

II(B)(2). Diversion and Deferred Adjudication

An increasingly popular record relief strategy involves diverting individuals away from a conviction at the front end of a criminal case. Diversion offers a less adversarial means of resolving an investigation or prosecution through compliance with agreed-upon community-based conditions leading to termination of the matter without conviction. Diversionary dispositions are described in the Model Penal Code: Sentencing as a way to “hold the individual accountable for criminal conduct when justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with conviction.”¹ In this understanding, diversion can function as a means to accountability and rehabilitation, rather than as retribution for its own sake.² The effectiveness of diversionary dispositions in furthering these goals has not been studied in depth, but existing research suggests

¹ See American Law Institute, Model Penal Code: Sentencing (2017) §§ 6.06(2) (“Deferred Adjudication”), 6.04(2) (“Deferred Prosecution”) (same quoted phrase except “charge and” are inserted before conviction). Because one goal of this model law is to introduce more transparency and structure into a prosecutor’s administration of pure diversion, the section on deferred prosecution is considerably more detailed than the one dealing with court-managed diversion. These schemes may have been modeled on Section 301.5 of the 1962 Model Penal Code, which provides that upon successful completion of a period of probation, the court may order that the judgment “shall not constitute a conviction for the purpose of any disqualification or disability imposed by law upon conviction.” Diversionary schemes have antecedents even in the early 20th century. See, e.g., *Marks v. Wentworth*, 85 N.E. 81, 82 (Mass. 1908) (if “the object of the probation seems to the court to have been accomplished, in such a way as not to require any punishment of the defendant, either for his own reformation or in the interests of the public, the court may finally dispose of the case by a dismissal of it”); C. S. Potts, *The Suspended Sentence and Adult Probation*, 1 TEX. L. REV. 188, 190 (1923) (discussing 1913 law; “[i]f defendant is not convicted of another felony during the time assessed as punishment by the jury, he may make application for a new trial and have the case dismissed.”); *Report of Committee C of the American Institute of Criminal Law and Criminology: Adult Probation Parole and Suspended Sentence*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 438, 443 (1910) (“we strongly recommend that after successful probation the indictment or complaint should be dismissed of record.”).

² See Margaret Love, Jenny Roberts, and Wayne Logan, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW POLICY AND PRACTICE § 7:22 (“Deferred adjudication and other diversionary dispositions”) (West/NACDL, 3d ed. 2018-2019); Margaret Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT’G REP. 6 (2009).

their promise.³ Diversion may also be employed in cases where the extent of culpability is not clear, to allow for a mutually-acceptable outcome for the prosecutor and individual.

While terminology and program characteristics vary, there are two primary types of diversion: pure diversion (prosecutor-managed) and deferred adjudication (court-managed). One or both of these dispositions are authorized in every jurisdiction.⁴

Pure diversion, sometimes also called deferred prosecution, is controlled by the prosecutor and may commence before or after the filing of criminal charges. Typically, it involves an agreement between the prosecutor and an arrested or charged individual that successful completion of a community-based program will terminate the criminal investigation or prosecution. While a court may be involved in approving the terms of a diversion agreement, particularly if it involves use of court supervisory or treatment resources, the prosecutor decides whether a person may participate in diversion and has complied with conditions of the agreement, so as to avoid further prosecution. Pure diversion may result in a formal decision not to prosecute (“*nolle prosequi*”), and the record of the defendant’s arrest and any charges may be subject to court-ordered dismissal and sealing. If the person was never charged, there may be no

³ See, e.g., Michael Mueller-Smith and Kevin Schnepel, *Diversion in the Criminal Justice System* (January 17, 2019) (studying short- and long-term outcomes of deferred adjudication in Harris County, Texas, and finding notable benefits for young Black men with no previous involvement in the justice system), <https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2019/01/Diversion.pdf>; Ted Chiricos *et al.*, *The labeling of convicted felons and its consequences for recidivism* (17 Sept., 2007) (studying recidivism outcomes of withheld adjudications in Florida), <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1745-9125.2007.00089.x>.

⁴ See *Pretrial Diversion*, National Conference of State Legislatures (September 28, 2017), available at <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx> (providing statutes for 48 states and the District of Columbia); S.D. Codified Laws §§ 23A-3-35, 23A-3-36, 23A-27-12.2, 23A-27-13. The one state that apparently lacks diversion by statute, North Dakota, provides for diversion by court rule. See N.D. R. Crim. P. 32.2.

court record to seal, and state laws may or may not provide for limiting public access to uncharged arrest records in a state repository and law enforcement agency.⁵

Deferred adjudication is designated variously in state codes,⁶ and varies also in how it is administered from state to state. But it is most saliently distinguished from pure diversion by the more formal involvement of the court in managing the criminal case after charges have been filed. It often requires a plea, admission, or finding of guilt, and always includes a period of probation and/or other conditions administered by the court, with the court deferring entry of a judgment of conviction. The prosecutor may have a say in which defendants are given the option of a deferred disposition, and in a few states even a dispositive one, but the key legal difference between the two dispositions is that the court determines whether the defendant has complied with conditions when adjudication or sentencing has been deferred, so to warrant vacating any plea and dismissing the charges. Nowadays, dismissal of the charges generally includes sealing of the record, frequently but not always at disposition.

The discussion that follows focuses on deferred adjudication rather than prosecutor-controlled diversion, as the latter frequently operates informally in accordance with the policies of a specific prosecutor’s office and typically does not involve a formal court proceeding, other than placing the diversion agreement on the record. This section also does not discuss record relief mechanisms by which courts are authorized to reduce felony convictions to misdemeanors after completion of conditions, dispositions that resemble deferred adjudication in offering an alternative way of

⁵ See Collateral Consequences Resource Center, Model Law on Non-Conviction Records § 2(a)(Dec. 2019), <https://ccresourcecenter.org/model-law-on-non-conviction-records/>.

⁶ See, e.g., Ark. Code § 16-93-1206 (“suspended imposition of sentence”); Cal. Penal Code §§ 1000 & 1000.8 (“deferred entry of judgment”); Colo. Rev. Code § 18-1.3-102 (“deferred sentencing”); 11 Del. Cod. § 4218 (“probation before judgment”); Conn. Gen. Stat. § 54-56e (“accelerated pretrial rehabilitation”); Hawaii Rev. Stat. § 853-1 (“deferred acceptance of guilty plea”); Maryland Code, Criminal Procedure § 6-220 (“probation before judgment”); Mass. Gen. Laws ch. 278, § 18 (“continuance without a finding”); N.Y. Crim. Proc. Law § 170.55 (“adjournment in contemplation of dismissal”); N.D. Cent. Code § 12.1-32-02(4) (“deferred imposition of sentence”); Ohio Rev. Code § 2951.041 (“intervention in lieu of conviction”); Tex. Code Crim. Proc. art. 42A.102 (“deferred adjudication community supervision”); Utah Code Ann. 77-40-104 (“plea in abeyance”); 18 U.S.C.A. § 3607 (“pre-judgment probation”).

encouraging compliance and making the record eligible for expungement, but that do not have the advantage of avoiding a record of conviction.⁷

Deferred adjudication first became popular in the 1970s as an efficient case management tool for prosecutors reluctant to divert entirely, and a way of maximizing the possibility that salvageable defendants could be steered out of the justice system entirely so as to avoid the collateral consequences of a conviction.⁸ (Avoidance of collateral consequences was of course considerably easier in the days before digitization of criminal records and the near-universal practice of background checking.) There are pluses and minuses both for criminal defendants and for the prosecution in these types of dispositions: for defendants there is the prospect of a “clean slate” if they can manage to comply with sometimes-onerous conditions, which may include substantial financial costs for supervision or required programs, and for prosecutors there is the prospect of swift and potentially harsh consequences if a defendant fails.⁹ At the same time, the long-term benefits for the community of this

⁷ See, e.g., Cal. Penal § 17(b) (“Wobbler” charged as a felony may be reduced to a misdemeanor); Idaho Code. Ann § 19-2601(3) (reduction of felony to misdemeanor); Minn. Stat. § 609.13, subd. 1 (same); N.D. Cent. Code § 12.1-32-02(9) (same).

⁸ See, e.g., *Yale v. City of Independence*, 846 S.W.2d 193 (Mo. 1993) (“The obvious legislative purpose of the sentencing alternative of suspended imposition of sentence is to allow a defendant to avoid the stigma of a lifetime conviction and the punitive collateral consequences that follow.”); *State v. Schempp*, 498 N.W.2d 618, 620 (S.D. 1993) (noting that the purpose of suspended imposition of sentence is “to allow first-time offender to rehabilitate himself without the trauma of imprisonment or the stigma of conviction record”). See generally Love, *Alternatives to Conviction*, note 2 *supra* at 6.

⁹ See, e.g., Amy Yurkanin, “Leniency for sale? Alabama offers first offenders a second chance -- at a price,” AL.com, Oct. 9, 2017, updated Mar. 7, 2019, https://www.al.com/news/2017/10/dismissal_for_sale_programs_of.html. See generally Nat'l Ass'n of Criminal Def. Lawyers, *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform 11* (2009), available at <http://www.nacdl.org/criminaldefense.aspx?id=20191> (“Although procedures vary, the hoops through which participants must jump result in dismissals for relatively few defendants. Profound consequences flow from every failure.”). Commenting on the perils of exposing ill-equipped defendants to the high cost of failure under the Texas deferred adjudication law, a practitioner in that state recalled that

sort of conviction-avoidance setup for at least some defendants have been established in the research literature.¹⁰

While every state offers some form of diversion,¹¹ only two states (Kansas and Wisconsin) do not authorize their courts to defer adjudication in any cases involving criminal charges. This appears to represent a significant expansion of an important record remedy just in the two years since an earlier prior version of this report was published in 2018, when we identified 13 states that made no provision for deferred adjudication.¹² In those two years, states have expanded eligibility for court-managed diversionary dispositions and made sealing more generally available after successful completion. Some states have also eliminated the requirement of a guilty plea to avoid having this disposition trigger federal collateral consequences, as some federal laws and policies—including immigration law—treat diversionary pleas as convictions, even if no judgment of conviction is ever entered by the court.¹³

prosecutors value it as an option because it is available to a broader group of offenses than regular probation (and they have lobbied to keep it that way), and particularly because the defendant retains their full exposure to the underlying penalty. So a deferred for burglary (a first degree felony) can be violated with limited due process and get the 50 years the prosecutor wanted in the first place. They tell the baby DAs that deferred is the easy way to send someone to prison “because you know they’re going to screw up.”

¹⁰ See note 3, *supra*.

¹¹ See note 4, *supra*.

¹² See Margaret Love, Joshua Gaines & Jenny Osborne, *Forgiving & Forgetting in American Justice: A 50-State Guide to Expungement and Restoration of Rights* 13 (Aug. 2018 rev.), <https://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Aug-2018.pdf> It is likely that several of the 13 states reported as having no deferred adjudication authority in fact had such a program through a drug or other intervention court.

¹³ See, e.g., Or. Rev. Stat. § 475.245 (eliminating the requirement of a plea or admission to avoid triggering deportation under 8 U.S.C. § 1101(a)(48)); Colo. Rev. Stat. § 18-1-410.5 (authorizing vacating guilty pleas in diversion cases on grounds that they were entered without adequate advice of counsel). Among the other federal laws and policies that treat diversionary dispositions as a conviction if the person was required to plead guilty or admit facts sufficient to establish guilt, even if the plea has been withdraw and the case dismissed, are federal sentencing guidelines, U.S.S.G. § 4A1.2(f) and the federal Fair Credit Reporting Act, 15 U.S.C. § 1681c(a),

The map accompanying this section shows that 20 states now make deferred adjudication broadly available, in many cases for any offense eligible for a probationary sentence and without regard to prior record, leaving it up to the court (and in some states also the prosecutor) to determine the appropriateness of the disposition on a case-by-case basis.¹⁴ Alabama and Georgia are included in this category because of their extensive system of intervention courts that are administered on a county-by-county basis.¹⁵ All but one of these 20 states (Idaho) authorize sealing upon successful completion, though Texas requires a 2-to-5-year waiting period in some cases before the court will issue an Order of Nondisclosure.¹⁶ In many of the

as construed by Aldaco v. RentGrow, Inc., 921 F. 3d 685 (7th Cir. 2019). The federal banking laws independently consider diversionary dispositions to be convictions without regard to a guilty plea, *see* 15 U.S.C. § 1892(a)(1)(A), but the FDIC has recently proposed to amend its interpretive policy document to give effect to expungement and sealing, which should provide states with incentive to amend some of the deferred adjudication provisions that require waiting periods before sealing or do not provide for sealing at all. *See* Federal profile, Restoration of Rights Project, Section III(B)(3)(b).

¹⁴ The 20 states whose courts have broad deferred adjudication authority are: Alabama, Colorado, Georgia, Idaho, Massachusetts, Maryland, Maine, Mississippi, Missouri, Nebraska, New Mexico, New York, North Dakota, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, and West Virginia. Details of these laws and statutory citations are available in the relevant state profiles from the Restoration of Rights Project.

¹⁵ Alabama diversion courts are established and administered county-by-county under a general state-wide authority, and eligibility criteria and conditions are established locally. The courts have reportedly had broad participation and, in many cases, considerable success both for defendants and for the government. But participation in deferred programs may come at a high price, both literally and figuratively, and lead to more severe punishments for those who are unable to pay. *See* Yurkanin, “Leniency for sale?”, *supra* note 9. Georgia’s system of “Accountability Courts,” authorizing diversion in non-property and drug crimes, is similarly structured. <https://cjcc.georgia.gov/accountability-court-program>. *See* Ga. Code Ann. §§ 35-3-37(h)(2)(C), 15-1-20(b). In contrast, the administration of Mississippi’s intervention courts is centralized and governed by state statute.

¹⁶ In Texas, people charged with non-violent misdemeanors who are discharged following “deferred adjudication community supervision” are eligible for an automatic OND, although the court may deny relief in specific cases. Those denied automatic relief, along with those charged with felonies and serious and repeat misdemeanors, may seek relief after a waiting period, two years for misdemeanants and five years for felonies. *See* Tex. Code Crim. Proc. art. 42A.102; Tex. Gov’t Code § 411.0725.

20 states, a court-managed diversion program has existed for years, though programs have recently been expanded or reorganized to target certain populations, like veterans and individuals with mentally health needs.¹⁷

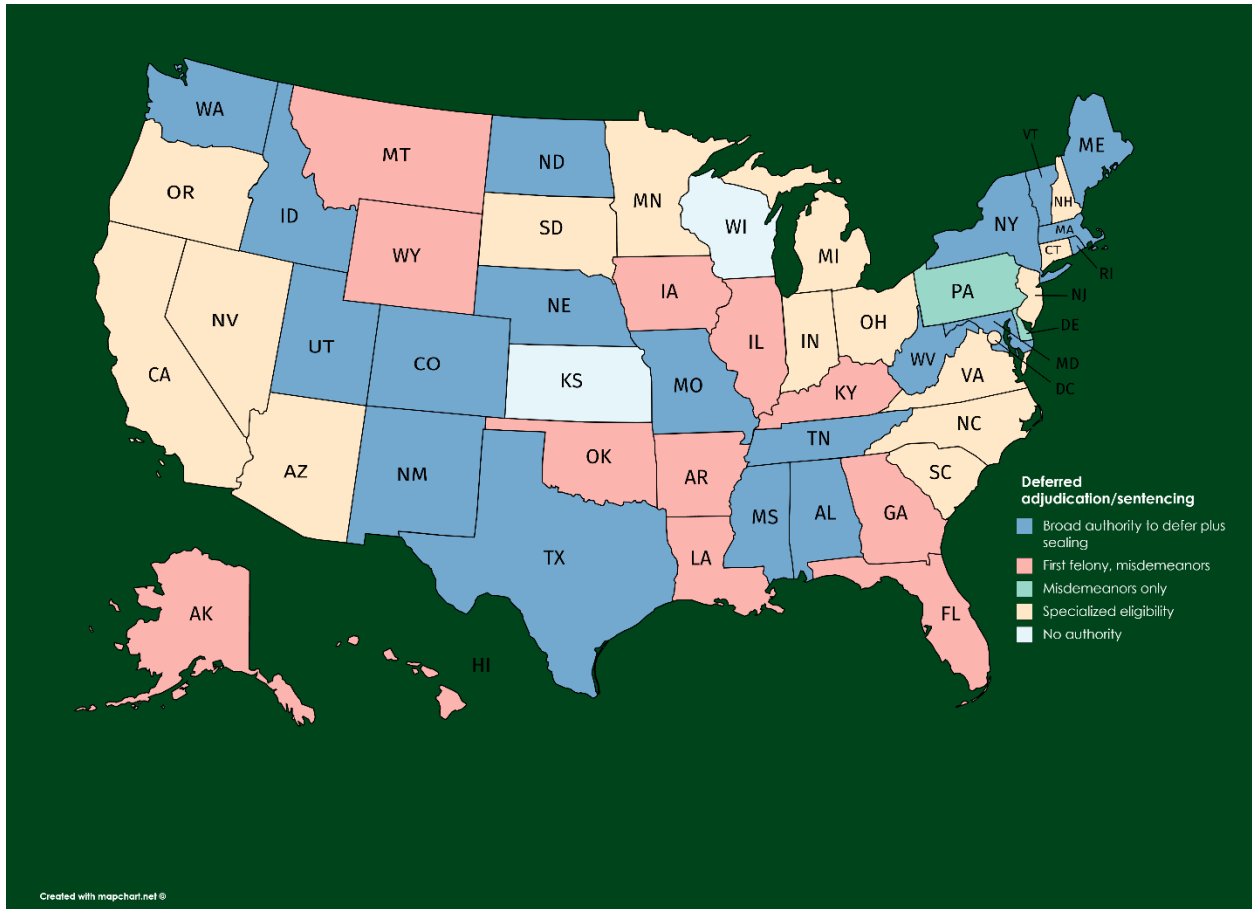
The next category of 13 states is distinguishable from the first by varying restrictions on eligibility based on offense charged or prior record and, for many, limits on record relief.¹⁸ Florida and Louisiana alone in this group allow someone with a prior felony conviction to participate, but both restrict sealing (Florida for almost any prior record and Louisiana by a 10-year waiting period). Illinois has a 5-year wait to seal, and Iowa and Wyoming do not allow sealing at all. Pennsylvania and Delaware restrict eligibility for their “probation before judgment” programs to misdemeanor-level cases. Another group of 16 states, D.C. and the federal system offer deferred adjudication only in specialized types of cases, typically drug cases where the defendant has no prior record. As previously noted, only Kansas and Wisconsin make no provision at all for court-managed diversion.

¹⁷ Our report on laws enacted in 2019 stated:

In 2019, 18 states enacted 26 laws creating, expanding, reorganizing, or otherwise supporting diversionary and deferred dispositions, to enable individuals charged with crimes to avoid a conviction record. These new authorities reflect the clear trend across the country toward increasing opportunities to steer certain categories of individuals out of the system, through informal diversions, specialized treatment or intervention courts, or completing probation conditions while judgment is deferred, or sentence suspended. Laws enacted in 2019 extended this favorable treatment to juveniles, military service personnel and veterans, persons with mental illness, drug and alcohol users, human trafficking victims, caregivers of children, and even certain persons charged with sex offenses

See Collateral Consequences Resource Center, *Pathways to Reintegration: Criminal Record Reforms in 2019* at 21, <https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration-Criminal-Record-Reforms-in-2019.pdf>; see also CCRC, *Four Years of Second Chance Reforms, 2013-2016* (2017), <http://ccresourcecenter.org/wp-content/uploads/2017/02/4-YEARS-OF-SECOND-CHANCE-REFORMS-CCRC.pdf>.

¹⁸ States in this category are Alaska, Arkansas, Delaware, Florida, Hawaii, Iowa, Kentucky, Louisiana, Montana, Oklahoma, Pennsylvania, and Wyoming.



The only federal statute authorizing deferred adjudication was enacted in 1984 and adheres to the narrowest eligibility model, with relief narrowly targeted to youthful offenders.¹⁹ In recent years federal courts have implemented various programs to divert and defer criminal defendants,²⁰ but there is little authority for these programs

¹⁹ See 18 U.S.C. § 3607 (deferred adjudication if a person charged with drug possession has no prior drug conviction, with expungement only if the offense was committed under the age of 21).

²⁰ A 2017 report from the United States Sentencing Commission (USSC) catalogues various programs managed by federal courts that are geared to avoiding a prison sentence, though perhaps not always a criminal record. See *Federal Alternative-to-Incarceration Court Programs* (September 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf. That report describes generally analogous state problem-solving court programs but does not focus on statutory deferred adjudication options aimed at avoiding conviction and generally leading to expungement of the record. Perhaps because federal law contains only one narrow authority for deferred adjudication (18 U.S.C. § 3607, sometimes referred to as the Federal First Offender Act), the USSC report does

in federal statutes and no evidence of Congressional interest even in expanding the limited statutory authority that does exist.

In the end, as the public appetite for punitive justice policies fades in the states, and a public commitment to clean slate outcomes grows stronger, it is likely that governments will focus more resources on community-based accountability and rehabilitative programs as opposed to punitive custodial penalties. In this environment we can expect that jurisdictions will expand reliance on court-managed diversionary programs, and that we can expect to see additional states joining the 20 whose programs are “broadly inclusionary.” There have been only a few research studies of these programs, but those that do exist have found them effective in promoting desistance, employment, and earning outcomes at least for some populations.²¹ As the adverse consequences of a conviction record show no signs of abating, studying conviction-avoidance mechanisms like deferred adjudication should be a research priority for the academy.

Further information about deferred adjudication procedures and eligibility can be found in in the state-by-state profiles in the Restoration of Rights Project (<http://restoration.ccresourcecenter.org>).

not address non-incarceration outcomes that avoid a conviction record. Curiously, it does not suggest the potential usefulness of such outcomes in reducing recidivism or proposed further study of these issues. Such a study has been suggested on several occasions by the Practitioner’s Advisory Group to the USSC.

²¹ See note 3, *supra*.