



DIVERSION & IMMIGRATION LAW

Diversion refers to a variety of programs that seek to avoid the processing of a defendant through the traditional criminal legal system.

The goal of diversion is to direct an individual who has been accused of a crime into a treatment or care program as an alternative to imprisonment and/or prosecution.

Diversion can take many forms, depending on how and when the diversion program is introduced in relation to the stage of criminal legal proceedings.

WHY DOES DIVERSION MATTER IN THE IMMIGRATION CONTEXT?

THE IMPORTANCE OF AVOIDING ARREST

Avoiding initial contact with the criminal legal system, which often takes the form of an arrest and booking into a jail, keeps noncitizens out of the arrest-to-deportation pipeline.

Once an individual has been fingerprinted and booked into jail, ICE can immediately detect that person through various endeavors. It only takes a matter of hours or days for ICE to alert the jail facility that it intends to take custody of the individual, which often results in the initiation of deportation proceedings.

More than 75% of ICE arrests are a result of contact with the criminal legal system.

THE IMPORTANCE OF AVOIDING PROSECUTION/CONVICTION

The definition of a conviction differs for state law purposes and immigration purposes. Often, what may be a “dismissal” in an individual’s criminal record is considered a conviction for immigration purposes.

Convictions and/or admissions of guilt for many types of criminal offenses, though they may seem like “low level” offenses in our criminal legal system (such as drug and theft offenses), can make noncitizens deportable under immigration laws, even if they hold lawful immigration status.

TYPES OF DIVERSION & PROGRAM MODELS

PRE-ARREST (OR NO ARREST) DIVERSION (CONTROLLED BY POLICE & PROSECUTORS)

When an individual makes contact with a law enforcement officer and is suspected of committing a crime, instead of being arrested, they may be diverted to a care or treatment provider, who will assess the individual's needs and make recommendations for the appropriate alternative to jail (i.e. treatment, classes, etc). The prosecutors' office does not file any charges against the individual.

- **Law Enforcement Assisted Diversion (LEAD)**

A model for a pre-arrest diversion program, run in conjunction with the **LEAD National Support Bureau**. During the initial contact with the police, rather than making an arrest, the officer calls a community-based social services partner to intervene, assess, and start an appropriate treatment/ service plan, depending on the individual's needs and offense.

In lieu of the normal criminal justice system cycle—booking, detention, prosecution, conviction, incarceration—individuals are instead referred into a program where the individual receives a wide range of support services, which can include housing and/or drug treatment. Prosecutors and police officers work closely with case managers to ensure that if there are any future encounters with the individual, including new criminal prosecutions, they are coordinated with the existing treatment/ service plan.

Example: Jose is homeless and possibly schizophrenic. One day, a police officer confronts him after he is caught urinating in public. Jose becomes angry with the officer, and the officer restrains and searches him. He finds a small bag of cocaine on him. Instead of arresting him, the officer calls a LEAD social services partner organization to pick up Jose and create a services plan for him, which includes temporary housing, mental health treatment, and drug treatment. Instead of being arrested and prosecuted, Jose is able to get the help he needs, reducing the likelihood that he will commit future crimes.

CITE & RELEASE

Cite and release does not refer to any specific type of program, but rather refers to the practice of issuing a citation for certain low-level offenses, instead of making an arrest. Models vary depending on the city/county.

- **Cite & Divert:** The police officer issues a citation for certain low-level misdemeanor offenses and instead of going to court, the individual is required to meet with a prosecutor within a certain timeframe to participate in a diversion program, in lieu of prosecution. If the individual successfully completes the requirements of the diversion program, the prosecutor does not file any charge(s) with the criminal court.

Example: Suzie is pulled over for speeding, and the officer smells marijuana in her car. The officer searches the car and finds a joint. Instead of arresting her, he issues her a citation for speeding and possession of marijuana. She is required to report to a designated location to meet with a prosecutor within 30 days, who puts her on a diversion program to complete a short drug treatment program and defensive driving classes. She completes the requirements, and the charges are never filed with the court.

- **Citation & Court Summons:** The police officer issues a citation for certain low-level misdemeanor offenses, and the accused individual must appear in court on the date/time specified on the citation to address the charge(s).

Example: Lupe is caught shoplifting items worth less than \$50. Instead of being arrested, she receives a citation with a date and time for her court date. She appears in court and pays a fine.



POTENTIAL IMMIGRATION CONSEQUENCES: Without realizing the severity of the outcome, a noncitizen may plead guilty and pay a fine for a deportable offense (such as Possession of Drug Paraphernalia or Theft), which results in a “conviction” for immigration purposes.

PRE-CHARGE DIVERSION (CONTROLLED BY PROSECUTORS)

The defendant is arrested and booked into jail. Intervention occurs *after arrest but before charges are filed with the criminal court*. Defendant enters into a diversion agreement with the prosecutors’ office where the defendant agrees to complete certain requirements, like classes, community service, drug treatment, counseling, etc. If requirements are completed, the prosecutors’ office does not file the charge(s) with the court.

Example: John is pulled over for a traffic violation and the officer finds a small bag of marijuana in his vehicle. This is the second time he has been caught with marijuana. The officer arrests him. He meets with a prosecutor, who agrees not to file the charge if John completes drug treatment. John successfully completes drug treatment, and the charge is never filed with the court.

PRE-TRIAL DIVERSION (CONTROLLED BY PROSECUTORS AND THE STATE PENAL & CRIMINAL PROCEDURE CODE)

Intervention can occur before or after the plea, depending on the county, but it always occurs prior to disposition & sentencing. Pretrial Diversion programs often include conditions of classes, community service, counseling, etc. See **Pre-Plea and Post-Plea Diversion** below.

PRE-PLEA DIVERSION

A form of pretrial diversion in which the defendant is arrested for an offense, the prosecutor files the charge with the criminal court, and *prior to entering a guilty plea* with the court, the defendant enters into a diversion agreement with the prosecutors' office to complete classes or treatment in exchange for dismissing the charge. If the defendant does not complete the required classes or treatment, the charge may be re-filed in the future.

- **Deferred Prosecution:** A form of pre-trial diversion used in Travis County (and potentially other counties). After charge(s) are filed with the court, the defendant enters into a pre-trial diversion agreement with the prosecutors' office. The agreement is not part of the court record. This agreement removes a defendant from prosecution prior to a guilty or no contest plea. Upon entering into the deferred prosecution agreement, the prosecutor recommends dismissal of the charge(s) to the court, and the charge(s) is dismissed. If the defendant does not complete the requirements of the agreement, the prosecutors' office may file the charges(s) with the criminal court at a later date.

Example: Diego and his wife get in an argument, and the neighbor calls the police. Diego is arrested for slapping his wife (Assault-Family Violence), his first arrest. The prosecutor files the charge with the criminal court. Prior to entering a plea with the court, Diego enters into a pretrial diversion agreement with the prosecutor, where he agrees to complete anger management classes and counseling within 6 months. The prosecutor dismisses the charge. Diego completes the classes and counseling within 6 months.



IMPORTANT IMMIGRATION CONSIDERATIONS: In some types of pre-trial diversion agreements, an admission of guilt may be required, which can make a noncitizen deportable or bar the immigrant from relief, depending on the type of offense, even if it's a dismissal for criminal purposes. That's why the language and structure of these agreements and policies matter so much!

POST-PLEA DIVERSION (CONTROLLED BY PROSECUTORS AND STATE PENAL CODE)

Another type of pre-trial diversion but Intervention/Diversion occurs *after a guilty or no contest plea* has been entered with the criminal court.

- **Deferred Adjudication:** In Texas, a defendant makes an agreement with the prosecutors' office and the court to complete certain requirements (usually probation and classes), enters a guilty plea with the court, and the judge delays entering a finding of guilt. The charge is dismissed upon completion of those requirements. If there are any probation violations, probation is usually revoked and a finding of guilt is entered, often with a sentence of jail time.

 **THIS IS STILL A CONVICTION FOR IMMIGRATION PURPOSES!**

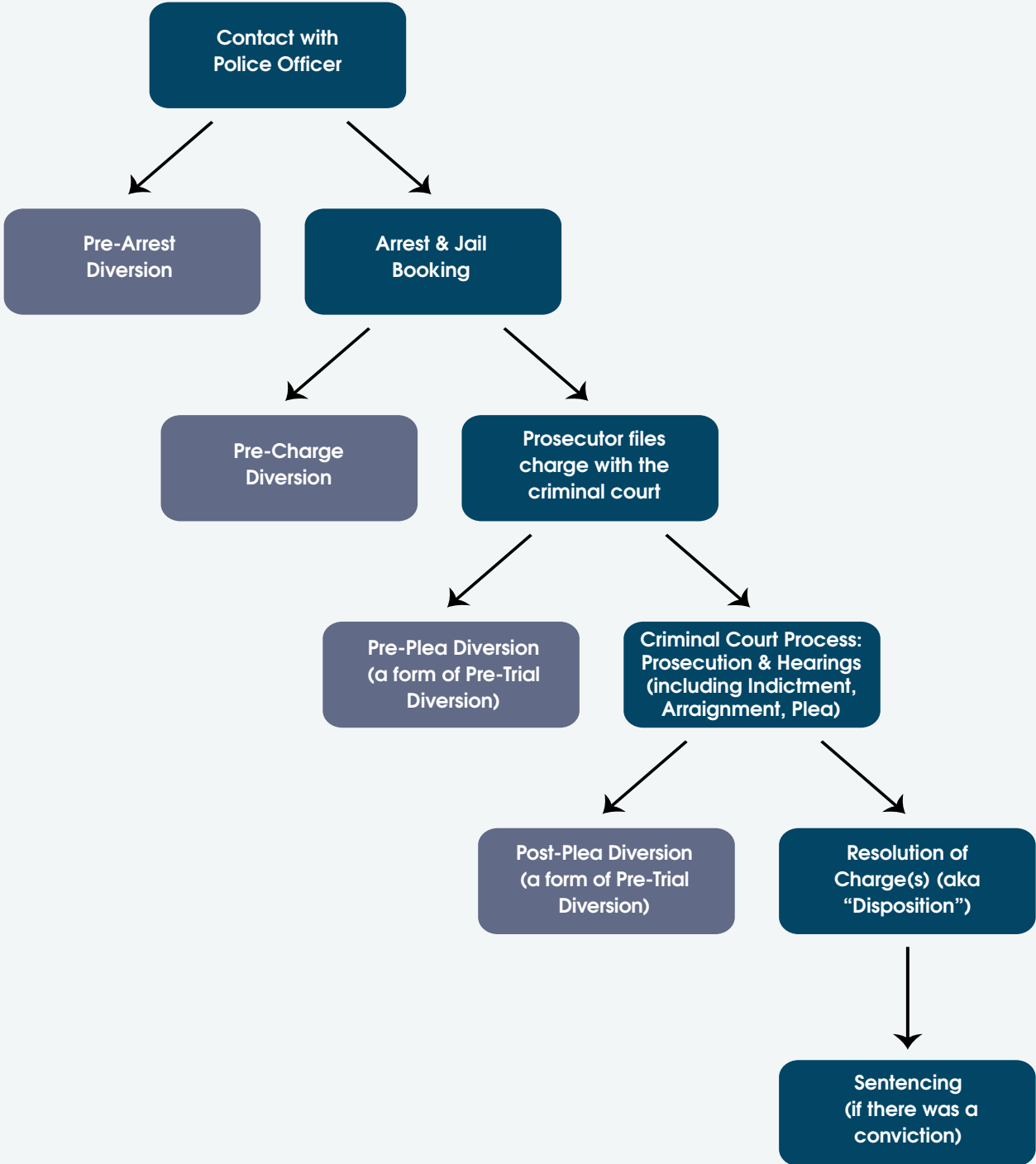
Example: Katie is arrested for Driving while Intoxicated (DWI) after a police officer sees her car swerving in the street. The prosecutor files the charge against her in criminal court. She is released on bond shortly after. She appears in court a few times, and eventually enters into an agreement with the prosecutor to plead guilty, complete DWI classes, and do 6 months of probation. She pleads guilty and the court enters a judgment of deferred adjudication, acknowledging the guilty plea and the requirements that she must complete. Upon completion of the classes and probation, the charge is dismissed.

- **Deferred Disposition:** In Texas, this is used for Class C misdemeanor cases (which are the lowest level offenses in TX and are punishable by fine only). Similar to Deferred Adjudication – a defendant receives a citation for a Class C misdemeanor offense, receives a court summons, agrees to complete certain requirements (probation, classes, etc), pleads guilty before the court, and the court delays entering a finding of guilt. If the requirements are completed, then the charge is dismissed.

 **THIS IS STILL A CONVICTION FOR IMMIGRATION PURPOSES!**

Example: Maria is pulled over for failing to stop at a red light, and the police officer sees that she has a marijuana pipe in her vehicle. She receives citations for the traffic violation and possession of drug paraphernalia. At her first court date, in order to avoid paying a big fine, she enters into an agreement with the prosecutor to complete some classes in exchange for dismissing the charges against her. She enters a plea of guilty and agrees to do the classes. Three months later, when she finishes the classes, the charges are dismissed.

WHERE DO THESE TYPES OF DIVERSION FIT INTO THE CRIMINAL LEGAL PROCESS?



QUESTIONS?

Contact Anita Gupta, Staff Attorney at the Immigrant Legal Resource Center, at agupta@ilrc.org.