



FLORIDA STATE UNIVERSITY

COLLEGE OF SOCIAL WORK

*Institute for Justice Research and Development*

# DEFERRED PROSECUTION PROGRAMS: AN IMPLEMENTATION GUIDE

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## EXECUTIVE SUMMARY

The increase of prosecutorial diversion efforts is an exciting development in the smart decarceration movement, which seeks to reduce incarceration rates in ways that are effective, sustainable, and socially just. Prosecutors possess enormous influence over the course of a criminal proceeding, as they alone decide whether to bring charges against an individual and specify how many and what type of charges are pursued. Additionally, as prosecutors participate in plea-negotiations, bail hearings, and provide sentencing recommendations to judges and juries, they are perfectly positioned to accelerate smart decarceration strategies by advocating for diversion programs designed to shift some individuals away from the criminal justice system, connect those individuals with community resources to better meet identified needs, and foster public safety by promoting overall well-being of individuals and communities.

***Deferred prosecution*** is one prosecutor-led diversion mechanism which has the potential to reduce criminal justice involvement and incarceration rates while maximizing public safety. Although probation and other diversion programs allow individuals to remain in the community while they serve out their sentence, only deferred prosecution programs provide individuals with the opportunity to avoid accruing criminal charges on their record or to have the original charges dismissed (or expunged) after they successfully complete the program.

The overarching mission of deferred prosecution programs is to provide individuals with the opportunity to accept responsibility for their actions, engage in behavioral health treatment and human service programs (when needed), and reduce the probability of future criminal offending behavior.

This implementation guide was developed specifically for prosecutors and provides step-by-step guidance on how to design, implement, manage, and evaluate a sustainable and evidence-driven deferred prosecution program.

The 12 steps are: (1) Build the stakeholder team, (2) Identify the target population, (3) Determine program components, (4) Choose the appropriate program model, (5) Match program intensity to defendant needs, (6) Recruit eligible defendants, (7) Incorporate rewards and sanctions, (8) Understand program barriers and facilitators, (9) Program completion, (10) Expungement, (11) Evaluate program effectiveness, and (12) Plan for sustainability.

The 12 steps are followed by three logic models which describe the core elements of deferred prosecution programs, as well as the specific inputs, outputs, and anticipated outcomes and impact of three different types of deferred prosecution programs both pre-charge and pre-plea programs and post-charge and post-plea programs. Resources are provided to assist prosecutor's offices in the design, implementation, management, and sustainability of a deferred prosecution program.

## HOW THIS IMPLEMENTATION GUIDE WAS DEVELOPED

To develop this implementation guide, researchers interviewed and conducted focus groups with 60 key stakeholders (40 professionals and 20 defendants) from six deferred prosecution programs across three jurisdictions in the Midwest. Stakeholders included prosecutors, public defenders, private attorneys, judges, probation officers, court personnel, community behavioral health and human service providers, and defendants. Stakeholders represented one pre-charge program, two pre-plea programs, and three post-plea programs. These programs were chosen because they varied in structure, capacity, target population, and founding date (which ranged from 2007 to 2015).

Stakeholders were asked to identify relevant community and criminal justice system partnerships, discuss stakeholder roles and responsibilities (e.g., official duties, the extent of discretion, and program satisfaction), describe how eligible defendants were identified, detail common issues which hampered success for both prosecutors and defendants, discuss local conditions that affected program implementation or sustainability, and explore defendants' experiences of deferred prosecution program participation.

In addition to conducting interviews and focus groups, researchers observed court proceedings and program staff meetings, reviewed program development and implementation documents, and analyzed administrative data of defendants. The goal of this phase of data collection was to identify the range and variety of program characteristics (e.g., inclusion and exclusion criteria, and program requirements), assess relationships between criminal justice system personnel, program personnel, and defendants, and to explore factors associated with successful program completion.

All data were collected 2016-2017. The goal of the study was to provide a blueprint for the expansion of deferred prosecution programs into other jurisdictions by offering consistent terminology and guidelines for the development and assessment of such programs. The results of this two year mixed-methods study are synthesized in the implementation guide.

## INTRODUCTION AND BACKGROUND

### What Is Diversion?

Diversion represents a range of alternatives to traditional justice case processing for individuals who make contact with the criminal justice system.<sup>i</sup> According to the National Survey of Criminal Justice Diversion Programs and Initiatives (2013), diversion programs may occur in any of the following three phases: law enforcement, pre-trial or prosecution level, or problem-solving or specialty court. The law enforcement phase typically involves partnerships between local law enforcement and community behavioral health providers with the goal of increasing public safety and connecting individuals with treatment. Diversion at the pre-trial or prosecution phase – the focus of this implementation guide – is designed to reduce docket pressure, lower costs, focus prosecution resources on cases which demand more time and attention, and produce better outcomes for individuals and communities. Like diversion efforts which occur in the law enforcement phase, pre-trial or prosecution phase diversion programs also attempt to connect individuals to targeted community services as a means to reduce future criminal offending behavior. Diversion efforts at the problem-solving or specialty court phase are designed to reduce recidivism and provide additional oversight to cases involving a range of special populations.<sup>ii</sup>

### What Is Deferred Prosecution?

Deferred prosecution refers to a number of types of programs which occur in the pre-trial or prosecution phase of the case. These programs are pursued explicitly at the discretion of the prosecutor's office, and are typically implemented as early as possible in the case, ideally during charge and plea-entry.<sup>iii</sup> The underlying legal assumptions for deferred prosecution program eligibility are that the charge or charges are provable, and that the defendant does not have a legitimate fourth, fifth, or sixth Amendment claim.<sup>iv</sup> Both deferred prosecution programs and probation allows individuals to remain in the community while serving out the terms of their sentence; however, only deferred prosecution offers individuals the chance to avoid charge or conviction and, by extension, the collateral consequences of conviction.

Eligible defendants are generally (although not always) low-risk or have non-violent charges and little to no prior criminal history. These individuals are identified by either the prosecutor's office or referred by defense attorneys and provided the opportunity to engage a variety of activities including restitution repayment, community service, and engaging community behavioral health and human services in the community.<sup>v</sup> Most deferred prosecution programs match program activities to meet mutually agreed upon goals.

## When does a Deferred Prosecution Program Begin?

Deferred prosecution programs are implemented during one of the following time periods:

**Pre-charge.** The eligible defendant is offered entrance into the deferred prosecution program prior to a formal charge being filed. Successful completion of the program ensures charges are withheld. Pre-charge programs typically target low-risk defendants with little or no prior criminal justice system contact.

**Pre-plea.** Charges are filed, and the eligible defendant is offered entrance into the deferred prosecution program prior to entering a guilty plea. Successful completion of the program ensures charges are dismissed. Pre-plea programs typically target low-risk defendants with little or no prior criminal justice system contact.

**Post-plea.** Charges are filed, and the eligible defendant is offered entrance into the deferred prosecution program on the condition that they must enter a guilty plea. Successful completion of the program ensures the individual is able to withdraw their guilty plea, and the prosecutor declares *nolle prosequi*, or “do not prosecute.” Charges are dismissed. Post-plea programs typically target higher-risk defendants with more serious charges or a longer history of prior criminal justice system contact.

In most cases, deferred prosecution program failure results in the resumption of traditional criminal justice system court proceedings. For those defendants who enter a post-plea deferred prosecution program, failure moves them immediately to sentencing.

## Why Implement a Deferred Prosecution Program?

Although many diversion programs exist, deferred prosecution programs have tangible benefits for defendants, prosecutors, and the community.<sup>vi</sup>

**Defendants** are offered the opportunity to avoid conviction as well as the collateral consequences of having a criminal record such as reduced employment opportunities, restrictions on housing and financial resources, and disrupted involvement in family activities (e.g., volunteering at their child’s school). Identifying alternative forms of accountability to conviction and incarceration increases public safety as many defendants access a range of community resources which decrease the probability of criminal offending as well as other related problematic behaviors (e.g., substance use).

**Prosecutors** reduce docket pressure by diverting individuals with first-time or less serious allegations of criminal offenses to the behavioral health and human service sector when needed and are better able to focus limited prosecutorial resources on more serious cases which are more likely to impact public safety.

**Communities** avoid spending tax dollars on hearings, trials, and incarceration for eligible defendants without having to sacrifice public safety. Likewise, long-term research suggests that prevention efforts such as connecting individuals to behavioral health and human services when needed make communities safer.



# **Step-by-step guide:**

## **How to design, implement, manage, and evaluate a sustainable deferred prosecution program**

This guide is an introduction to the process of implementing a deferred prosecution program. The steps are ordered to reflect the on-the-ground process of program implementation based on extensive conversations with and observations of program stakeholders from six deferred prosecution programs. Each step contains practical guidance from current deferred prosecution program stakeholders to assist prosecutor's offices seeking to design, implement, modify, or expand a deferred prosecution program in their jurisdiction. This guide not only summarizes the design and implementation of multiple deferred prosecution programs, it also captures recommendations of "lessons learned" as programs grew, adjusted, and experienced changes in leadership in the prosecutor's office. While this guide is in a step-by-step format – organized according to the typical trajectory of program design and development – it is important to note that many established programs experienced these steps as iterative, rather than linear. For example, as programs grew, the prosecutor's office may have adjusted the size and structure of the team and service offerings may have expanded when more resources became available. Program evaluation is an ideal time to revisit the earlier design components to determine whether adjustments are needed.

## Step 1. BUILD THE STAKEHOLDER TEAM

The process of designing and implementing a deferred prosecution program requires an iterative process of relationship and team building with a range of stakeholders. In this process, the prosecutor's office can generate buy-in about the prospect of developing a new diversion program in the community and solicit feedback about the target population the program will serve. Many deferred prosecution program teams are comprised of the following stakeholders: in-house staff from the prosecutor's office, external criminal justice professionals, and behavioral health and human service providers in the community.

### **Stakeholders in the prosecutor's office.**

Implementing a deferred prosecution program typically represents a shift in both culture and process at the prosecutor's office. Administrators secure buy-in from in-house attorneys and staff to ensure the health and sustainability of the program. Deferred prosecution program administrators provide education and training for attorneys and staff on the purpose, function, and objectives of the deferred prosecution program and how program goals reflect the overall mission of the office to seek justice and maximize public safety. Training topics may include: overview of deferred prosecution programs, benefits of the program for the entire office, aims of the program and how deferred prosecution fits with the overall mission of the office to seek justice on behalf of the community, program elements and service components, and cultural competency training related to defendants who will participate in the program.

Many deferred prosecution programs likely benefit from assigning specific attorneys exclusively to the program, although some jurisdictions allow any of the prosecuting attorneys to execute a deferred prosecution agreement and grant access to the program. Building a deferred prosecution program team, even within a prosecutor's office, may also require staffing needs other than attorneys. In medium to large jurisdictions, deferred prosecution programs often employ a program manager (who may or may not hold a law degree) to administer the deferred prosecution program and liaise with key stakeholders. This prevents program administration from becoming part of an existing attorney's additional responsibilities on top of their caseload.

Although deferred prosecution programs are frequently a "light touch" option for defendants with low-level offenses, there are some resources required to implement a new program. Assigning appropriate staff who share the mission of the program and are given the discretion to execute its functions are the key element to implementation. Ongoing support may be maintained by providing stakeholders with data on program effectiveness, sharing success stories, and soliciting feedback on program elements. Additional staff such as program managers and social service providers (to either deliver or connect defendants to services) are ideal components of a new deferred prosecution program. Social workers and other human service professionals may be employed by the deferred prosecution program to assist with assessment, service referral and case coordination, service provision, and status updates with defendants between court hearings. While some programs in smaller jurisdictions have used attorneys to carry out these functions, others have stated a preference for using social service professionals in these roles and allowing their attorneys to carry out only legal functions.

## Stakeholders in the criminal justice system.

Deferred prosecution programs are overseen by the prosecutor's office and do not require the approval of criminal justice stakeholders, although the cooperation and support of these stakeholders are integral to program implementation and sustainability. Effective programs partner with a range of other criminal justice stakeholders, such as police departments, local jails, courts, and community organizations in order to implement key processes that promote the success of the program. Building relationships with each stakeholder group allows defendants to quickly deliver and receive information pertinent to the deferred prosecution agreement, ensuring that defendants are aware of program mandates, can easily update others on progress, and communicate expeditiously should barriers to program completion arise.

- ✓ **Law enforcement officers** play an important role in deferred prosecution programs, as they may serve as the earliest point for identifying potential defendants. Early intervention may prevent further justice system contact or pre-trial detention (as defendants are often released on their own recognizance once they sign a deferred prosecution agreement). Many deferred prosecution programs speak with the victim(s) of the crime (if any) as part of eligibility determinations; in some cases the victim may be represented by the responding officer.
- ✓ **Bond court administrators** or **pre-trial services** facilitate a key entry point for defendants into deferred prosecution programs. Building relationships with these stakeholders provides a standardized referral process at the earliest points of justice system contact. Although entities vary by jurisdiction, each set of stakeholders involved in the case before the initial court appearance are important to engage when designing a new program.
- ✓ **Judges** are pivotal program partners, even though the prosecutor's office has sole discretion over deferred prosecution. In some jurisdictions, the judge's approval may be needed to dismiss charges that have already been filed. Additionally, judges may create a special docket (or reserve space on a regular docket) to hear defendants' cases and increase flexibility and problem-solving for defendants who struggle to meet program goals. Defendants may be required to appear before a judge to enter a plea (in post-plea programs), to manage non-compliance, and at case termination.
- ✓ The role of the **defense attorney** is unique in deferred prosecution programs. While many deferred prosecution program defendants are represented by an attorney, it is not required in programs. In some deferred prosecution programs, defendants are able to enter into a deferred prosecution agreement without representation. This practice is most common in deferred prosecution programs that exclusively handle misdemeanor cases or for defendants with low-level offenses. Defense attorneys may help defendants negotiate entry into the program, understand the terms of the agreement, and argue on behalf of defendants who experience barriers to program completion.
- ✓ The **probation officer** (when warranted) may serve as a monitoring agent to assess compliance with the deferred prosecution agreement as well as facilitate connection to any services mandated by the program (when needed). When routine appearances before a judge or meetings with the prosecutor's office are required for deferred prosecution program participation, these interactions may be replaced by contact with the probation officer.

## Stakeholders in the community.

Building relationships with behavioral health and human service providers is important for program implementation as some defendants may be required to engage services as part of their deferred prosecution program agreement. Eligible defendants often have a unique set of needs and challenges and many deferred prosecution programs assess and refer defendants to community services.

It is imperative that providers who engage defendants in behavioral health and human services employ evidence-based services that have demonstrated significant impact with the target population. In some cases, prosecutor's offices have contracted with specific service providers or elected to employ their own staff to deliver evidence-based interventions in order to fill service availability and accessibility gaps in the community. Prosecutor's offices that seek to implement a new deferred prosecution program may partner with a researcher or service provider to aid in identifying evidence-based services and best practices within the community that specifically target the justice-involved population.

"I think a lot of it is trust from the planning process - that everybody's input is valuable. We have tried, even though it's diversion, to say, 'We know this is our program...but we can't make it work without everybody else, so we want your input.'"

-Prosecutor

"We talked to defense attorneys, we talked to the judges, we talked to probation and parole. Anybody who would listen and anybody who would talk to us..."

-Prosecutor

## Step 2. IDENTIFY THE TARGET POPULATION

Although programs may vary to accommodate the needs of defendants as well as the nuances of each jurisdiction, there are some common elements among deferred prosecution programs that can provide a uniform model for implementation. The characteristics and needs of the identified target population for the deferred prosecution program will guide and inform all subsequent decisions about program design, goals, and capacity. The target population should reflect specific, local characteristics of the jurisdiction and office caseload and should be determined in consultation with members of the stakeholder team.

Many deferred prosecution programs target defendants with non-violent misdemeanor criminal charges and minimal prior criminal histories, however, some programs target defendants with more serious charges or more extensive criminal histories. Some deferred prosecution programs target a range of special populations such as individuals charged with prostitution, domestic violence, or opioid related crimes. When considering the target population, some prosecutors caution that it is important to avoid net widening – or pushing individuals who were previously not charged into a diversion program, regardless of whether or not these individuals may have other human service needs. There are no universal metrics to suggest that one population succeeds in deferred prosecution programs where others fail. Common metrics include charge type, criminal history, level of risk, and victim approval.

### **Charge type:**

Deferred prosecution programs are often open to “low-level” offenses, which includes most misdemeanors and non-violent, non-sexual felonies. Additionally, some programs have expanded deferred prosecution programs to defendants with more serious charges, such as assault, and other felony charges (considered within the context of surrounding circumstances, criminal history, and risk level).

Multiple deferred prosecution programs may target a different population within the same jurisdiction. For example, one jurisdiction may have a deferred prosecution program targeted to defendants with misdemeanor charges while a separate program targets defendants with felony charges. In most cases, deferred prosecution programs for misdemeanor charges have fewer overall requirements including meetings or check-ins with the prosecutor’s office, fewer or less intense services, and a shorter program duration. These programs are likely to be pre-charge or pre-plea. Programs targeting felony defendants, on the other hand, often have more requirements, mandate more extensive services, and require frequent meetings and check-ins with a probation officer, the prosecutor’s office, or the judge.

Additionally, while eligibility is sometimes limited to defendants with a single charge, some programs target defendants with multiple charges or multiple charge types (e.g. misdemeanor and felony charges) to execute a deferred prosecution agreement.

**Criminal history:**

Criminal history often informs eligibility for deferred prosecution programs. Some deferred prosecution programs target defendants with no or minimal criminal history (which may focus on arrests or convictions). Criminal history is determined as a component of intake (either within the prosecutor's office or in contracted service provider's office); a designated staff person reviews an applicant's criminal record or delivers a risk assessment tool, which may assess prior arrests, jail stays, and convictions into the defendant's overall risk score.

While having no prior criminal justice system contact may benefit some applicants, it is worth noting that disparities in police stops and arrests may disproportionately affect certain groups of defendants. Even when charges are not filed, this disproportionate contact may constrain eligibility among some groups of the target population.

**Risk assessment:**

Deferred prosecution programs vary in their use of standardized risk assessments<sup>1</sup> in order to determine eligibility for programming.<sup>vii</sup> While some programs do not use a formal risk tool, others use validated risk assessments in order to make determinations about eligibility or to determine which deferred prosecution program is most suitable for the defendant.

**Victim approval:**

While some deferred prosecution programs engage in a conversation with individual victims of crime (versus commercial victims) before offering a deferred prosecution agreement to a defendant, not all programs determine eligibility based on victim approval. Some deferred prosecution programs weigh (in concert with other factors), whether the victim has granted approval prior to offering the defendant an agreement or provide individual victims an opportunity to object. Other deferred prosecution programs use victim consent as an inclusion criteria and will not admit defendants without it.

"I think it boils down to how much we know about a person, how much do we know about the crime that they're charged with and the circumstances of the crime, and do we have any kind of predictor of future risk?"

-Prosecutor

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<sup>1</sup> These metrics are not always neutral. The type and number of charges an individual accrues intersects with race, ethnicity, and neighborhood variables (among others). Likewise, although some programs use a standardized risk assessment tool to determine eligibility, scholars have long noted deep problems with these tools, including the tendency for tools to over-classify Black and Hispanic/Latinx defendants as high-risk. The prosecutor's office should be attentive to future research and exercise caution when using risk assessment tools. Data monitoring to establish whether racial or economic bias trends are present among the risk level of defendants is also warranted.

### Step 3. DETERMINE PROGRAM COMPONENTS

New deferred prosecution programs should determine the range of program components and whether or not defendants will be assessed for behavioral health and human service needs and referred for services as part of the deferred prosecution program agreement.

Although the needs of each target population vary, common deferred prosecution program components include:

- Restitution arrangements
- Community service hours
- Court appearances, meetings, and check-ins with the prosecutor's office and criminal justice stakeholders
- Drug screening (when applicable)
- Completion of services

A scan of services available in the community, including which behavioral health and human service agencies provide evidence-based services relative to the needs of defendants is necessary for programs wishing to incorporate a service component. The RNR Simulation Tool, developed by the Center for Advancing Correctional Excellence! at George Mason University, provides a tool for identifying evidence-based practices within a community, capacity to provide those services to justice-involved populations, and match defendants to services and programs based on assessed risk and need.

Common behavioral health and human service components include:

- Mental health treatment
- Substance use disorder treatment
- Cognitive behavioral therapy
- Behavior modification (e.g., anger management and parenting classes)
- Educational or vocational training
- Employment services or job placement

The scan is also an excellent opportunity to build relationships with key stakeholders in the community and to begin to think about what types of services deferred prosecution defendants will receive and how service connections will be facilitated. When conducting the scan, new programs should inquire about whether services are accepting new clients (and if there is a wait-list), whether services are accessible by public transportation, and how referrals can be expedited for defendants. Other key services information includes if there is a waiting list to access services, if health insurance or payment is required, and rules or regulations which might impact defendants (e.g., whether missed appointments result in termination). The Service Provision model mitigates service availability and accessibility issues.

It is important to note that each additional program requirement reduces the likelihood of successful program completion. Therefore, the potential benefit of each requirement should outweigh the risk of non-completion for individual defendants.

## Step 4: CHOOSE THE APPROPRIATE SERVICE MODEL

There are three primary organizing service models; the model varies based on the needs of the target population, the current interest and capacity of the prosecutor's office, and the availability and accessibility of services in the local community. Not all deferred prosecution program defendants will require behavioral health or human services; the models below describe programs which do incorporate a service component.

**Model 1. Independent Engagement:** Independent Engagement is appropriate for defendants who have limited (or absent) service requirements and service engagement is not monitored. For independent engagement, defendants are responsible for identifying and selecting their own service provider. Compliance is typically accomplished by simply providing documentation from the service provider that the services were received.

**Model 2. Service Referral or Coordination:** A subset of staff within the prosecutor's office or a contracted agency provides ongoing service referral and service coordination for defendants. At a minimum, service referral includes identifying relevant community partners and provides referrals to community agencies for defendants when service need is identified. A more intense version is service coordination. Service coordination often involves follow-up with defendants to ensure that services are engaged and to monitor progress in meeting the deferred prosecution agreement goals.

A central hub of service coordination affords a point of contact for defendants in need of services, avoids potential disruptions in service coordination due to staff turnover, expands access to community relationships and broadens the network of service providers and widens the array of available services, allows for a more standardized approach to referring and monitoring service provision, and offers greater structural support for data tracking and program evaluation.

**Model 3. Service Provision:** This model employs a community provider, exclusively contracted with the prosecutor's office or housed within the prosecutor's office, to deliver a majority of the services required of defendants; external referrals are made only for specialized services (such as certain behavioral health treatments or employment training). While the most resource-intensive model, service provision ensures that defendants have access to mandated services, provides standardized processes not only for monitoring and evaluation but also for service delivery itself. Through this model, service fidelity may be maintained.

The selected service model should match the current interest and capacity of the office, but many programs find that their service model changes over time. While most deferred prosecution programs initially implement an Independent Engagement model, program expansion or limited or inaccessible behavioral health and human services in the community, may shift the service model to Service Coordination or Service Provision to ensure that defendants' needs are met.



## Step 5. MATCH PROGRAM INTENSITY TO DEFENDANT NEEDS

Program length, intensity, and goals should be tailored to match the needs of defendants. Best practices indicate that **lower-risk or lower-need defendants** should have fewer program goals which can be completed relatively quickly (typically within 3-6 months) and less required contact with the prosecutor's office or judge. **Higher-risk or higher-need defendants**, on the other hand, may have more extensive service requirements and program goals to be completed over 12-15 months (or longer), more required contact with the prosecutor's office or judge, and may also be placed under the supervision of a probation officer.

Deferred prosecution programs may require that defendants pay restitution for their crime and/or complete community service in order to successfully complete the program. Restitution arrangements are determined by the value of damage, however these arrangements may take into consideration the defendants' income, in order to mitigate payment as a barrier to successful completion.

Some deferred prosecution programs manipulate program intensity to grant more autonomy to defendants who meet or exceed program goals or provide more structure to defendants who are struggling to meet their goals. [See "Rewards and Sanctions" on page 18.] For defendants in higher intensity services, detailing smaller, intermediate goals helps to maintain momentum and motivation.

Regardless of the service model and intensity of the program, all defendants should have access to the prosecutor's office to address any issues or obstacles to program completion.

"With this program it opens your eyes, and lets you know that this is how things work. We're not always here to just ... aw let's prosecute them, because ... throw them away, throw away the key, we also here to help you, help you to get you a second chance ... we feel like you deserve a second chance, we can provide that second chance for them, so that's what that's doing."

-Defendant

## Step 6. RECRUIT ELIGIBLE DEFENDANTS

A critical element of deferred prosecution programs is to identify eligible defendants as early as possible after arrest. Depending on jurisdiction, the earliest intervention point may vary; opportunities for deferred prosecution program identification and potential eligibility could begin with law enforcement officers, jail intake, pre-trial services, or the warrant office/division within the overall prosecutor's office. The warrant office is where decisions are made regarding whether or not to move forward with charges and which charges will be issued. It is at this early intervention point that attorneys in the warrant office may implement a brief screening tool to quickly identify eligible defendants and refer them to the most appropriate deferred prosecution programs (if more than one type of program is offered in the prosecutor's office).

Developing a mechanism to identify potential defendants suitable for program participation (e.g., screening tool), building relationships with front-end criminal justice stakeholders, and creating a formal referral process are all critical to successfully implement a new program.

## Step 7: INCORPORATE REWARDS AND SANCTIONS

Inevitably, some defendants will struggle to complete program goals in a timely manner and to sustain motivation to engage in the program over long periods of time. Although the long-term incentive of having one's criminal charges dismissed may be incentive enough for some defendants; however, both staff and defendants in deferred prosecution programs suggest that completion improves when incentives are tied to project goals.

Plan for potential obstacles to program completion and develop a range of incentives and sanctions to keep defendants moving forward.

Incentives should be used to reward defendants' for working toward their goals and to celebrate their success. Effective incentives include:

- Decreasing program intensity (e.g., requiring fewer check-ins or eliminating classes)
- Reducing or eliminating program fees
- Reporting progress and goal completion to the judge

Sanctions, on the other hand, may help manage defendants' chronic tardiness or absences, missed check-ins, positive drug screens, or failure to make progress toward program goals. Sanctions may include:

- Increasing program intensity (e.g., requiring more check-ins, adding mandatory classes, or more frequent drug screens)
- Increasing community service hours
- Dismissal from the deferred prosecution program
- Short-term incarceration (although even short-term incarceration is associated with negative consequences and a range of detrimental social and economic effects)

Defendants will benefit from a clear description of available incentives and how they can be earned throughout program participation. Additionally, when defendants fail to make progress, discussions of sanctions should be situated in the context of problem-solving, as even highly motivated defendants face a range of obstacles to program completion.

"You enter in a contract, you plead guilty, you're found guilty, judgment of conviction is withheld and there's a carrot at the end if you do well, and there's a stick if you do poorly."

-Defendant

## Step 8: UNDERSTAND PROGRAM BARRIERS AND FACILITATORS

Several barriers and facilitators of program completion have been identified. Below, common barriers are described in relation to program completion. Many deferred prosecution programs manage barriers by altering program design, offering rewards, and finding solutions to common problems by increasing or engaging known facilitators.

### **Barriers to program completion:**

**Fees:** Fees may be charged to enroll in deferred prosecution programs; fees may also be assessed to process drug screens or for some court appearances. Although fees are typically nominal, they present a barrier for defendants with precarious financial situations or for whom even small amounts strain their financial resources.

**Unavailable or inaccessible community services:** Behavioral health and human services may have a wait-list, are not accessible by public transportation, or require defendants to have health insurance.

**Frequent meetings or check-ins:** While some programs require few meetings/check-ins over the course of the program, others require weekly check-ins in addition to accessing community services. The time commitment of program participation may be prohibitive; defendants may fail to complete the program or voluntarily leave based on their inability to manage meetings with their other demands (e.g., employment and family). Lack of transportation causes further strain on meeting attendance.

**Family obligations:** Family caretaking responsibilities often complicate defendants' ability to find and retain employment, attend meetings and check-ins, and access services in the community. How these challenges are addressed will vary based on program capacity and goals. However, some deferred prosecution programs have chosen to provide more intensive case management to aid struggling defendants.

**Identifying a location to complete community service hours:** Defendants may not be able to identify a location to complete community service hours that is accessible by public transportation and works with their employment.

### **Facilitators of program completion:**

**Available, accessible behavioral health and human services (when needed):** When programs are equipped to make immediate, appropriate referrals to accessible services (e.g. accessible location, low- or no-cost), defendants are better able to complete the service program component. In response, some deferred prosecution programs create a centralized hub for coordinating services (**Service Coordination**) and other programs chose to deliver services in-house (**Service Provision**).

**Program rewards:** Rewards offered by deferred prosecution programs often serve as facilitators for defendants. Fee waivers, reductions in fines and fees, and decreased meetings/check-ins allow defendants to more easily matriculate through the program.

**Strong support network:** Family support and resources help defendants to meet program obligations. Support from an employer allows defendants to maintain employment while also attending classes, meetings, and check-ins while also engaging other services in the community (when needed).

**Prosecutorial discretion:** Prosecutors may adjust the requirements of the deferred prosecution agreement, address issues of non-compliance in a problem-solving manner, and negotiate extensions to allow defendants more time to meet program goals.

“We're spending a lot of time up front ... trying to meet the client's needs. Whether it be housing, mental health, ADA ... So even prior to them going and entering into a deferred prosecution [program], a lot of work is being done with clients.”

- Defense Attorney

## Step 9: PROGRAM COMPLETION

Successful completion of the program occurs when defendants have met all requirements detailed in the deferred prosecution agreement and have not acquired new criminal charges.

Defendants who complete pre-charge programs do not have a criminal complaint filed with the courts. For pre-plea program defendants, charges are dismissed. In post-plea programs, defendants withdraw their guilty plea and the original charge(s) are dismissed.

It is common for prosecutors to use prosecutorial discretion to truncate program length if a defendant has made progress towards goals—or extend program participation if they experience significant barriers to completion. In some programs, extensions are granted informally through dialogue between the defendant and the prosecutor. In other programs, defense council may be required to advocate for a program extension and a formal arrangement with the prosecutor's office must be reached.

Common reasons for extensions include:

- Outstanding restitution payments (missed payments or payments small enough that they will clear the debt by the end of the prescribed program timeframe)
- Additional time needed to secure employment or complete community service hours
- Failure to make progress toward behavioral health or human service goals

Responses vary to defendant's accruing new charges or being re-arrested during program participation. In some programs, acquiring a new charge is grounds for immediate termination from the program. In others, acquisition of a new, minor, charge may result in increased intensity of current programming or shifting to a different, more intense, deferred prosecution program. Prosecutor's may use discretion to determine whether the new charge is still amenable to the current program and may exact a less severe sanction, such as community service, while allowing the defendants to remain in the current program.

Failure to successfully complete the program typically results in traditional case processing for pre-charge and pre-plea programs. If a defendant fails to complete a post-plea deferred prosecution program, the case moves immediately to sentencing where the defendant will be sentenced on the charge(s) plead.

"Successes are people who can see the future, understand that they will be inhibited if they don't fix this issue that they're facing in the criminal justice system, who are truthful to a fault with themselves and with the judge and with the probation officer, and who work. It's work."

-Prosecutor

## Step 10: EXPUNGEMENT

Although the goal of deferred prosecution programs is to reduce criminal justice involvement (and the collateral consequences of that involvement) while maximizing public safety, successful completion of a deferred prosecution program may not guarantee expungement to all defendants. The process for expungement varies widely and not all defendants may be eligible for expungement in a jurisdiction, although expungement or sealing should be incorporated as a program component whenever possible (e.g., after successfully completing a post-plea program, charges will be automatically expunged or sealed). Providing assistance to program completers through the expungement process requires a commitment of resources on the part of the prosecutor's office, as it extends the relationship between the office and the defendant beyond program participation. Further, expungement for convictions and arrests may adhere to two different processes. Therefore, arrests may be flagged on a criminal background check even after the conviction is expunged.

Create a process to share information and provide expungement assistance with defendants. Defendants will need to know about relevant laws, procedures, requirements, and the expungement application process. Materials should be comprehensive and accessible to your defendants so that they can move through the expungement process with minimal direction from the prosecutor's office.

## Step 11: EVALUATE PROGRAM EFFECTIVENESS

It is important that mechanisms for tracking program data and measuring outcomes of the deferred prosecution program are carefully considered during the implementation process. New deferred prosecution programs will benefit from evaluating the program during the implementation phase. Program evaluation may be performed in-house or the prosecutor's office can partner with a researcher from a university for assistance.

While the ability to collect data will vary by capacity and available resources of the jurisdiction, some common data elements include:

- Defendant demographics (e.g., age, race, and socio-economic status)
- Current and previous criminal charges
- Service needs, referrals, and whether services were accessed and completed
- Program requirements (e.g., restitution and community service)
- How long the defendant was in the program
- Whether or not the defendant completed the program
- Whether or not the defendant accrued new charges and what those charges were
- Case disposition
- Future criminal justice involvement

These data are useful for assessing program acceptability, effectiveness, and sustainability. In addition to quantitative data elements, focus groups and interviews with key stakeholders and defendants (both those who complete as well as those who fail to complete the program) may help to identify common barriers and facilitate future defendants' success.

Adequate data tracking permits a program to make evidence-informed midcourse corrections during the implementation of a deferred prosecution program. The ability to measure, in real time, whether or not a program is meeting desired outcomes is invaluable. Data can be used to improve defendant outcomes but also to monitor desired changes within the prosecutor's office and public safety. During the implementation process, prosecutor's offices may need to adjust eligibility criteria, program length and intensity, refine or expand service offerings, or identify gaps in the program reach or services offered.

Building formal evaluations into the implementation process affords a regular time to review collected data and analyze whether or not objectives are being met. It is important that data are collected from and shared with key stakeholders. If possible, an impartial third-party should be granted access to the data to establish statistical effectiveness. Program evaluation provides an opportunity for regular assessment and program improvement. Evaluation results and process notes on program design and implementation may be disseminated to assist other prosecutor's offices seeking to implement a deferred prosecution program.



## Step 12: PLAN FOR SUSTAINABILITY

As the goal of deferred prosecution is to divert the target population from the office caseload, sustainability of the program is imperative. The Center for Public Health Systems Science at Washington University in St. Louis developed a sustainability framework and assessment tool to help plan for sustainability during program design and implementation.

The tool guides you to define and measure sustainability along eight key areas:

- **Environmental support**: Having a supportive internal and external climate
- **Funding stability**: Establishing a consistent financial base
- **Partnerships**: Cultivating connections between your program and key stakeholders
- **Organizational capacity**: Having internal support and resources to effectively manage your program
- **Program evaluation**: Assessing your program to inform planning
- **Program adaptation**: Taking adaptive actions to ensure ongoing effectiveness
- **Communications**: Having strategic communication with stakeholders and the public
- **Strategic planning**: Using processes to guide program direction, goals, and strategies

The sustainability tool can be accessed here: <https://sustaintool.org>

## LOGIC MODELS

The following three logic models frame the need for designing and implementing a deferred prosecution program within the context of the expected inputs, targeted outputs, and potential outcomes and impact within the community. Each logic model is paired with text to explain the conceptual framework.

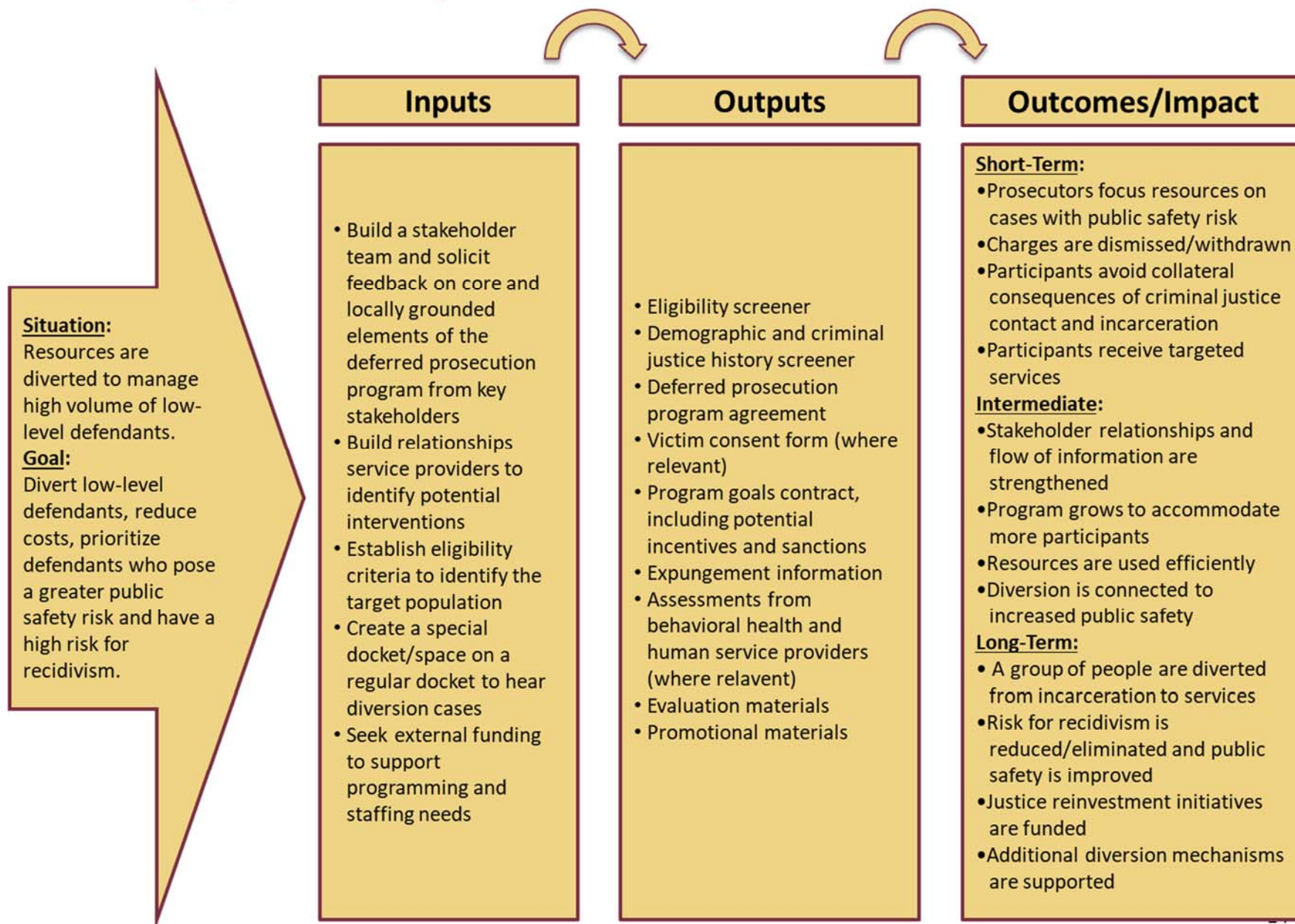
### **Logic Model 1: Description of core elements of a deferred prosecution program**

The reality of the current state of the prosecutor's office is that caseloads are high and resources are often diverted away from processing defendants with serious offenses who pose the greatest threat to public safety in order to manage the high volume of defendants with low-level offenses who pose little risk to public safety. Prosecuting low-level defendants exposes these individuals to a range of negative collateral consequences of criminal justice system involvement (e.g., reduced educational and employment opportunities, housing restrictions, family disruption, and civil-political disenfranchisement). The goal of deferred prosecution programs is to divert low-level defendants from traditional prosecution and prioritize resources for cases that pose a greater risk to public safety.

The required inputs to build a deferred prosecution program include team building with criminal justice stakeholders to identify the group of defendants who will benefit the most from program participation and provide the most relief to the office caseload. When possible, a special docket should be created (or space reserved on a regular docket) to hear diversion cases. Relationship building with behavioral health and human service providers will help ensure that program goals can be met by defendants and help to expand the mission of diversion into the community. Outputs will likely include a range of screening and data collection tools, program contracts and forms, and informational handouts to guide defendants. Assessment tools will help to ensure that defendants are meeting goals and identify service gaps. Promotional materials will help to expand the mission of the program into the community.

The outcomes and impact of the program vary over time. In the short-term, defendants have charges dismissed/withdraw a guilty plea after successful program completion, avoid collateral consequences of criminal justice system contact, and receive targeted behavioral health and human services. Prosecutors are able to focus resources on cases with greater public safety risk. In the intermediate, relationships and flow of information between stakeholders are strengthened and resources are used efficiently and effectively. The program may grow to accommodate more defendants or expand to address the needs of a different target population, and the public learns about the benefits of diversion and how diversion increases public safety. In the long-term, the risk for recidivism is reduced/eliminated among the target population, public safety is improved, and funds are freed up to support justice reinvestment initiatives and additional diversion mechanisms.

## Core Elements of Deferred Prosecution Programs



## **Logic Model 2: Description of pre-charge and pre-plea programs – one case example.**

Pre-charge and pre-plea programs are designed to address the reality that existing resources are often spent managing defendants with low-level offenses. The goal for pre-charge and pre-plea programs is to reduce costs associated with processing defendants who pose a low risk to public safety and invest resources in processing defendants who pose a greater safety risk and have a higher risk for recidivism.

Program inputs include internal program staff (Deputy District Attorney who functions as a supervisor, Assistant District Attorneys, plus other community prosecutors), stakeholders from the Chief Judge's Office and public defender's office, plus private defense attorneys and case workers. Stakeholders develop a protocol outlining program eligibility and determining the target population. Develop relationships with behavioral health and human service providers in the community. Identify potential funding sources to launch and/or sustain program.

There are many program outputs. Defendant eligibility is established using a screening tool. The prosecuting attorney offers entrance into the deferred prosecution program and the defendant's attorney helps defendant decide if the program is the most appropriate course of action. If the offer is accepted, then the defendant signs a written agreement which details program requirements including restitution amount (if applicable) and deadline for completion (usually 3-6 months). No criminal complaint is filed. When needed, defendants' needs are identified and referrals are made to behavioral health and human services in the community. Defendants contribute to the program and community through community service and restitution.

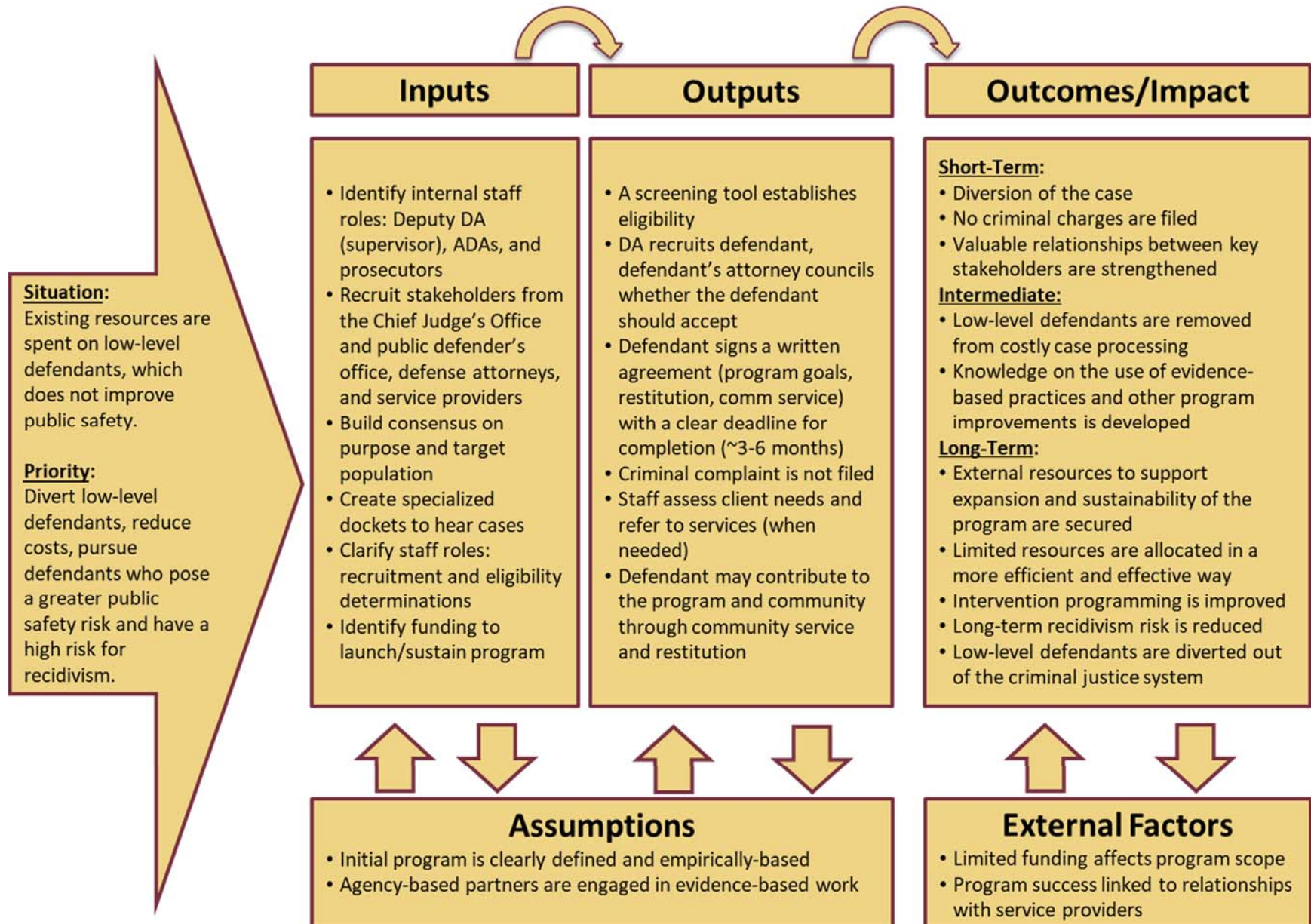
The outcomes and impact of the program vary over time. In the short-term, outcomes include successful diversion of the case, no criminal charges are filed, and valuable relationships between key stakeholders are strengthened. Intermediate outcomes include removing low-level defendants from costly case processing, obtaining external resources to support implementation, expansion, and sustainability of the program, and developing knowledge on the use of evidence-based practices and other program improvements. Long-term outcomes include allocating limited resources in a more efficient and effective way, improving intervention programming, reducing long-term recidivism risk, and successfully diverting low-level defendants out of the criminal justice system.

Several assumptions inform the development and implementation of a pre-charge or pre-plea program. These include the initial conceptualization of the program being clearly defined and empirically-based and having agency-based partners engaged in evidence-based work.

Likewise, limited funding affects the scope and quality of the program outcomes and impact and program success is linked to behavioral health and human service agency relationships for defendants who require services to fulfill the terms of their agreement.



## Pre-Charge, Pre-Plea Programming



### **Logic Model 3: Description of post-charge, post-plea programming – one case example.**

Post-charge, post-plea programs are designed to address the reality that existing resources are often spent managing defendants with low-level offenses. The goal for post-charge and post-plea programs is to divert low-level defendants with previous criminal histories or other needs and invest resources in prosecuting defendants who pose a greater public safety risk and have a high risk for recidivism.

Program inputs include internal program staff (Deputy District Attorney who functions as a supervisor, Assistant District Attorneys, plus other community prosecutors), stakeholders from the Chief Judge's Office and public defender's office, Bond Court Judge, plus private defense attorneys and case workers. Stakeholders build consensus on program purpose and the target population. Specialized dockets are created to hear cases. Staff roles are identified, including who will perform recruitment and eligibility screening. Staff administer assessments to identify client needs and make service referral (when needed). Defendants contribute to the program and community through program fees, community service, and restitution.

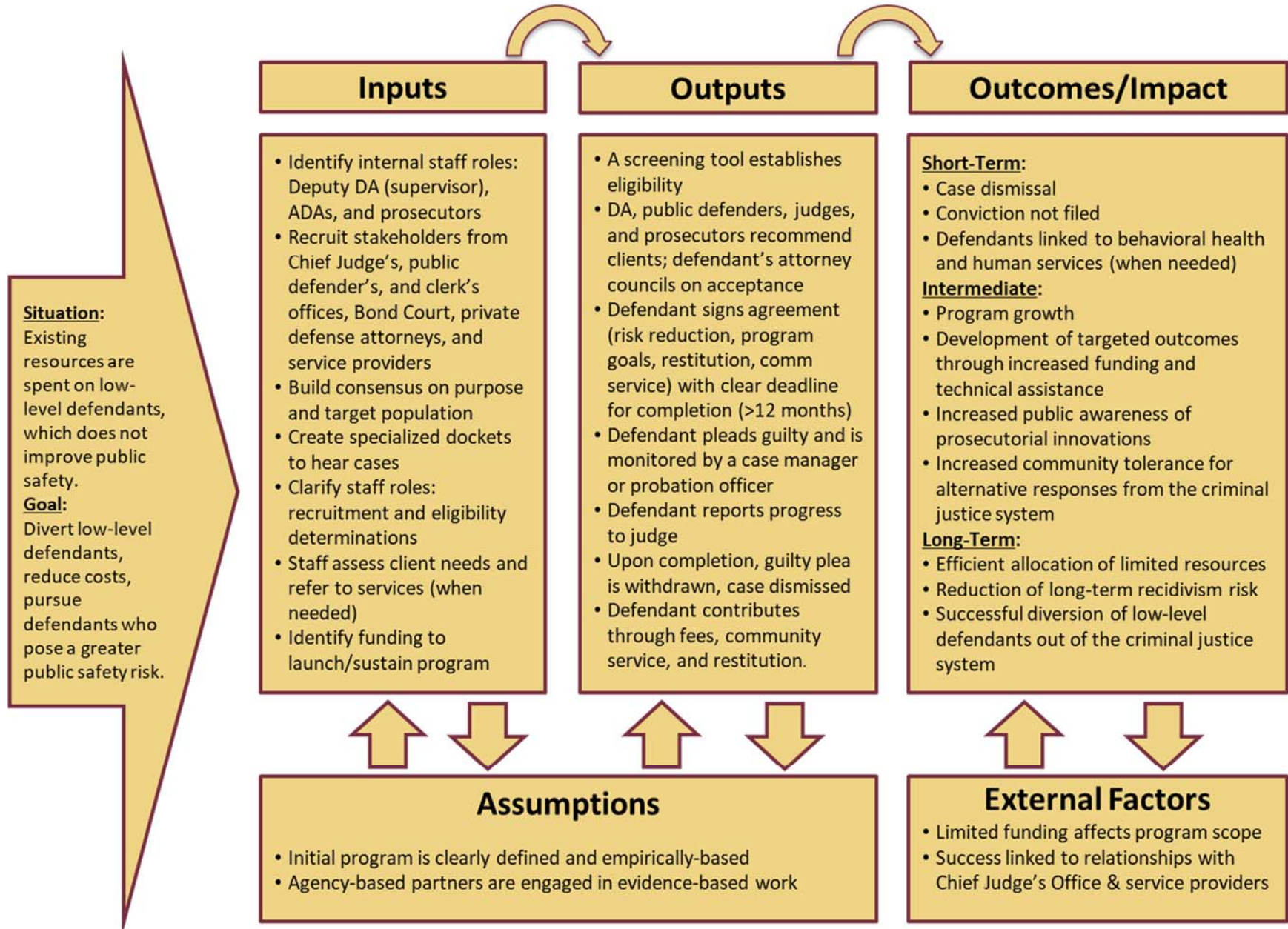
There are many program outputs. Defense attorneys, public defenders, judges, and prosecutors recommend potential clients to the program; eligibility is established using a screening tool or standardized risk assessment tool. The prosecuting attorney offers entrance into the deferred prosecution program and the defendant's attorney helps the defendant decide on an appropriate course of action. If the offer is accepted, the defendant signs a written agreement which details program requirements and focuses on risk reduction. Program requirements including restitution arrangements and a deadline for completion (usually at least 12 months). The defendant pleads guilty and may be monitored by a case manager or probation officer. Defendants report to judge throughout program to report on their progress. Defendants who successfully complete the program withdraw their guilty plea and the case is dismissed.

Outcomes/impact. The outcomes and impact of the program vary over time. In the short-term, outcomes include case dismissal and conviction not filed and defendants are linked to behavioral health and human services (when needed). Intermediate outcomes include program growth and the development of more targeted outcomes through increased funding and technical assistance, increased public awareness of prosecutorial innovations, and increased community tolerance for alternative prosecution programs. Long term outcomes include the efficient allocation of limited resources, a reduction of long-term recidivism risk, and successful diversion of identified defendants out of the criminal justice system.

Several assumptions inform the development and implementation of a pre-charge or pre-plea program. These include the initial conceptualization of the program being clearly defined and empirically-based and having agency-based partners engaged in evidence-based work.

Likewise, limited funding affects the scope and quality of the program outcomes and impact and program success is tied to behavioral health and human service agency relationships as well as relationships with the Chief Judge's Office.

## Post-Charge, Post-Plea Programming





## CONCLUSION

Implementing a deferred prosecution program within the prosecutor's office allows for the diversion of eligible defendants from traditional criminal case processing. Individual outcomes are improved when defendants are connected to needed behavioral health and human services in the community and the prosecutor's office can focus on prosecuting defendants who pose a threat to public safety and have a high risk for recidivism.

This implementation guide was developed in consultation with professional stakeholders and defendants who represented a range of deferred prosecution programs. After completion, the guide was provided to experts at Fair and Just Prosecution<sup>viii</sup> to ensure the accuracy and comprehensiveness of the content. The step-by-step guidance on how to design, implement, manage, and evaluate a deferred prosecution program incorporates practical tips and identifies common obstacles to program success. The program elements, practices, and resources detailed in this guide ensure that new and expanding deferred prosecution programs meet the needs of the prosecutor's office while adhering to the best available evidence on how to maximize successful program implementation, program effectiveness, and sustainability.

## RESOURCES

### **The Prosecutor-Led Diversion Toolkit**

The Prosecutor-Led Diversion Toolkit was developed by Association of Prosecuting Attorneys in order to provide assistance for implementing diversion programs as well as sample documents from other jurisdictions and prosecutor's offices from around the country.

<http://www.diversiontoolkit.org/>

### **The Center for Court Innovation Planning Tools**

The Center for Court Innovation seeks to help create a more effective and humane justice system. Based in New York City, they offer a range of fact sheets, self-assessment tools, and practitioner monographs full of concrete suggestions on how to build your program, engage stakeholders, identify funding resources, and ensure program effectiveness.

<https://www.courtinnovation.org/publications/planning-resources>

### **The University of Pretrial**

An online community offering education, resources, news, and connection for those working in pre-trial diversion.

<https://university.pretrial.org/home>

### **The Risk-Needs-Responsivity Simulation Tool**

The Risk-Needs-Responsivity Simulation Tool, developed by Center for Advancing Correctional Excellence! at George Mason University, identifies evidence-based practices within a community and capacity to provide those services to justice-involved populations.

[https://www.gmuace.org/research\\_rnr.html](https://www.gmuace.org/research_rnr.html)

### **The Program Sustainability Assessment Tool**

The Center for Public Health Systems Science at the Washington University in St. Louis developed a web-based sustainability framework and assessment tool to help plan for sustainability during program design and implementation.

<https://sustaintool.org/about-us/>

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