compliance?

Ruling: The fees were imposed to process the diversion and are not reimbursable.

Court: Court of Appeals of Kansas

Tracy Bullock paid a \$100 fee when she was enrolled in the pretrial diversion program. She failed to comply with the terms of her diversion, the diversion was terminated, and prosecution of her case resumed. Bullock was ultimately acquitted of the charge she was initially diverted for. After her acquittal, she filed a motion with the trial court requesting a return of her \$100 diversion fee. That motion was denied and she appealed.

Bullock argued that since diversion agreement was a contract and since the appropriate remedy under contract law is to return the parties to the same conditions they were in before entering into the contract, she should be refunded her diversion fee. The court of appeals disagreed.

“Contrary to Bullock’s argument, both parties in this case have been returned to positions substantially similar to their former conditions. When entering into the diversion agreement, Bullock waived her constitutional right to speedy trial and right to a jury trial in exchange for the State’s agreement not to prosecute. After the contract was rescinded due to Bullock’s breach, Bullock again had her constitutional right to speedy trial and trial by jury and the State had its right to prosecute her. Both parties, therefore, had the same rights after the contract was rescinded that they did before they entered into the agreement.”

The court called the diversion fee the cost the defendant pays for the opportunity to be diverted, and covers the expenses of processing and supervising her. “Although Bullock, because of her violation of the agreement, did not finish the diversion program, the State still incurred the costs of providing and supervising the program.”

Status of speedy trial rights after a violation

Defendants in pretrial diversion waive their right to a speedy trial. The case summarized below discusses whether a pretrial diversion participant can reassert his right to a speedy trial once it becomes clear that his diversion will be terminated due to non-compliance.

People of California v. Murphy, 74 Cal. Rptr. 2d 116 (1998)

Issue: When a defendant waives his right to a speedy trial to participate in pretrial diversion and then fails to complete diversion, is that waiver general or of limited time?

Ruling: A grant of diversion necessarily requires that the defendant generally waive his right to a speedy trial.

Court: Superior Court of California, Appellate Department

Liam Murphy was arrested and charged with resisting arrest, battery, and petty theft. As part of a negotiated disposition, he was offered pretrial diversion for one of the charges, and the parties agreed that the other two charges would trail the diverted charge and would be dismissed upon successful completion of diversion. In accordance with California Penal Code 1001.53, when Murphy was being placed in the pretrial diversion program he was asked by the court if he was waiving his speedy trial rights. He responded “time is waived.”

Shortly after starting diversion, Murphy was arrested for a new charge. Since a condition of the diversion was that he not be rearrested for any new offenses, prosecutors moved to terminate diversion and set all the charges for trial. Murphy then withdrew the time waiver in all three of the original charges. Approximately two weeks after this withdrawal of the time waiver, the court held a hearing on the prosecutor’s motion to terminate diversion. At that hearing, the court dismissed all three of the original charges on the ground that Murphy’s speedy trial rights had

been violated. In doing so, the court relied upon Penal Code § 1382(a)(3)(B), which provides that, upon withdrawal of a time waiver “the defendant shall be brought to trial....within 10 days thereafter.” Prosecutors appealed this ruling.

The appeals court noted that diversion is different than normal proceedings in that no future trial date is set – and this is so because the nature of diversion is that there will be no trial if diversion is successfully completed. As a result, the court concluded that “the waiver entered by respondent at the time he agreed to accept diversion as an alternative to trial on the merits was a general waiver. It makes no difference whether respondent specifically mouthed the term ‘general’ when he waived his speedy trial rights. We find that, as a matter of law, when a defendant elects to enter diversion, the time waiver required by Penal Code § 1001.53 is a general time waiver.” The court reversed the ruling of the trial court and reinstated the three charges.

VII Use of Diversion Information in Subsequent Proceedings

Perhaps no issue is more complex in the pretrial diversion arena than distinguishing the proper from improper use of diversion information for purposes other than the monitoring and supervision of diversion. NAPSA Standards state that, as a general rule, all diversion information should be considered confidential and not released without the participant's consent. The Standards recognize, however, that there may be other instances in which the information might be used, and stress that this is another reason why it is important that potential participants consult with an attorney prior to enrolling in diversion.¹⁴ The cases summarized below illustrate the wide variety of sought after uses of diversion information and how the courts have responded.

State of Kansas v. Chamberlain, 120 P.3d 319 (2005)

Issue: Was the use of defendant's prior pretrial diversion agreement to enhance his sentence on a new charge a violation of the Ex Post Facto and Contract Clauses of the U.S. Constitution?

Ruling: Changes in state law on sentencing enhancement did not retroactively define prior diversions as criminal convictions and did not interfere with prior diversion agreements.

Court: Supreme Court of Kansas

In Kansas, as in many states, the severity level and availability of sentence enhancements for a DUI charge rises with each subsequent DUI conviction. From the time of Richard Chamberlain's first pretrial diversion for a DUI offense in 1986 until 2001, Kansas law provided that only DUI convictions or DUI diversion agreements occurring in the immediately preceding five years could be taken into account for purposes of determining the severity level of subsequent DUI's. In 2001, the Kansas legislature amended that law to provide that any DUI conviction, including "entering into a diversion agreement" and "occurring during a person's lifetime shall be taken into account when determining the sentence to be imposed for a first, second, third, fourth, or subsequent offender." K.S.A. 2004 Supp. 8-1567(m)(1), (3).

When Chamberlain was arrested for DUI in 2002, his 1986 DUI diversion agreement was counted as a prior conviction, which, when added to a 2001 DUI diversion agreement, made him a third time DUI offender. Chamberlain moved to have his 1986 DUI diversion agreement discounted, arguing that the 2001 amendment to the DUI penalty statute was an unconstitutional violation of the Ex Post Facto and Contract Clauses of the U.S. Constitution. The trial court denied the motion, and Chamberlain was found guilty and sentenced as a third time DUI offender. The court of appeals upheld that ruling and the case went to the Kansas Supreme Court.

¹⁴ Supra note 1, Standard 7.1.

Taking up the Ex Post Facto issue first, the court noted that the 2001 amendment “did not retroactively define the diversion as a criminal conviction; it simply changed the period during which a diversion agreement could be counted as a conviction for enhanced sentencing under the current DUI conviction....[T]he legal consequences of the actions in this case – that his prior DUI diversion would enhance the penalty for his current offense – affected his current offense and had no effect on his 1986 diversion.” Thus, the court ruled, there was no violation of the Ex Post Facto Clause.

As to the Contract issue, the court noted that the purpose of the Contracts Clause of the U.S. Constitution is to prohibit states from enacting laws that interfere with contractual obligations. The court held that the 2001 amendment had no effect on the 1986 diversion agreement. The court affirmed the judgment of the court of appeals.

United States v. Maass, 1997 U.S.App. LEXIS 36140

Issue: Can the Government introduce previous pretrial diversion agreements as evidence at a defendant's trial on similar charges?

Ruling: The introduction of the evidence did not constitute plain error.

Court: U.S. Court of Appeals for the Tenth Circuit

Robert Maass was charged with threatening a U.S. Postal Services mail carrier. At trial on this charge, the government sought to introduce into evidence the fact that Maass had twice previously been granted pretrial diversion on charges of threatening federal government officials. On both those occasions, Maass had successfully completed diversion and the charges were dismissed. Maass filed a motion to exclude that evidence. The court did not issue a ruling on that motion and, when the government offered the information into evidence at trial, Maass did not object – as he was required to preserve the issue for appeal. He was convicted and filed an appeal claiming that the evidence should not have been allowed.

The court of appeals noted that since Maass did not object at trial when the evidence was being introduced, the court could only review the issue for plain error. Under this analysis, the court could only decide whether introducing the evidence “seriously affected the fairness, integrity, or public reputation of judicial proceedings.”

The court cited Federal Rule of Evidence 404, which limits the introduction of character evidence. It does permit, however, “evidence of other crimes, wrongs, or acts...for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” The court noted that the government sought to introduce the evidence to show that Maass knew that the statements he made to the mail carrier were a federal crime, because they were similar in nature to the threats he had made to federal officials in the two previous cases that were diverted. “Because the agreements were probative of whether Maass’ statements should be considered threats, the agreements were relevant,” concluded the court. In addition, the court pointed out that the district court properly instructed the jury to use the pretrial diversion agreements for a limited purpose only – “to determine whether Maass had the

state of mind or intent necessary to commit the acts charged in the indictment.” As a result, the court ruled that introducing the pretrial diversion agreements into evidence did not constitute plain error. The court upheld Maass’ conviction.

State of Ohio v. Daoud, 2003 Ohio 676

Issue: Was trial court correct in allowing statements made by defendant during screening for diversion to be used to impeach that defendant’s credibility at his trial?

Ruling: The court erred in when it announced that it would allow the statements to be used for impeachment.

Court: Court of Appeals of Ohio, Second Appellate District

George Daoud applied for admission to pretrial diversion after his arrest for receiving stolen property. During the diversion screening process with prosecutors Daoud made certain statements regarding the offense with which he was charged. He was denied admission to diversion and the case proceeded to trial. Before the trial began, Daoud filed a motion to have all statements made as part of the diversion screening process excluded from evidence. The court denied this motion, in part. The court ruled that the prosecution could use Daoud’s statements to impeach his credibility if his testimony at trial contradicted anything he said in those statements. As a result, Daoud did not testify on his own behalf at his trial. Daoud appealed, arguing that the court’s ruling on the motion inhibited his defense.

The appeals court began by noting that the trial court erred when it ruled that the information could be used for impeachment purposes. According to the court, when the court of common pleas approved the prosecutor’s diversion program it developed standards for the operation of the program. Those standards make clear that no statements made by a defendant during the diversion screening process can be used in court for any purpose, including impeachment.

The next question, however, was whether the error required overturning Daoud’s conviction and ordering a new trial. The court concluded that it could not assess how Daoud was prejudiced by the error because he never did testify. “Even though the court’s ruling was incorrect in its terms, it was incumbent on Daoud to offer the evidence he wished to offer and then challenge the State’s efforts to use diversion evidence, both in order to enable the trial court to make a final determination of its admissibility and to preserve any error for purposes of appeal.” Having failed to do, “Daoud cannot show the prejudice that reversible error requires.”

State of New Jersey v. Kern, 325 N.J. Super. 435 (1999)

Issue: Can an incriminating statement made in court by the defendant at a hearing on her rejected application for the pretrial intervention program be used against her at her trial?

Ruling: The trial court erred in allowing the statement to be entered into evidence.

Court: Superior Court of New Jersey, Appellate Division

After her indictment for theft by deception, Betty Kern applied for admission to the pretrial intervention program. Her application was rejected and she requested a hearing before the court to challenge the rejection. In the course of that hearing, Kern volunteered that she was guilty of the charge, but had an explanation. The judge immediately cut her off and advised her not to say anything more about the case. The court ultimately upheld the prosecutor's rejection of her pretrial intervention application. Kern waived her right to a jury trial and agreed to a bench trial.

That trial was held before the same judge who heard her challenge to the prosecutor's rejection of the application. Over the defense counsel's objections, the judge allowed prosecutors to admit into testimony the incriminating statement made by Kern at the earlier hearing. In his decision to find the defendant guilty the judge acknowledged the defendant's statement, but noted that it was not critical in light of other evidence. Kern appealed, arguing that the trial court should never have allowed the statement to be entered.

The appeals court agreed with Kern. The court referred to the pretrial intervention program's Guideline 5, which provides: "Effective operation of pretrial intervention programs requires that a relationship of confidence and trust be initiated and maintained between participating defendants and staff. No information, therefore, obtained as a result of a defendant's application to or participation in a pretrial intervention program should be used, in any subsequent proceedings, against his or her advantage." The court noted that the guideline "makes it clear that information obtained during the application process is treated no differently from information obtained while a defendant is participating in the program. Nor, in our view, is it necessary that an applicant be accepted into the program to ensure that statements made during the application process are barred from further use."

The court also called "contrary to human nature" the trial judge's statement that he viewed Kern's incriminating statement as not being critical in light of other evidence. "The State's case against defendant was strong, but not so strong as to justify a finding that the erroneous introduction of the defendant's confession was harmless error." Finally, the court held that the judge who hears a challenge to a rejection should not preside over an ensuing bench trial. The court reversed the trial court's judgment of conviction and remanded the case for possible re-trial.

Pizzillo v. Pizzillo, 884 S.W.2d 749 (1994)

Issue: Can an admission made to prosecutors as part of the enrollment process to pretrial diversion be used by the probate court in determining child visitation rights?

Ruling: The statutory restrictions on the use of information applies only to the instant criminal charge, not later proceedings for other matters. The probate court erred, however, in allowing the information to be presented because the record had been expunged.

Court: Court of Appeals of Tennessee, Middle Section

During a troubled time in their marriage, the three-year-old daughter of Gabriel and Diana Pizzillo made a claim that Gabriel had sexually assaulted her. Gabriel was arrested. Prosecutors offered him an opportunity to participate in the pretrial diversion program. Part of the requirements of that program was that he sign a memorandum of understanding admitting to sexually abusing his daughter. Gabriel claimed his innocence, but on the advise of his counsel signed the agreement. He successfully completed diversion and his charge was dismissed and expunged. In the meantime, the Pizzollo's were divorced.

Thereafter, Gabriel petitioned the probate court to allow limited supervised visits with his daughter. Diana objected to any visitations, citing as the reason that Gabriel was denying that he had ever sexually abused their daughter. At a hearing before the court, Diana filed a copy of the expunged memorandum of understanding in which Gabriel had admitted the abuse. The court reviewed the document and then denied Gabriel's petition, citing as the reason that he was denying committing the acts that he had admitted to earlier.

The Court of Appeals, in considering the probate court's use of the expunged information, turned to the pretrial diversion statute, which states, in pertinent part: "The memorandum of understanding may include stipulations concerning the admissibility in evidence of specified testimony, evidence or depositions if the suspension of the prosecution is terminated and there is a trial on the charge; however, no confession or admission against interest of the defendant obtained during the pendency of and relative to the charges contained in the memorandum of understanding shall be admissible in evidence for any purpose, including cross-examination of the defendant." Tenn. Code Ann. § 40-15-105(a)(3). The court reviewed the legislative history of this statute and concluded that the restrictions on the use of any admissions was meant to apply only to later criminal trials on the charge itself.

While the memorandum of understanding might ordinarily be admissible, the court held that it was not in the case because Gabriel's record had been expunged. "[R]ecords expunged following the successful completion of a pretrial diversion program cannot be used as judicial admissions or to impeach a person's credibility," the court ruled.

Estate of Alfred Wooden v. Hunnicutt, WL 2546918, Tenn.Ct.App (2005)

Issue: Can information pertaining to a witness' prior placement in pretrial diversion be raised in cross-examination to impeach the credibility of the witness in a chancery court hearing on a dispute over a signature on a Quitclaim Deed?

Ruling: The witness can be properly impeached.

Court: Court of Appeals of Tennessee

When Alfred Wooden died in 2003, three co-executors were named for the estate, including Evelyn Hunnicutt. When the other two co-executors learned that the Robinson County Trustee's Office had a Quitclaim Deed purporting to transfer ownership of Wooden's home to Hunnicutt, they challenged the authenticity of Wooden's signature on the document. At a hearing in chancery court, Hunnicutt was asked on direct examination whether she had ever forged a deed.

She replied that she had not. On cross-examination, Hunnicutt admitted that she had been indicted for forging a deed, and was placed on pretrial diversion for that charge. Her credibility as a witness was then impeached when it came out that she had lied on her pretrial diversion application by claiming that she had no prior convictions where in fact she had felony convictions for falsifying her tax returns and conspiracy to engage in gambling. The chancery court ultimately ruled that the signature on the Quitclaim Deed was a forgery.

Hunnicutt appealed on the grounds that the chancery court improperly considered her previous pretrial diversion. The Tennessee Court of Appeals cited the statute addressing the use of pretrial diversion information, Tenn.Code Ann § 40-15-105(a)(3), which states: “The defendant’s statement of facts relative to the charged offenses shall not be admissible as substantive evidence in any civil or criminal proceeding against the defendant who made the statement. However, evidence of the statement is admissible as impeachment evidence against the defendant who made the statement in any criminal proceeding resulting from the termination of the memorandum of understanding. No other confession or admission of the defendant obtained during the pendency of and relative to the charges contained in the memorandum of understanding shall be admissible in evidence for any purpose, other than cross-examination of the defendant.”

The court also referred to its earlier decision in *Pizzillo v. Pizzillo* (884 S.W. 2d 749, 1994), in which it ruled that the statute’s “restriction against the later use of an accused’s confessions or admissions against interest applies only to criminal trials involving the same charge contained in the memorandum of understanding. It does not apply to later civil proceedings.” Thus, the court concluded that “Hunnicutt could properly be impeached with the evidence surrounding the pretrial diversion because this is a civil, not a criminal matter.” The court affirmed the decision of the chancery court.

In re Holtgreven, 620 N.E. 2d 310 (1993)

Issue: Does a crime victim’s earlier participation in a pretrial diversion program constitute evidence of felonious conduct for the purposes of determining an award from the victim’s reparations fund?

Ruling: The diversion does count as such evidence, making the victim ineligible for reparations.

Court: Court of Claims of Ohio, Victims of Crime Division

Under Ohio law, a crime victim may apply for reparations under a crime victim’s fund, except that no award may be made to a victim “who, within ten years prior to the criminally injurious conduct that gave rise to the claim, was convicted of a felony or who is proved by the preponderance of the evidence...to have engaged, within 10 years prior to the criminally injurious conduct that gave rise to the claim, in conduct that, if proven by proof beyond a reasonable doubt, would constitute a felony under the laws of this state, another state, or the United States.” R.C. 2743.60(E).

One year prior to her victimization in a robbery, Shirley Holtgreven was enrolled in a pretrial diversion program after being charged with welfare fraud. Her initial claim for reparations for the injuries she sustained in the robbery was heard and granted by a single commissioner of the Court of Claims. The Attorney General appealed, arguing that Ms. Holtgreven's participation in pretrial diversion was tantamount to a conviction, thus making her ineligible for reparations. The appeal was heard by a panel of three commissioners. Noting that a prerequisite for enrollment in pretrial diversion is an admission to the charges, the panel concluded that the Attorney General had met the burden of proving by a preponderance of the evidence that Holtgreven engaged in felonious conduct. "Therefore, the applicant's claim must be denied."

Phino v. Gonzales, 432 F.3d 193 (2005)

Issue: Does a vacated criminal conviction remain a "conviction" for the purposes of determining an immigrant's eligibility for deportation?

Ruling: The government may draw a distinction between convictions vacated for rehabilitative purposes, i.e., pretrial diversion, and those vacated due to defects in the criminal proceedings.

Court: U.S. Court of Appeals for the Third Circuit

Portugal native Gummersindo Pinho came to the United States, took up residence in New Jersey, and married a U.S. citizen. In 1992, he was arrested and charged with possession with intent to distribute cocaine near school property. He applied for admission into the pretrial intervention program, but was rejected because the local prosecutor had a policy against accepting any defendants charged with distributing drugs near a school. As a result, Pinho pleaded guilty to possession of cocaine and was sentenced to two years probation.

Several years later, after he had completed probation, Pinho, represented by different counsel, applied for post-conviction relief, claiming that he had had ineffective assistance of counsel when he pleaded guilty to cocaine possession. Pinho claimed that the school building that he was charged with selling cocaine near had no longer been serving as a school at the time of his offense, and that an effective counsel would have known that fact – and he would then have been eligible for pretrial intervention. Based on the new information about the status of the school building and on Pinho's successful completion of probation, the prosecutor's office consented to Pinho's admission to the pretrial intervention program. Three weeks later, the prosecutor's office dismissed all charges against Pinho, stating that he had successfully completed pretrial intervention.

Pinho then applied for "permanent resident" status with the Immigration and Naturalization Service (INS). Federal law (8 U.S.C. § 212(a)(2)(A)(i)(II)) barred permanent resident status to any alien convicted of a drug offense. In rejecting Pinho's application, the Board of Immigration Appeals (BIA) relied heavily on this law and its previous decision in *In re Roldan* (22 I. & N. Dec. 512, B.I.A., 1999) in which the agency held that an alien remains convicted "notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure." Pinho appealed the BIA decision to the U.S. District Court, which also ruled against him, finding that Pinho's vacated conviction

was still a “conviction” for immigration purposes. He then took the case to the U.S. Court of Appeals for the Third Circuit.

That court noted that Congress has passed a law defining “conviction” for immigration purposes. That law states: “The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendre or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.” (8 U.S.C. § 101(a)(48)(A)) The court noted that this law does not address convictions that are imposed but subsequently vacated.

As a result, the court announced a test for classifying vacated convictions for immigration purposes. “To determine the basis for a vacatur order, the agency must look first to the order itself. If the order explains the court’s reasons for vacating the conviction, the agency’s inquiry must end there. If the order does not give a clear statement of reasons, the agency may look to the record before the court when the order was issued. No other evidence of reasons may be considered.”

Applying this rule to this case, the court noted that Pinho raised only one claim in his post-conviction relief petition – ineffective assistance of counsel. The state filed no response and the judge’s vacatur order refers to the pretrial intervention agreement, which came about as a result of the ineffective assistance of counsel claim. Since the record is clear that the conviction was vacated as a result of ineffective assistance of counsel, Pinho was no longer “convicted” within the meaning of 8 U.S.C. § 202(a)(48)(A).

Patton v. Unemployment Appeals Commission, 685 So. 2d 77 (1996)

Issue: Does a guilty plea as a condition of enrolling in a pretrial diversion program mean that an individual must acknowledge a criminal conviction on job applications?

Ruling: A conviction only attaches upon an adjudication of guilt, and a person in pretrial diversion has not been adjudicated guilty.

Court: Court of Appeal of Florida, Second District

Joan Patton entered a pretrial diversion program after her arrest for welfare fraud. As a condition for enrolling in diversion, she entered a plea of guilty. While she was still in the diversionary period she applied for a job with a mortgage company. In response to a question on the application she stated that she had never been convicted of a criminal offense. She was hired, but when the company learned of her guilty plea and diversion status she was terminated for the misconduct of lying on her application. She then applied for unemployment benefits. A referee with the Unemployment Commission denied that application, ruling that Patton had been convicted, and thus lied on her job application.

The case went to the Florida Court of Appeals, which cited Florida case law that holds that a conviction does not occur until there is an adjudication of guilt. The court ruled that a person in pretrial diversion has not been convicted, notwithstanding the guilty plea. “The referee’s determination of work-related misconduct was based solely upon the misrepresentation of her plea.” The court remanded the case with instructions that Patton be awarded unemployment benefits.

VIII Conclusion

Just as there is no one model of pretrial diversion, the cases summarized here demonstrate that there is no one body of case law that provides clear guidance on how pretrial diversion legal issues should be addressed. The courts have defined differently the exact nature of the role and authority of the prosecutor in relation to the court. The courts have also split on the due process rights of participants facing termination; some have ruled that participants have the right to a hearing, others not. Finally, courts have come to different conclusions regarding the use of pretrial diversion information in subsequent court proceedings or in other settings. For the most part, all of these differences can be attributed to different fact circumstances and to the statutory framework in place in the respective jurisdictions.

The cases do make clear, however, that, at minimum, prosecutors maintain substantial authority over the operations of pretrial diversion. This authority flows ultimately from separation of powers. Even in jurisdictions where the statute gives the judiciary the final say in admission and termination decisions, the courts recognize that the views of the prosecutor must be given great deference.

As noted at the outset, over 2,000 cases involving pretrial diversion were identified during the initial screening of cases. While many of these cases turned out to have a tangential involvement with pretrial diversion, several hundred cases had direct relevance. The sheer number of cases involving pretrial diversion issues is an indication that, notwithstanding the deference provided to prosecutors, there is significant judicial review at both the trial court and appellate court levels of the decisions and actions relating to the operation of pretrial diversion.

The large number of cases and the wide range of legal issues that have arisen also underscore the importance that potential participants in pretrial diversion have access to counsel before deciding whether to apply for and enroll in pretrial diversion. As these cases demonstrate, the stakes can be very high for those participating in pretrial diversion, and they must be aware of the implications of their participation.

Finally, the fact that there are so many cases from so many jurisdictions shows how extensively pretrial diversion is being used as a dispositional option in criminal cases. As noted in the Introduction, there has been very little research in recent decades on the effectiveness of pretrial diversion in reducing the likelihood that participants will recidivate after completing the diversion program. Given the extensive use of diversion, greater efforts should be made in assessing the extent to which it is successful in minimizing recidivism.

APPENDIX A

EXCERPTS FROM NAPSA BALCK LETTER STANDARDS

ON PRETRIAL DIVERSION:

STANDARDS 1 THROUGH 7

I. POINT OF PRETRIAL INTERVENTION

Standard 1.1: Defendants should be eligible to apply for and/or enroll in a pretrial diversion program from the point of the filing of formal charges until the point of final adjudication. Defendants should be informed of the possibility of diversion as soon as possible. An opportunity to consult with counsel should be provided before having to decide whether to apply for and/or enroll in diversion.

Standard 1.2: A defendant's decision to apply for and/or enroll in a pretrial diversion program should be voluntary.

Standard 1.3: Applying for or the possibility of enrolling in a pretrial diversion program should not preclude a defendant from considering and pursuing other strategies which may be more beneficial than the diversion options.

II. ELIGIBILITY

Standard 2.1: When establishing eligibility criteria every effort should be made to encompass all potential participants who can benefit from the pretrial diversion option.

Standard 2.2: No potential participant should be denied access to the pretrial diversion option based upon race, ethnic background, religion, gender, disability, marital status, sexual orientation or economic status. No person who is protected by applicable federal or state laws against discrimination should be otherwise subjected to discrimination for eligibility purposes.

Standard 2.3: Formal eligibility guidelines should be established and reduced to writing after consultation among program representatives and appropriate criminal justice officials. The guidelines should be distributed to all interested parties.

Standard 2.4: Potential participants should not be denied the pretrial diversion option based solely on the inability to pay restitution or program fees.

Standard 2.5: Pretrial diversion programs have an affirmative obligation to insure that agreed upon eligibility guidelines are adhered to and honored by other actors in the criminal justice system.

Standard 2.6: While it is the prosecutor's prerogative to initiate pretrial diversion consideration for potential participants, courts should have a role in monitoring the fair application of diversion eligibility guidelines.

III. ENROLLMENT

Standard 3.1: Prior to making the decision to enroll in a pretrial diversion program, a potential participant should be given the opportunity to review with counsel a copy of the general program requirements including program duration and possible outcomes.

Standard 3.2: Pretrial diversion programs may require conditions of the participant at the point of enrollment. No additional conditions should be imposed on the participant by the court or the prosecutor.

Standard 3.3: Enrollment in the pretrial diversion program should not be conditioned on a formal plea of guilty. An informal admission of responsibility may be acceptable as part of a service plan. Participants who maintain innocence should not automatically be denied the diversion option.

Standard 3.4: Time limits for the duration of participation in a pretrial diversion program should be established.

Standard 3.5: Defendants who are denied enrollment in a pretrial diversion program should be afforded administrative review of the decisions and written reasons for the denial.

IV. SERVICES

Standard 4.1: Pretrial diversion programs should utilize individualized and realistic service plans that feature achievable goals. Service plan formulation should occur as soon as possible after enrollment in consultation with the participant and should be reduced to writing.

Standard 4.2: Service plans should address the specific needs of the participant and not be designed merely to respond to the crime charged.

Standard 4.3: Service plan requirements should be the least restrictive possible to achieve agreed-upon goals and should be structured to help the participant to avoid behavior likely to lead to future arrests.

Standard 4.4: Restitution, volunteer community service work and drug testing may be included in an individualized service plan.

Standard 4.5: Service plans should be revised when necessary. No additional requirements should be sought unless necessary to achieve agreed-upon goals. Modifications would be determined only after consultation with the participant. Any agreed-upon modifications should be reduced to a written agreement.

V. DISMISAL

Standard 5.1: Pretrial diversion program policy should provide for a dismissal with prejudice upon successful completion of program requirements. It should be the responsibility of the pretrial diversion program to insure general enforcement of dismissal agreements.

Standard 5.2: A pretrial diversion program should limit the information provided to the court or prosecutor to that which is necessary to verify that program requirements were met and that the service plan was addressed satisfactorily.

Standard 5.3: Upon successful completion of a pretrial diversion program, a participant may have his/her record sealed or expunged in compliance with state law or agreed upon policies.

VI. NON-COMPLETION

Standard 6.1: A participant should be able to withdraw from the pretrial diversion program voluntarily at any time prior to its completion and elect criminal justice processing without prejudice.

Standard 6.2: The pretrial diversion program should retain the right to terminate service delivery or recommend termination when the participant demonstrates unsatisfactory compliance with the service plan. When such a determination is made the participant should be returned to criminal justice processing without prejudice. The program should provide written reasons for the decision to the participant, defense counsel, prosecutor and/or court.

Standard 6.3: Prior to implementation, a participant facing termination should be afforded an opportunity to challenge that decision with defense counsel if so desired.

Standard 6.4: Arrests that occur during the participant's course of the pretrial diversion program participation should not be grounds for automatic termination. A review proceeding at which the fact of the arrest and all other relevant circumstances are considered together with the participant's record of performance should ensue. The decision whether or not to terminate should occur only after weighing all the factors.

VII. CONFIDENTIALITY

Standard 7.1: Pretrial diversion programs should specify to the potential participant at the time of entry precisely what information might be released, in what form it might be released, under what circumstances it might be released and to whom it might be released, both during and after participation. As a general rule, information gathered in the course of the diversion process should be considered confidential and not be released without the participant's prior written consent.

Standard 7.2: Pretrial diversion programs should strive to guarantee, by means of interagency or intra-agency operating agreements or otherwise, that no information gathered in the course of a diversion application or participation in a diversion program will be admissible as evidence in the case for which diverted or in any subsequent civil, criminal or administrative proceeding.

Standard 7.3: Guidelines should be developed for determining the types of information to be contained in reports to be released to criminal justice agencies in support of a dismissal recommendation.

Standard 7.4: Qualified researchers and auditors should, under limited and controlled conditions, be afforded access to participant records provided that no identifying characteristics of individual participants are used in any report.

APPENDIX B

EXCERPT FROM NATIONAL PROSECUTION STANDARDS OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Standard 44.1: Prosecutorial Discretion

The decision to divert cases from the criminal justice system should be the responsibility of the prosecutor. The prosecutor should, within the exercise of his discretion, determine whether diversion of an offender to a treatment alternative best serves the interests of justice. The determination of the prosecutor of whether or not to divert a particular defendant should not be subject to judicial review.

Standard 44.2: Alternative Diversion Programs

As a central figure in the diversion process, the prosecutor should be aware and informed of the scope and availability of all alternative diversion programs. It is recommended that all programs which may be non-criminal disposition alternatives maintain close liaison and the fullest flow of information with the prosecutor's office.

Standard 44.3: Information Gathering

The prosecutor should have all relevant investigative information, personal data, case records, and criminal history information necessary to render sound and reasonable decisions on diversion of individuals from the criminal justice system. Legislation and court rules should enable the prosecutor to obtain relevant information from appropriate agencies for this purpose.

Standard 44.4: Factors to Consider

The prosecutor should exercise discretion to divert individuals from the criminal justice system when he considers it to be in the interest of justice and beneficial to both the community and the individual. Factors which may be considered in this decision include:

- a. The nature and severity of the offense;
- b. Any special characteristics or difficulties of the offender;
- c. Whether the defendant is a first-time offender;
- d. Whether there is a probability that the defendant will cooperate with and benefit from the diversion program;
- e. Whether an available program is appropriate to the needs of the offender;
- f. The impact of diversion upon the community;
- g. Recommendations of the involved law enforcement agency;
- h. Whether the defendant is likely to recidivate;
- i. Consideration for the opinion of the victim;
- j. Provisions for restitution; and
- k. Any mitigating circumstances.

Standard 44.5: Diversion Provisions

The use of non-criminal disposition should incorporate procedures which include the following provisions:

- a. A signed agreement identifying all requirements of the accused;
- b. A signed waiver of speedy trial requirements;

- c. The right of the prosecutor, for a designated time period, to proceed with the criminal case when, in his judgment, such action would be in the interest of justice;
- d. A signed release by the accused of any potential civil claims against victims, witnesses, law enforcement agencies and their personnel, the prosecutor and his personnel, after the accused has had the opportunity to confer with counsel; and
- e. Appropriate mechanisms to safeguard the prosecution of the case, such as admissions of guilt, stipulations of facts, and dispositions of witnesses.

Standard 44.6: Record of Decision

A record of the non-criminal disposition, including reasons for the decision, should be created for each case and made a part of the accused's criminal history record.

Standard 44.7: Explanation of Decision

The prosecutor should provide adequate explanations of the non-criminal dispositions to victims, witnesses, and law enforcement officials.

Standard 44.8: Need for Program

In jurisdictions where diversion programs are insufficient, the prosecutor should urge the establishment, maintenance, and enhancement of such programs as may be necessary.

APPENDIX C

EXCERPT FROM AMERICAN BAR ASSOCIATION STANDARDS ON PROSECUTION FUNCTION

Standard 3-3.8 Discretion as to Noncriminal Disposition

- (a) The prosecutor should consider in appropriate cases the availability of noncriminal disposition, formal or informal, in deciding whether to press criminal charges which would otherwise be supported by probable cause; especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition.
- (b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

APPENDIX D

EXCERPT FROM AMERICAN BAR ASSOCIATION STANDARDS ON DEFENSE FUNCTION

Standard 4-6.1 Duty to Explore Disposition Without Trial

(a) Whenever the law, nature, and circumstances of the case permit, defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.

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