

**A SHORT HISTORY OF THE PRETRIAL DIVERSION OF ADULT
DEFENDANTS FROM TRADITIONAL CRIMINAL JUSTICE PROCESSING
PART ONE: THE EARLY YEARS**

By
John P. Bellasai, JD

“The Commission recommends:...Early identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required.” (Final Report of the 1967 President’s Commission on Law Enforcement & Administration of Justice, *The Challenge of Crime in a Free Society*.)

Starting in 1967, with a widely-publicized recommendation of the President’s Commission on Law Enforcement & Administration of Justice, contained in its final report, entitled, *The Challenge of Crime In a Free Society*, much has been written in praise of pretrial diversion – first, by front-line criminal justice decision-makers (prosecutors and trial judges) and by diversion practitioners themselves. In subsequent years, mainly during the 1980s, a good deal was also written about diversion in the way of criticism, especially from the defense bar, civil libertarians, and professional researchers. From its high-water level of the mid-1970s, pretrial diversion by the late 1908s was widely regarded in national justice policymaking circles as an innovation which not only had been oversold but which had failed.

Despite such wildly varying public perceptions, the successful pretrial diversion nationwide of thousands of defendants annually in numerous programs has continued unabated for more than three decades now. By the mid-1990s, the resilience of pretrial diversion as a cost-effective dispositional alternative has received renewed, widespread attention. Far from being discredited, the concept has re-emerged in court systems coast-to-coast as a legitimate, useful dispositional alternative—for certain types of defendants in certain types of cases -- albeit without its advocates touting many of the extravagant claims for it as a panacea that characterized the heady early years.

In fact, as we look back on the roller-coaster ride of the past three decades, pretrial diversion has come full circle. Rather than fulfilling its early claim to being an relative to the traditional criminal justice system, diversion now has become truly institutionalized within that system. The purpose of this article is to review the high points (and low points) of that 30-plus year journey.

Before we begin our journey, however, we will need to define our terms and otherwise get our bearings. First, the word “diversion” (like its even less precise alternative “diversionary”) has become a very fashionable label applied these days by various authors, criminal justice planners and grant applicants to just about any community-based alternative to incarceration. The term “diversion” has thus become so overused and exploited that it serves more to confuse than to clarify. In this context, the term “diversion” must be understood to refer *only* to *pretrial* diversion, or as it is perhaps more aptly called, “pretrial intervention” or “deferred prosecution”.

The term “pretrial intervention” or PTI was coined in 1968 by the US Department of Labor (DOL) when developing its early “manpower model” of pretrial diversion. The term PTI was carried over by the Pre-Trial Intervention Service Center, created by the American Bar Association (ABA) in 1973, with DOL funding. The widespread use down through the years of the term “PTI” is a direct consequence of the, early pervasive influence of DOL and the ABA’s PTI Center on the evolution of the diversion field. In contrast, the term “deferred prosecution” was coined by Flint, MI Prosecuting Attorney Robert F. Leonard, an avid, early proponent of pretrial diversion, who wrote widely on the subject in the 1970s. The term “deferred prosecution” was then picked up by the National District Attorneys’ Association (NDAA) and regularly utilized in its publications over the years. The term “pretrial diversion” -- over time, the most popular of the three terms and the one most commonly used today by outside parties writing or commenting on the practice -- seems to have won out as the preferred term due to its regular, repeated usage throughout the 1967 Report on the President’s Commission on Law Enforcement & Administration of Justice, and because of its subsequent adoption by NAPSAs in 1978, in its *Standards & Goals for Pretrial Diversion* (discussed below).

Second, as for which of the literally hundreds of so-called “diversionary” mechanisms and programs operational today are considered “true” pretrial diversion, for the purposes of this review, the working definition first developed by the ABA’s PTI Center in 1973 is still an authoritative source, as is the official NAPSAs definition, adopted in 1978, which is contained in the Association’s *Standards and Goals for Pretrial Diversion*. Significantly, the 1978 NAPSAs definition generally comports with the ABA Center’s earlier (1973) definition -- though NAPSAs’s appears to be a bit narrower. Consistent with both definitions, for our purposes here, we are concerned only with those diversionary procedures which feature (1) uniform eligibility criteria; (2) structured delivery of services and supervision; and (3) dismissal -- or its functional equivalent -- of pending criminal charges upon successful completion of the required term and conditions of diversion.

Third, before beginning our review of major developments in pretrial diversion since the seminal year in 1967, it is important to note that at least one successful community-based pretrial diversion program -- the Citizen’s Probation Authority (CPA) of Flint, Michigan -- predated the 1967 Report on the President’s Commission on Law Enforcement & Administration of Justice by two years. In addition, a few states, -- Connecticut, Illinois and New York -- by 1967 had already enacted legislation authorizing treatment in lieu of prosecution for various categories of defendants. (See Connecticut General Statutes Annotated Sec. 19-4840; Illinois Revised Statutes Chapter 91-2, Sec. 120; and New York Mental Hygiene Law Sec. 1.20.) But the widespread interest in pretrial diversion which led to the explosive proliferation of new programs in the 1970s must be traced directly to the 1967 Report of the President’s Commission on Law Enforcement & Administration of Justice. It is to the post-1967 period, then, that the history of pretrial diversion on a truly national scale belongs. And as we look back from the perspective of 30-plus years of nationwide experience with pretrial diversion, it seems particularly appropriate to identify some of the highlights leading to the formulation of what is embodied in the 1995 revised edition of the *NAPSAs Standards and Goals for Pretrial Diversion* as the state-of-the-art today.

The Manpower Administration of the US Department of Labor (DOL) was the first Federal Government entity to take steps to translate the pretrial diversion recommendations of the 1967 President's Commission into reality. In 1968, DOL funded two pilot pretrial diversion programs -- one in New York City and the other in Washington DC. Each targeted first time offenders (other than drug or alcohol abusers) charged with non-violent misdemeanor offenses and who were unemployed or underemployed; each provided ongoing job development, training and placement services; and each offered dismissal of pending charges and expungement of arrest records to all successful divertees. These two programs, the Manhattan Court Employment Program (MCEP) of the Vera Institute of Justice in NYC, and Project Crossroads in DC, were each assessed by their respective justice system administrators to be a success after only the first 18 months and both were refunded by DOL. Significantly, major process and impact evaluations of each were commenced *starting only at that point, not earlier*, and continuing over several succeeding years. The practical results were, on the one hand, widespread favorable publicity for the two programs as well as for the concept they represented and, on the other, formal commitment from DOL, not only to refund the projects in question but to replicate them elsewhere.

While DOL prepared the groundwork for expanding the MCEP-Crossroads model to other jurisdictions, much additional, independent impetus was given to the concept of diversion on the national scene during the year 1970. First, the President's Commission on Prisoner Rehabilitation published a report which recommended, among other things, that "the Congress should enact legislation and appropriate funds for the creation of special units to provide pre-adjudication services to all kinds to defendants... with the object of diverting as many defendants as possible from the full criminal process".

Second, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970 (commonly known as the Controlled Substances Act, or CSA). Though the primary, stated purpose of the law was to schedule illegal, dangerous drugs in such a way as to make federal penalties for possession or sale commensurate with the risk of harm to the user. Congress added a diversion section to the Act. Section 404(b) of the CSA permitted first offender drug law violators to be placed on probation, with "appropriate conditions" (e.g. drug treatment), for up to one year after entry of a deferred plea of guilty. Provided the defendant did not violate any of the conditions of his or her probation during this time, the statute mandated that "the court shall discharge such person and dismiss the proceedings against him". Further, if the defendant was under 21 years of age at the time of the offense, the statute provided for expungements of all public records relating to the arrest and conviction.

The significance of the enactment of Section 404(b) of the CSA in 1970 was two-fold in terms of lending impetus to the general national trend towards community-based pretrial diversion for drug abusers. First, unlike Title I of the Narcotic Addict Rehabilitation Act (NARA), enacted in 1966, which had also provided for treatment in lieu of prosecution for selected drug addicts, the CSA diversion section did *not* require treatment in custodial (i.e., hospital) setting. In fact, a form of probation-without-verdict, it *required* rehabilitation in a *community-based* setting, as did the DOL "manpower model" for non-addicts. Second, and even more important, the legislative history of Section 404(b) of the CSA made it clear that Congress was aware that few street addicts are charged or prosecuted under federal law for possession of drugs. The diversion

provision was incorporated in the statute not in anticipation of significant federal addict diversion but, rather, as an example to the states to reform their own laws in parallel fashion. Thus, 1970 saw a federal-level policy mandate the implementation of community-based drug diversion on the state level. The large number of drug diversion programs which sprung up thereafter owe their conceptual legitimacy in large part to this law.

Other occurrences in 1970 signaled that the concept of pretrial diversion was gaining increased momentum and legitimacy. For one thing, the New Jersey Supreme Court promulgated Rule 3:28 of its Rules of Criminal Procedure. This marked the first statewide, formalized authorization for community-based programs of pretrial diversion other than by legislation. It also marked the first entry onto the scene of the judiciary as a major actor in the diversion process. The conventional wisdom had declared until then -- absent specific statutory provisions to the contrary -- that the pretrial stage of the criminal process was the *exclusive preserve* of the prosecutor. While this earliest form of New Jersey Supreme Court Rule 3:28 in no way sought to invade the domain of the prosecutor in the screening and charging process out of which diversion decisions came, the groundwork was nonetheless laid for judicial monitoring of the fair administration of formalized diversion by the prosecutor -- a groundwork upon which, in later years (at least in New Jersey) a non-statutory role for the judiciary in the diversion process would be erected.

Also in New Jersey, 1970 saw the advent of the third “manpower model” pretrial diversion program -- the Newark Defendants’ Employment Project (NDEP). Apart being the first such program in that state and serving as an impetus to the later implementation of additional programs in other New Jersey counties, NDEP was of significance to the diversion field nationally in that the project’s funding came in-part from DOL but also in part from the Law Enforcement Assistance Administration (LEAA) of the US Department of Justice (DOJ), via block grant monies. Thus, 1970 saw the entry of LEAA and DOJ into the arena of diversion program funding, previously a DOL preserve. (This was a catalytic role which LEAA and other DOJ agencies were to go on to play for decades to come whether through block grants to states or discretionary grants to public and private entities in cities and counties nationwide.)

Finally, 1970 saw Senator Charles (Mac) Matthias of Maryland formally praise on the floor of Congress the accomplishments of Project Crossroads during its pilot phase. The Senator used this as an opportunity to call for nationwide experimentation with the “manpower model” of pretrial diversion.

The following year, 1971, witnessed tremendous activity on both the federal and local levels. DOL activated seven more diversion programs on the Crossroad – MCEP “manpower model” -- Project De Novo in Minneapolis, MN; the Baltimore Pretrial Intervention Project, in Baltimore, MD; the Boston Court Resource Program, in Boston, MA; Project Intercept in the San Francisco Bay area; plus similar programs in Cleveland, OH, San Antonio, TX, and Atlanta, GA. At the same time, LEAA funded two new program starts of its own which were to prove equally successful and replicable -- Operation Mid-Way in Nassau County, NY and the New Haven Pretrial Diversion Program in New Haven, CT. (Of all these early DOL-funded diversion programs, only Project De Novo (now called *Operation De Novo*) in Minneapolis has survived.

Today it still successfully diverts hundreds of defendants each year -- many charged with nonviolent *felony* offenses—as it has done routinely since 1971.)

While these efforts were getting under way, the first two programs funded by DOL, Project Crossroads and MCEP, were institutionalized in their respective jurisdictions' criminal justice systems. (Despite many ups and downs over succeeding years and many changes in operational procedures and sponsoring agencies, institutionalized programs of pretrial diversion have continued unabated, in some form or other, in the criminal justice systems of both New York City and Washington, DC from that time through the present.) Meanwhile, in Philadelphia, PA, the local trial court (Common Pleas Court) and the Office of the District Attorney (now US Senator Arlen Specter was Philadelphia District attorney at that time) were jointly operating a major pretrial diversion program -- the Pre-Indictment Probation (PIP) Program -- under a special Rule from the Pennsylvania Supreme Court, without any outside funding. The PIP Program diverted thousands of defendants in its first year without federal or state funding assistance and was considered so useful and successful by the end of the year that it provided the impetus for additional programs across the State of Pennsylvania, all authorized under a statewide Supreme Court Rule (still on the books 30 years later).

On the national scene that year, U S Attorney General Richard Kleindienst stated publicly, in a speech delivered at the National Conference on Corrections, that the Nixon Administration approved of the use of first offender pretrial diversion and that fostering the spread of such programs was a priority for DOJ. The American Bar Association (ABA) likewise gave its support to the use of pretrial diversion for first-time defendants with the publication by its Special Committee on Crime Prevention & Control, chaired by prominent trial attorney Edward Bennett Williams, of a national report entitled, *New Perspectives on Urban Crime*. This well-received ABA book strongly recommended diversion for both drug-dependent defendants and non-drug abusing defendants, on a selective basis. Finally, the Approved Drafts of the ABA *Standards for the Prosecution Function* and *Standards for the Defense Function* were both published for the first time in 1971. In both sets of standards, the ABA for the first time articulated a *duty* on the part of both the prosecutor and the defense attorney to explore the possibility of diversion as a dispositional option in all appropriate cases.

In 1972, LEAA funds led to the start-up of the Metropolitan Dade County Pretrial Intervention Project, in Miami, FL. The consistent record of accomplishment of Dade County Pretrial Intervention from that time forward led not only to the proliferation of diversion programs in the State of Florida -- far in excess of the number anywhere else in the south -- but to the adoption of a state diversion statute and to state-level standards and goals for diversion promulgated by a governor's crime commission.

Likewise, 1972 saw the implementation of the New York City Addiction Services Agency's Court Referral Project (CRP), funded with LEAA seed money. Until its unfortunate demise in 1976 as a fatality of New York's City's fiscal crisis, CRP was the largest drug diversion program in the country outside of the Treatment Alternatives to Street Crime (TASC) system, which evolved in part based on the CRP model and in response to CRP's track record of success.

Another major development in the drug diversion area occurred in 1972 with the passage by the California Legislature of Penal Code Section 1000, which authorizes the pretrial diversion of drug-dependent defendants on any non-violent offense, as long as there exists no record of previous drug law convictions or probation or parole violations. The emerging significance of Penal Code Section 1000 for diversion was not only that it is a state-wide mechanism through which thousands of cases are diverted yearly to community-based treatment programs in the nation's most populous state, but that this statute in its first decade on the books gave rise to more court decisions directly addressing various aspects of pretrial diversion -- usually with rulings quite favorable to the interests of defendants -- than all other diversion programs and statutes combined.

As indicated above, the Philadelphia Court of Common Pleas' Pre-Indictment Probation (PIP) Program, inaugurated in January of the previous year, had proved so successful in meeting its stated objectives that it was institutionalized and expanded. Mid-1972 saw the enactment of Pennsylvania Supreme Court rules governing diversion, together with the establishment in state law of the ARD (Accelerated Rehabilitative Disposition) as a pretrial diversion procedure of statewide applicability.

In Washington, DC, the local trial court in 1972 received an LEAA grant to fund an experimental pretrial diversion program for heroin addicts coming through their city's criminal justice system. Called the Narcotics Diversion Project, this model was designed to reflect findings from a comparative assessment of all extant diversion programs in operation nationwide, both drug and non-drug. This study, which had predated by a year program implementation, had been conducted under a grant to the ABA's Special Committee on Crime Prevention & Control from the Ford Foundation; the findings were published in the 1972 edition of *The Georgetown Law Journal*, along with a discussion of salient legal issues raised by the use of pretrial diversion. The resultant program design featured a conscious attempt to fuse optimal features derived from the comparative review of other successful diversion programs. It also featured (at the insistence of the local US Attorney) a *conditional guilty plea* that could be withdrawn at successful completion of the program; referral for regular drug testing and outpatient treatment to the local city treatment agency; a longer term of services and supervision (12-18 months) than most other (non-drug) diversion programs then in operation; and the return of problem cases for interim, short-term sanctions to *the same trial court judge* who had originally placed the participant in diversion. (In this and other respects, the Narcotics Diversion Program -- though it had ceased operation by 1980, before a planned outside evaluation could be implemented -- anticipated and reflected numerous features characteristic of the later "drug court" model, popularized in the early 1990s as a result of an operationally successful, well-publicized and independently evaluated effort in Miami/Dade County, FL. (Since 1990, this so-called "drug court model" -- which encompasses both a true pretrial diversion track and other possible tracks, at the option of the local jurisdiction -- been very widely replicated nationwide, with funding from the Drug Court Office, DOJ.)

On the national scene, two more respected organizations took official positions in favor of pretrial diversion during 1972. The American Correctional Association (ACA) adopted a resolution entitled, "Diversion of Non-Dangerous Offenders", advocating the increased use of diversion, at its 102nd annual congress, held that year in Pittsburgh, PA. In addition, the

American Law Institute (ALI) promulgated its *Model Code of Pre-Arrest Procedure*, Section 320.5 of which not only recommends use of pretrial diversion but details preferred procedural steps for the diversion of appropriate cases.

In the U.S. Senate, the Community Supervision and Services Act, S. 798 (first introduced the previous year and by now popularly known as the “Burdick Bill”, after its sponsor, Senator Quentin Burdick), passed unanimously in 1973. It called for federal pretrial diversion of selected offenders from *all* US district courts. The same year, the National Commission on Marijuana and Drug Abuse not only went on record recommending that *all* states set up programs of pretrial diversion for defendants charged with simple possession offenses, but took the view this avenue of case processing was “*constitutionally mandated*”.

Coming on the heels of this recommendation, in 1973 LEAA, in conjunction with the Special Action for Drug Abuse Prevention (SAODAP) in the Executive Office of the President (the original incarnation of the so-called “Drug Czar’s Office”) implemented a nationwide program of both pretrial and postconviction referral to treatment of addicted defendants called TASC (Treatment Alternatives to Street Crime). By the end of that year, the first 12 TASC projects were operational -- in Austin, TX, Baltimore, MD, Birmingham, AL, Cincinnati, Cleveland and Dayton OH, Indianapolis, IN, Kansas City, MO, Marin County (San Francisco Bay area), CA, Miami, FL, New York City (Office of the US Attorney for the Southern District of NY, i.e., Manhattan) and Wilmington, DE. Most of these featured the use of true pretrial diversion as one possible dispositional track, while others were treatment *in lieu of incarceration*, (i.e., as a condition of pretrial release or probation) only. One TASC project -- the one operating out of the Office of the US Attorney for the Southern District of New York -- was unique in that the true pretrial diversion was the *only* dispositional route for the defendants, most of these having been charged with serious felonies, as well.

One of the first diversion-related events of national note in 1973 was the publication in January of that year of the seven-volume *Report of the National Advisory Commission on Criminal Justice Standards and Goals*. Several key standards, most importantly 2.1 in the *Courts* volume and 3.1 in the *Corrections* volume, called for pretrial diversion and spelled out procedural and service delivery considerations important to the diversion process. Two months later, DOL awarded funding jointly to the ABA’s Commission on Correctional Facilities and Services and the National District Attorney’s Association (NDAA) for creation, in Washington, DC, of a Pretrial Intervention Service Center (PTISC). The PTI Center, as it quickly came to be called, was given a mandate to serve as a clearinghouse of diversion information for *all* interested parties. Its mission also extended to developing and publishing monographs, issues papers, newsletters, and other publications on key issues in the diversion field, as well as to the delivery by telephone of technical assistance to states and localities desirous of establishing additional pretrial diversion programs.

When viewed from the perspective of long-term influence on the development of diversion program operations, few occurrences in these early years had so profound an influence on the development of pretrial diversion as a professional discipline as did the establishment by the ABA of its PTI Center. PTI Center publications on diversion legal issues, program design, and research and evaluation issues not only determined the configuration of many of the newer

diversion programs started up after 1973 but also led to operational modifications in many of the older “manpower model” PTI programs whose existence predated PTI Center activation.

Also, in the spring of 1973, the National Association of Pretrial Services (NAPSA) -- formed the previous year as a dues-paying, national professional association for pretrial *release* program administrators *only* -- met in Washington, DC and decided by resolution of its membership to expand its area of concern to pretrial *diversion*, as well. NAPSA followed this up with a national conference in Atlanta, GA, strictly on diversion, which was well-attended by most of the program directors from the DOL and LEAA- funded pilot efforts then in operation across the country. This marriage of pretrial release and diversion in 1973 under a “common umbrella” professional association led swiftly to the enrollment of many diversion practitioners in NAPSA and to the election within a year of several diversion program administrators to the NAPSA Board of Directors – a practice that has continued to this day.

This development was of immediate and profound significance for the emerging discipline of pretrial services. Despite increasing recognition of pretrial diversion as a legitimate innovation over the previous five years by criminal justice officials and policymakers and its popularity at all levels of government, diversion practitioners themselves had never come together before to establish a common identity or to work toward common goals, beyond the scope of their respective jurisdictions.

The appropriateness of this inter-disciplinary bond, forged by NAPSA in 1973 between release and diversion practitioners at the local level and among diversion practitioners nationwide, has had enormous impact and significance. First, by this action a *national pretrial services profession* was created. Second, state-level organizing of pretrial professional associations, modeled on the national example of NAPSA, began to spring up. With the subsequent evolution of state pretrial services associations, the professional identification of pretrial *release* practitioners with pretrial *diversion* practitioners has generally persisted. It is thus beyond doubt that the release-diversion alliance forged through NAPSA in 1973 has been a major factor working to solidify the position of diversion as a field and its practitioners as professionals -- coequal to probation and parole officers -- in the eyes of most criminal justice officials at the federal, state and local levels nationwide.

In contrast to the primarily national-level developments of 1973, the following year, 1974, was dominated by initiatives at the *state level*. Following on the widespread dissemination of the NAC Standards, LEAA in January of 1974 began a major funding initiative, through its state planning agencies, for standards and goals commissions appointed by the various state governors, each of which would develop standards for all facets of the justice system in their states. Coming as it did in the middle of the “diversion boom”, this LEAA State Standards Initiative led naturally to the development of particularized *diversion* standards and goals at the state level. (By January, 1977, nine states -- Florida, Georgia, Idaho, Louisiana, Michigan, Missouri, Nebraska, North Dakota, and Texas -- reportedly had developed pretrial diversion standards through the mechanism of their respective governor’s standards and goals commissions, while 15 other states -- Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Maryland, Montana, New Jersey, Ohio, Oregon, Pennsylvania, South Dakota, and

Wisconsin -- indicated to LEAA officials in Washington that work on diversion standards was ongoing.)

In the State of New Jersey, 1974 saw the first steps taken toward the creation of a statewide program of pretrial diversion operating in every county of the state, managed under the aegis of the State Administrative Office of the Courts (AOC), under the broad authority of New Jersey Supreme Court Rule 3:28, first enacted in 1970 to authorize the creation of the DOL-funded Newark Defendants' Employment Project (NDEP), discussed above. The AOC's new Pretrial Services Unit in early 1974 was vested by then Chief Judge Richard J. Hughes, a strong proponent of "PTI" (as diversion was uniformly termed in New Jersey), with the responsibility for developing uniform statewide rules of PTI eligibility, admissibility, and administration. The AOC's Uniform Proposal for the Implementation of PTI in New Jersey, promulgated in December of that year, served as a blueprint for PTI expansion statewide over the remainder of the decade. (By 1978, 20 PTI programs were in operation across the State of New Jersey, in that year alone considering over 17,000 applications for the entry into diversion -- and considering not just first offenders -- of which approximately 46% were granted by the prosecutor and/or the presiding judge.)

The year 1974 also saw the start up in Rochester, NY of the Monroe County Pretrial Diversion Program -- one of the field's longest-running and most carefully structured programs. Funded from 1974-77 under successive grants from LEAA, the Rochester program was unusual in that it was (and still is) operated by a private nonprofit entity, the Pre-Trial Services Corporation, a nonprofit arm of the Monroe County Bar Association. (It was institutionalized only after a thorough, rigorous and independent outside evaluation was conducted which includes process, impact and cost-benefit components and relied on looking at outcomes for matched comparison groups of program and non-program defendants. This well designed and totally independent evaluation, which scientifically established the program's success and cost-effectiveness, set a new standard for diversion program evaluations which, unfortunately for the diversion field was seldom matched elsewhere.)

In addition, during 1974 four states -- Florida, Massachusetts, New York, and Washington -- enacted statutes authorizing statewide pretrial diversion and laying down, with varying degrees of particularity, procedures and criteria for diverting defendants. This was a quite significant development in that these were the first non-drug diversion statutes (Sec. 944.025 of the Florida Correctional Reform Act of 1974; Massachusetts House Bill 2199; New York Criminal Procedure Law Secs. 170.55 and Sec. 3; Washington State Senate Bill No. 2491) to be passed at the state level since the diversion movement began in 1967.

The enactment two years earlier of California Penal Code Section 1000 concerning drug diversion (see above) led during 1974 to several California state court decisions of broad import to the diversion field, rather than simply of interest to practitioners in California. The decisions handed down in that year in California, though they only directly affected aspects of that state's statutory scheme, were to be of nationwide significance because they were the first state court decisions to address issue of fundamental importance to pretrial diversion everywhere -- (1) the role of the prosecutor versus the judge in the diversion process; (2) what constitutional rights a defendant could be required by a prosecutor to waive as conditions precedent to diversion; and

(3) whether the existence of statewide enabling legislation required that each locality in the state must make the diversion option available to defendants under its jurisdiction.

Federally funded program initiatives in the diversion area continued in 1974, with nine new TASC programs-- Albuquerque, NM, Alameda County, CA, Boston, MA, Camden County, NJ, Denver, CO, Detroit, MI, Newark, NJ, Richmond, VA, and St. Louis, MO -- being added to the list of 11 others started up the previous year that were refunded. (Only Wilmington TASC dropped out after its initial pilot year.)

One additional federal pilot diversion program initiated in 1974 deserves special mention because of its then uniqueness -- DOJ, through the Office of the US Attorney for the Southern District of Illinois, started a pilot federal diversion program in contemplation of passage by Congress the following year of the Burdick Bill, discussed above. The stated intent of DOJ was to expand this effort to all 94 federal district courts after the passage of the federal bill, but it would not be until the end of the decade that the long-awaited federal diversion legislation would be enacted. Nevertheless, additional prosecutor-administered federal diversion programs for *non-drug-dependant defendants* soon were ongoing in Washington DC, Portland, OR, Memphis, TN, and Louisville, KY.)

The year 1974 saw the issuance by the ABA's PTI Center of the first *Directory of Pretrial Intervention Programs*. A total of 57 diversion projects in 22 states and the District of Columbia were listed. Considering the fact that only four of these had existed in 1970, the nationwide proliferation of programs was very visibly brought home to the criminal justice community with the publication of this first issue of the PTI Center's Diversion Program Directory. Appropriately, the year also saw the inception of the Maryland Association of Diversion Programs, reportedly the first such state association to be established. The Maryland example would soon thereafter lead to the establishment of other state associations, though as noted above, these usually took the form of umbrella alliances of both pretrial release and pretrial diversion programs, on the model of NAPSA, the California state association being the only other stand-alone example of a state association for diversion-only practitioners.

It is perhaps not an exaggeration to say that the next year, 1975, saw the apogee of pretrial diversion for its entire first decade. Three more states -- Arkansas, Colorado, and Tennessee -- enacted statewide diversion legislation (Arkansas Act No. 346; Sec.6-7-401, Colorado Law No. 72; and Tennessee House Bills Nos. 204 and 1671) and a federal diversion bill (H.R. 9332) was introduced into the House of Representatives for the first time during the 94th Congress, paralleling the reintroduction of the Burdick Bill in the Senate again that year.

DOL in 1975 funded 10 more "manpower-model" diversion programs (the so-called "Third Round" PTI projects -- including Chatham County, GA, Detroit, MI, Denver, CO, Kansas City, MO, Pierce County, WA, the State of Rhode Island, and Yonkers, NY) under Title III of the Comprehensive Employment and Training Act (CETA). DOL also awarded continuation in funding in 1975 to eight others in the so-called "Second Round" PTI group -- Atlanta, GA, Boston, MA, Compton County, CA, Detroit, MI, Las Vegas, NV, Milwaukee, WI, Nashville, TN, New Orleans, LA, Phoenix, AZ, San Diego, CA, San Juan, PR, and St. Paul, MN. LEAA

meanwhile started up 13 additional, new TASC programs while granting continuation funding to 30 others.

As of April of that year, the second edition of the ABA PTI Center's *Directory of Pretrial Intervention Programs* was published. It listed 118 projects in 31 states, the District of Columbia, Puerto Rico, and the Virgin Islands -- more than double the number recorded in the previous year. The New Jersey Supreme Court adopted detailed Guidelines interpreting its Rule 3:28 on diversion -- in the process not only encouraging the practice to be administered with more uniformity from county to county in that state but also laying down many detailed procedural requirements dealing with many aspects of diversion operations.

Three unrelated events occurred during June, 1975 which were to have very different effects on diversion programs and practitioners, yet each of which was profound. Perhaps most importantly, on June 19, President Gerald Ford, in his Crime Message to Congress, stated that "experimentation with pretrial diversion programs should continue and be expanded". This was the first time that a President of the United States had directly endorsed the idea of pretrial diversion, though President Nixon earlier, in 1973, had done so indirectly through his remarks at the Annual TASC Conference, and through US Attorney General Kleindienst's remarks to the National Conference on Corrections in 1971, which clearly had constituted an official US Government endorsement. (See above.)

On June 25th, 30 release and diversion programs throughout the State of Michigan banded together to form the Michigan Association of Pretrial Services Agencies (MAPSA). Though not the first state association for diversion programs, MAPSA was the *first release-plus-diversion association* to be formed on what might best be called the "national" (i.e., NAPSA) model. In this regard, MAPSA has been a precursor for many more unified state associations implemented since that time -- California, Colorado, Florida, New York, Minnesota, New Mexico, Ohio, Oregon and Pennsylvania, among others.

Like its predecessor, 1976 was a good year for pretrial diversion on the federal and state levels. The third edition of the ABA's PTI Directory which appeared that year listed 148 diversion programs in 42 states and territories -- up again significantly from the number listed the previous year. The initiative toward formation of state associations continued, with the creation of strong associations in New York, Ohio, and elsewhere. Connecticut followed the lead of other states in passing statewide diversion legislation (Public Act 76-179) and the New Jersey Supreme Court modified and expanded its Guidelines governing Rule 3:28 diversion so as to be even more encompassing in scope and detail. The ABA at its Annual Conference that year passed a resolution in favor of the use of pretrial diversion which had been sponsored jointly by its Section of Criminal Justice and the Commission on Corrections -- the first time that the ABA as a whole, rather than of its committees, had gone on record advocating diversion.

The year 1976 also witnessed the award of two major LEAA grants to the national professional association, NAPSA. One called for NAPSA to develop national standards and goals to govern the operation of pretrial diversion programs, plus similar standards to govern programs of pretrial release. The second grant called for establishment of a Pretrial Services Resource Center (PSRC), which would provide, among other services to pretrial practitioners and those interested

in setting up diversion programs, an information clearinghouse, technical assistance services, and in-house publications addressing key issues in release and diversion. With the imminent demise of the ABA's DOL funded PTI Service Center, the new PSRC, created *via* the LEAA grant to NAPSA, would be the primary support entity for pretrial services nationally. The fact that the grantee was the national professional association guaranteed that the PSRC would be staffed by professionals who had direct, "hands-on" experience in the pretrial services field. The award of these two major grants to NAPSA in 1976 was widely interpreted to mean that, in the eyes of criminal justice policymakers at the federal level, pretrial services was an identifiable, credible discipline in its own right that had come of age.

The year 1977 was a year of consummation for many of the initiatives and developments already identified and discussed above which had come before. The Pretrial Services Resource Center opened its doors for operation in Washington, DC at the start of the year, just as the ABA's PTI Service Center finally closed out its operation after five years of outstanding service to diversion practitioners nationwide. Not only was the technical assistance torch passed smoothly to the PSRC, but a heightened level of information exchange and technical assistance to pretrial programs across the country was the result.

In May of 1977, the preliminary draft of the *Standards and Goals for Pretrial Diversion*, developed under an LEAA award to NAPSA, as discussed above, were presented for review and comment to the Board of Directors and then to the general membership of NAPSA for a vote. After extensive discussion and debate, they were formally adopted at the Sixth Annual NASPA Conference, held in the Washington, DC area in the fall of 1977.

The record of the first 10 years, as outlined above, is overwhelmingly positive -- even extraordinary -- for such a new and often controversial concept as pretrial diversion. Movement and evolution would continue into the next decade, to be sure, though it would take twists and turns during the 1980's that no one in the field foresaw, or seemed later to be prepared for, as the '70s drew to a close. By 1979, some clear trends could be discerned, however, and these played themselves out as predicted over the next decade. In contrast to the situation throughout most of the first decade, the stage for major developments in diversion would shift to the states -- state legislatures and state courts. Also, the trend toward uniform statewide diversion schemes, authorized either by state statute or court rule, made such consistent gains over the original model of the first decade -- whereby diversion programs were governed by "informal agreement" of local prosecutor and court at the city or county level -- that by the end of the '70s this "uniform, statewide approach" had become an irreversible trend. Likewise, state court decisions in many jurisdictions -- especially California, Florida and New Jersey -- worked to buttress the evolution toward statewide, uniform systems of diversion during the 1980's. The existence in many states of governors' standards and goals commissions and their drafting of state diversion standards, plus the proliferation of state pretrial services associations, also signaled a major shift of activity to the state level as the decade of the '80s commenced.

The numerous programs implemented as pilots during the first decade were by 1979 being institutionalized in sufficient numbers that patterns of permanence looked relatively predictable. In this regard it is significant that 40% of the diversion programs listed in the ABA's 1974 edition of the *PTI Program Directory* were sponsored by independent, private sector entities

while reference to the 1976 edition of the Directory shows that only 7% of the programs by then were independent or sponsored by private sector groups. In contrast, only 7% of the programs listed in 1974 were under the administrative control of executive agencies of state or local government, whereas 36% of the programs listed in the 1976 Directory were so lodged. (This does not include prosecutor-administered programs, which actually declined from 23% of the total in 1974 to 16% in 1976.) The other large gain for program sponsorship by the end of the first decade of diversion programs was the courts, who again, according to the ABA's PTI Directory, sponsored or administered 11% of the programs listed as of 1976, in contrast to only 5% in 1974 -- more than double the number within only two years' time.

These patterns of institutionalization diversion into large, conventional units of government over time would affect the traditional flexibility associated with the concept generally as well as the adaptability which characterized many of the early, successful diversion programs and made them popular with the local judges and prosecutors -- a development anticipated with considerable anxiety among proponents of diversion and often debated by diversion practitioners and other keen observers as the decade of the '70s drew to a close. Advantageous in terms of fiscal security and administrative stability, the large-scale institutionalization of diversion programs into traditional agencies of government -- trial courts, prosecutors' offices, probation departments, etc. -- raised the specter of co-optation. The next decade would tell whether diversion would remain an alternative to, or finally become an extension of, the traditional adversarial system of processing criminal cases and defendants.

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The author, a member of the District of Columbia Bar (1972-present), was formerly on the staff of the ABA Special Committee on Crime Prevention and Control (1970-72) and then Director, Narcotics Pretrial Diversion Project, DC Superior Court (1972-78). A longtime NASPA member, he served for 16 consecutive years as an officer and member of the Association's Board of Directors (1975-1991), was twice elected Vice President (1978-80 and 1985-91). He was the first Chair of NAPSA's Diversion Committee (1972-78) and also served as Technical Editor in 1977-78 on the first draft of NAPSA's Standards & Goals for Pretrial Diversion. In 1995-1996, again as a member of the Association's Diversion Committee, he co-authored the revised edition of these diversion standards, which have since been adopted and reissued by NAPSA. He is the 1993 recipient of the Ennis J. Olgiati Award, the Association's highest award, for outstanding contributions to pretrial services.