



# DECLINATION AND DIVERSION POLICY FOR THE ABOUSHI ADMINISTRATION

A District Attorney's first priority is protecting public safety and community stability. That means protecting and supporting communities, and doing everything in our power to keep them whole. Communities are safer when prosecutors implement declination and diversion policies that



incarceration, reduce recidivism, keep people free of criminal records and able to work, and direct those in need of treatment to available community-based resources.<sup>1</sup> Under the Aboushi administration, the Manhattan DA's Office will decline as many cases as possible, including charges resulting from poverty, mental illness, or substance use. We will effectively and efficiently re-design and expand diversion programs that utilize community-based resources and programming and do not punish people for technical violations or taking drugs while in recovery. We will focus on collaborating with experts and advocates to create public health solutions that promote public safety, decrease prosecutor caseloads, and reduce overall costs including our overall budget.



In this paper, we will talk about our plan to decline to prosecute a number of cases, divert when declination is against the individual or public interest, and outline changes to the office structure that will facilitate declination and diversion.

This has to start by instructing bureau chiefs and ADAs to decline to prosecute certain charges as outlined in greater detail below. For those charges that are not declined, it is critical that we are able to quickly identify alternatives to incarceration.

We will install a robust pre-charge diversion program in the Early Case Assessment Bureau (ECAB), a unit within the Manhattan District Attorney's office that processes most arrests and



MOVE FORWARD TO PROSECUTION.

Right now, our city does not do diversion well.

Our drug courts are a mess, our sex trafficking

court is notorious for failing to target sex

traffickers while it sends plenty of sex workers to

jail, and our overall approach punishes people

instead of giving them tools to succeed. Diversion,

when implemented properly, is proven to lower

recidivism rates, reduce the collateral

consequences people face following an arrest, and

conserve prosecutorial and judicial resources for

cases involving more serious crimes. Evidence

shows that individuals charged with both low-level

and more serious offenses, individuals who have

never previously been arrested or charged, and

individuals with criminal records all benefit from



address the root causes of crime.2

While expanding service delivery to those in need, we must also never “widen the net” by unnecessarily pulling large numbers of individuals into the web of the criminal legal system. That system is ill-suited to address the issues justice-involved individuals face, and our office will not trespass in areas where public health or social services agencies are better able to serve the person and society as a whole. Additionally, to efficiently and effectively utilize our available resources, we must decline to prosecute property and public order offenses that do not pose a threat to the physical safety of other persons. Doing so is consistent with public safety goals.



will include a broad pre-charge diversion program

that is a thoughtful and collaborative initiative.

Our office will work together with licensed clinical social workers, immigration attorneys, substance use disorder (SUD) professionals and medication for addiction treatment (MAT) specialists, medical doctors, mental health professionals, housing advocates, community organizers, violence interrupters, and most importantly, members of directly impacted groups themselves – to develop a range of community-based alternatives to prosecution that our office can facilitate. To be clear: The DA Office, including the ECAB unit, *will never* endeavor to speak to a defendant without representation and every conversation will be initiated through the attorney.



to prosecute offenses that are crimes of poverty – such as trespass, low-level theft, and public order offenses – as well as offenses related to substance use, mental illness, or sex work. The unit would also expand diversion opportunities to those individuals accused of offenses where evidence shows that diversion and public health interventions can successfully address criminogenic needs, reduce long-term recidivism, and enhance public safety. The unit will employ not just assistant district attorneys working only with law enforcement; we will also have an in-house social work team, staffed with case managers who will connect individuals to affiliated social service providers, community organizations, and medical professionals and monitor compliance with any necessary



determine whether declination of diversion is appropriate, with the default position that cases alleging the offenses set forth in Appendices A and B (attached to this policy) will be declined or diverted; all charges stemming from criminalization of sex work, poverty, mental illness, or substance use will be declined.

Together, these proposals will allow the office to shrink the footprint of the criminal legal system, connect individuals with services where required for public safety, and concentrate the office's prosecution resources on the individuals and cases that pose the greatest threat to the physical safety of residents.

### **Our Policy:**



will offer two different diversion opportunities with a varying degree of intensity, program requirements, and supervision levels. Assistant district attorneys, working closely with the diversion program's social work team, will determine to which level of diversion a case should be assigned. Only members of the social work team and other trained professionals will determine if and what treatment interventions are warranted in a given case. Attorneys, who do not have the expertise necessary to make these decisions about treatment protocols, will not set or impose conditions on diversion participants.

Our diversion program will follow these broad guidelines:



**will decline cases wherever possible.** Cases

will be immediately declined for evidentiary reasons, including, but not limited to, lack of sufficient evidence to establish guilt beyond a reasonable doubt, any potential Fourth Amendment violation, a lack of credible evidence or testimony, or an uncooperative complainant or witness necessary to establish guilt at trial. Our office will not use diversion to impose a penalty on an individual who could not otherwise be convicted in a court of law.

2. **Individuals with prior arrests and convictions are not barred from diversion so long as other admissions criteria are met.** Research

consistently shows that, where a root cause of



therapeutic interventions, diversion is often the most effective way to prevent recidivism. Studies have demonstrated that diversion programming substantially benefits individuals with a prior criminal history. In fact, these individuals show the greatest reductions in recidivism.

- 3. The Office's Diversion Program will be broad in scope.** Terms and conditions will be structured to accommodate a participant's individual needs.
- 4. We will not impose fines and fees for people who can't pay. We will ensure the fee structure of diversion programs accommodates participants' varying ability to pay.** All diversion participants may submit an



unable to pay will not be subject to a fee.

5. **We will not require participants to admit**

**guilt or plead guilty** in any diversion

program. A requirement that a participant

either plead guilty or admit guilt to

participate in diversion forces potential

participants to choose between maintaining

their innocence and receiving the legal and

therapeutic benefits of the program.<sup>3</sup> It

delays entry into the program, as many more

participants want to conduct discovery before

pleading guilty. It also has harmful

immigration consequences and can lead to

deportation down the road, even if the

person successfully completes the program.

Therefore, allowing for participation without



maximizes the benefits of the program.

Successful completion should result in a declination of charges, which incentivizes compliance and minimizes the impact of collateral consequences.<sup>4</sup>

6. **Information obtained from participants during treatment will not be used against them in any future proceeding.** The protection of personal information revealed during treatment is critical to treatment effectiveness.<sup>5</sup> Although there will be some limits on confidentiality inherent in any treatment program coupled with the criminal legal system, the Office will provide a written guarantee to participants that, should their cases be returned to the general criminal



they relay during treatment will be introduced or utilized in future proceedings, including trial and/or sentencing.

Our declination and diversion levels will be structured as follows:

- **Level One:** The first level is for people accused of property and public order offenses that don't cause physical harm to other persons. When an individual is arrested or accused of only one or more offenses on this list, the presumption, or default, is that criminal prosecution should be declined entirely. A non-exhaustive list of eligible offenses, where the rule is declination, is provided in Appendix A. Prosecuting these cases has no public safety benefit, and often negatively impacts



INCREASING THE LIKELIHOOD THAT THEY WILL REOFFEND.

- **Level Two:** The second level is for participants with no or minor recent criminal history whose most serious charge is one of the offenses listed in Appendix B. Level Two Diversion does not require treatment, fees, or additional programming, but does mandate that the participant refrain from committing another felony offense (evidenced by an arrest supported by sufficient evidence to support a prosecution) for a period of six months.
- **Level Three:** Level Three Diversion is used for individuals with a substantial recent criminal history who have criminogenic needs that can be addressed through treatment, including for substance use and mental health, or social services programming. Our social work team will work to



INDIVIDUALS WHO QUALIFY FOR LEVEL TWO DIVERSION

(charges included in Appendix B), but have a substantial recent criminal history or commit a new diversion-eligible felony within six months, are also eligible for Level Three Diversion. While individuals charged with offenses in Appendix B are presumptively eligible for Level Two or Three Diversion, other, more serious, charges will also be considered for enrollment in Level Three Diversion, depending on the circumstances. The goal of Level Three Diversion will be to connect persons in need, and/or persons in crisis, to a carefully tailored suite of services, resources, and treatment in the least coercive manner possible that incorporates measurements of success set by treatment providers and social services experts, not attorneys.



now automatically be reviewed by the ECAB team of assistant district attorneys, as well as the assigned social workers, for diversion eligibility. Following this review, there will be a presumption that ADAs follow the above guidelines in declining or proceeding with charges into one of the three appropriate evidence-based pre-arraignment diversion or declination case tracks. Enrollment in Level Two or Three Diversion will be offered at jail arraignments.

The diversion program will not be limited to the offenses listed in Appendices A and B. ECAB attorneys will also be able to refer appropriate cases involving more serious charges to the diversion screening team for potential inclusion in the program. Defense attorneys may also request a



normal charges are filed.

If an individual faces multiple charges in Appendix A within a short period of time, the office's social work team will offer to connect the individual to services, but the individual will not be required to participate or comply as a condition of declination or diversion.

In certain cases involving repeat or aggravating circumstances, attorneys will be able to request a departure from these presumptions, including a change in diversion level or proceeding with traditional prosecution. Before doing so, a social worker on staff must provide an opinion as to the ideal therapeutic approach to the case and the individual. The attorney must then provide that opinion, as well as their own evaluation of the case



approval for the deviation.

## APPENDIX A:

### Charges to be declined

- Criminal trespass 3d degree
- Possession of burglar's tools
- Unlawful possession of radio devices
- Criminal mischief 3d or 4th degree
- Criminal tampering 3d degree
- Reckless endangerment of property
- Fortune Telling
- Making graffiti
- Possession of graffiti instruments
- Petit larceny 6



particularly crimes of poverty

- Forgery, 3d or 2d degree
- Criminal possession of a forged instrument, 3d or 2d degree
- Other misdemeanor fraud charges, particularly crimes of poverty
- Refusing to aid a peace or police officer
- Resisting arrest
- Criminal possession of a controlled substance
- Criminal sale of controlled substances, first offense
- Offenses involving marijuana
- Prostitution



degree

- Unlawful assembly
- Disorderly conduct
- Loitering
- Criminal nuisance
- Possession of a weapon, 4th degree
- Aggravated unlicensed operation of a motor vehicle, 3d deg

## APPENDIX B:

**Charges to be diverted into Level Two or Three Diversion, depending on the individual's recent criminal history and criminogenic needs**

- Assault in the 3d degree (PL § 120.00)
- Criminal trespass, 1st (PL § 140.17)



- Criminal mischief 2d or 1st degree (PL §§ 145.10, 145.12)
- Criminal tampering 1st degree (PL § 145.20)
- Grand larceny 3rd and 4th degree (PL § 155.30, 155.35)
- Welfare fraud, all degrees (PL § 158.05, et. seq.)
- All other felony theft offenses (PL Art. 165)
- Other felony fraud charges, particularly crimes of poverty (PL Title K)
- Escape, 2d degree (PL § 205.10)
- Criminal possession of a controlled substance 2d or 1st degree (PL §§ 220.18, 220.21)



## SUBSEQUENT OFFENSES (F.L. STAT. 220)

- Driving under the influence (but always at Level 3) (VTL § 1192)

### APPENDIX C:

#### A Summary of Scholarly Research on Declination and Diversion

##### **Evidence supporting the declination of offenses:**

Research shows that while criminal activity is deterred by arrest, whether prosecution or punishment follows has little to no additional impact.<sup>7</sup> The arrest itself carries a number of negative informal consequences (“unpleasantness of the apprehension itself, possible loss of liberty due to pretrial detention, ... legal fees, ... social and



conviction, such as disapproval of family, friends, and the community at large, as well as job loss”) that, for most individuals, are the primary forces preventing criminal activity.<sup>8</sup> The commission of low-level offenses, including thefts, is largely unresponsive to changes in punishment. Studies have shown that even substantial decreases in penalties have not led to higher crime rates.<sup>9</sup> Once an individual has been apprehended, imposing more severe sanctions actually *increases* the likelihood a person will reoffend.<sup>10</sup> Therefore, research on recidivism supports a policy in which contact with the criminal legal system or arrest and any subsequent sanction should be as lenient as possible within the limits of public safety.<sup>11</sup>



Offenses is particularly appropriate because drug use in society is “driven mostly by broader social economic and cultural factors, as well as by the internal dynamics of epidemics” and tends not to respond to criminal punishment.<sup>12</sup> In addition, because “[o]nly a small fraction of those who have ever used illicit drugs become problematic drug users,”<sup>13</sup> a casual user who is arrested but does not otherwise violate the criminal law may not be in need of any treatment interventions. After all, research confirms that “[m]ost dependent users of drugs, legal or illegal, quit without any formal treatment.”<sup>14</sup>

Drug sales and possession with intent to sell have proven to be equally unresponsive to criminal punishment. There is often not a clear line



from substance use disorder. Often, individuals sell drugs to sustain a drug habit<sup>15</sup> or to obtain subsistence income.<sup>16</sup> In addition, prosecuting a drug seller has no impact on the availability of controlled substances or their use. Drug markets are highly adaptable, and, even when major distribution chains are disrupted, drug supply and sales simply pop up in another form, location, or using another tactic.<sup>17</sup> As a result, researchers have advocated focusing enforcement on limiting collateral damage by targeting dealers who cause broader societal harm, such as corrupting public officials, hiring juveniles as employees, or using violence as part of their business practice.<sup>18</sup>

**Research supporting expansive diversion programming:**



both low-level and more serious offenses, individuals who have never previously been arrested or charged, and individuals with criminal records all benefit from diversion and, where necessary, treatment to address the root causes of crime.<sup>19</sup> In fact, the reductions in recidivism that accompany participation in diversion are most substantial among individuals who have committed more serious offenses, including those involving the use or threat of force.<sup>20</sup>

Best practices support the least restrictive interventions possible to achieve treatment goals.<sup>21</sup> Overburdening participants with program requirements interferes with their ability to participate in pro-social activities like



RECIDIVISM ACTUALLY INCREASES AS A RESULT.<sup>22</sup>

Studies of diversion programs consistently show substantial cost savings to taxpayers as compared to traditional prosecution. Diversion and treatment are less expensive than probation or incarceration,<sup>23</sup> and because diversion is more likely to reduce recidivism, the long-term savings attributable to a lower incidence of crime and subsequent processing of additional criminal cases is dramatic.<sup>24</sup>

<sup>1</sup>See National Institute of Corrections, *A Framework for Evidence-Based Decision Making in State and Local Criminal Justice Systems*, 4th ed. (June 2017) at 17-18, <https://bit.ly/34m8wSf>.



structure and terms of this policy is included in Appendix C.

<sup>3</sup> See National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Diversion / Intervention* (2008) (“NAPSA Standards”) § 4.3, <https://bit.ly/3kpvvla>.

<sup>4</sup> *Id.* at §§ 1.1, 6.1

<sup>5</sup> See, e.g., Kimberly K. McClanahan, *Can Confidentiality be Maintained in Group Therapy?*, *The National Psychologist* (July 21, 2014), <https://bit.ly/35rq66H>.

<sup>6</sup> Although there are sometimes unrecovered losses in these and other theft and fraud cases, the Office should not prosecute these crimes simply to serve as a collections agency for members of the



RESULTS IN INCREASED INCARCERATION. PROSECUTION OF these offenses does not promote the safety of our community, and the Office's resources must be focused elsewhere. Recovery of monetary losses are best handled in the civil court system, including small claims court, which is designed to address this type of loss.

<sup>7</sup> Daniel S. Nagin, *Deterrence in the Twenty-First Century*, in Michael Tonry, ed., *Crime and Justice in American, 1975-2025*, v. 42 (2013) at 201-202.

<sup>8</sup> *Id.* at 210.

<sup>9</sup> See, e.g., Pew Charitable Trusts, *The Effects of Changing State Theft Penalties* (Feb. 2016), <https://bit.ly/2HpqhXV> (States that substantially increased their felony theft thresholds did not see



following the legislative changes).

10 David Huizinga and Kimberly L. Henry, *The Effect of Arrest and Justice System Sanctions on Subsequent Behavior: Findings from Longitudinal and Other Studies*, in Akiva M. Liberman, ed., *The Long View on Crime: A Synthesis of Longitudinal Research* (2008) at 244.

11 *Id.* at 250. Neither is there any empirical support for the contention that declining to prosecute low-level offenses will embolden the public to commit more serious crimes. Deterrence research shows these supposed “spill-over” effects are extremely unlikely to occur. Raymond Paternoster, *How Much Do We Really Know about Criminal Deterrence?*, 100 *J. Crim. L. & Criminology* 765, 809 (2010), <https://bit.ly/3nPz3ON>.



SO LITTLE OVER 30 YEARS!, in MICHAEL TOMMY, ed.,  
Crime and Justice in America, 1975-2025, v. 42  
(2013) at 98; see also Alex Stevens, *Modernising  
Drug Law Enforcement Report—Applying harm  
reduction principles to the policing of retail drug  
markets*, International Drug Policy Consortium  
(March 2013) at 6, <https://bit.ly/3ma9OWC>;  
Samuel R. Friedman, *Drug Arrests and Injection  
Drug Deterrence*, 101 Am J Public Health 344  
(Feb. 2011), <https://bit.ly/3jq18tj>; Samuel R.  
Friedman et. al, *Relationships of deterrence and  
law enforcement to drug-related harms among  
drug injectors in US metropolitan areas*, 20 AIDS  
93, 97 (2006), <https://bit.ly/3dT3GPC>.

13 Thomas F. Babor, et al, eds., *Drug Policy and  
the Public Good* (2d ed. 2018) at 32.



*Dealing MORE Effectively with PROBLEMATIC*

*Substance Use and Crime*, in Tonry and Nagin, eds., *Reinventing American Justice*, v. 46 (2017) at 166.

15Kathryn Casteel, *A Crackdown on Drug Dealers is a Crackdown on Drug Users*, *FiveThirtyEight* (Apr. 5, 2018), <https://53eig.ht/3okiDip>.

16 Vicky Spratt, *I deal drugs to pay off my student loan*, *BBC* (Sept. 6, 2018), <https://bbc.in/2HrfRaw>.

17Jonathan P. Caulkins and Peter Reuter, *Dealing More Effectively and Humanely with Illegal Drugs*, in Tonry and Nagin, eds., *Reinventing American Justice*, v. 46 (2017), 116.

18Pollack (2017) at 133.



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(commentary) at 7, <https://bit.ly/31CwLtH>.

<sup>20</sup>*Id.*; S.B. Rossman, *The Multi-site Adult Drug Court Evaluation: The Impact of Drug Courts — Volume 4*, Urban Institute (June 2011) at 261, <https://bit.ly/31zqWNE>. Reducing recidivism in this population is also most valuable for society because the types of crimes avoided cause substantial harm to the public.

<sup>21</sup>See NAPSA Standards at § 5.3.

<sup>22</sup>See National Institute of Corrections (2017) at 17.

<sup>23</sup>See Michael Rempel, et. al, *NIJ's Multisite Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness*, Center



<https://bit.ly/35P1NJV>.

24 RTI International, *Study: Replacing Prison Terms with Drug Abuse Treatment Could Save Billions in Criminal Justice Costs* (Jan. 8, 2013), <https://bit.ly/2FRYTkS>; see also Micah W. Kubic and Taylor Pendergrass, *Diversion Programs Are Cheaper and More Effective Than Incarceration. Prosecutors Should Embrace Them*. ACLU.org (Dec. 6, 2018), <https://bit.ly/2Tk8HXZ> (discussing the RTI International study).



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