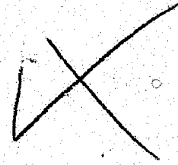
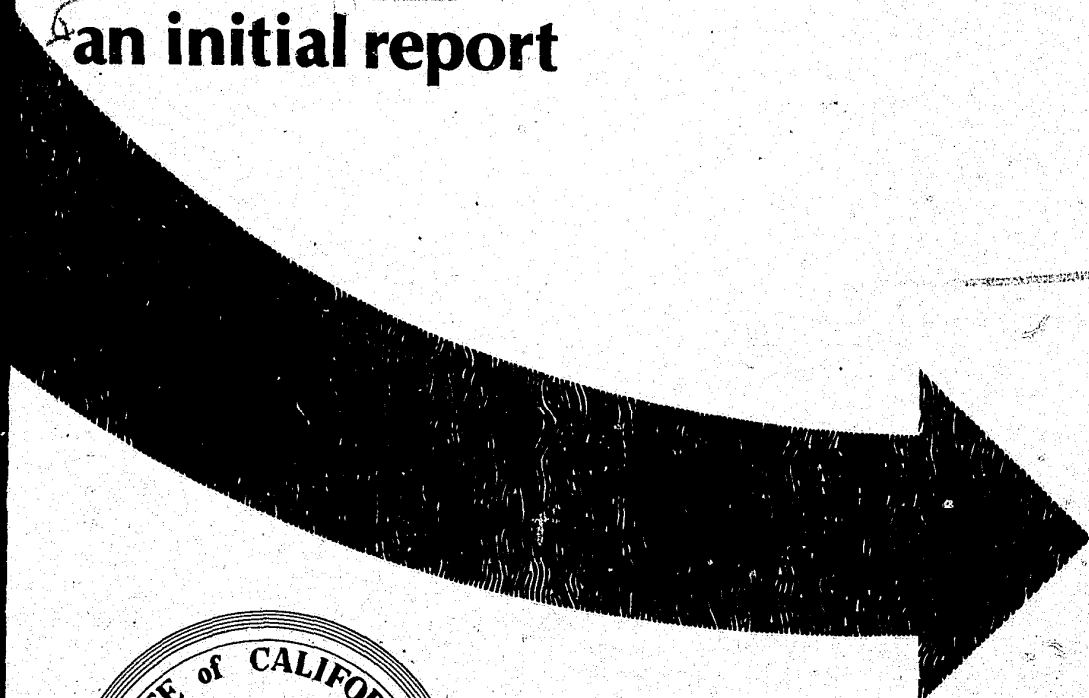


California



THE DRUG DIVERSION PROGRAM

an initial report



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THE DRUG DIVERSION PROGRAM-An initial report
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FOREWORD

On December 15, 1972, Governor Ronald Reagan signed the Campbell-Moretti-Deukmejian Drug Abuse Act. The Act was an urgency statute and took effect immediately. Chapter 2.5 entitled "Special Proceedings in Narcotics and Drug Abuse Cases," the subject of this study, is shown in Appendix A.

The Department of Mental Hygiene is responsible for the Drug Diversion Program. However, due to the fact that the Bureau of Criminal Statistics was already obtaining data on adults for whom county probation departments were responsible, the Drug Diversion Reporting Program was initiated on January 15, 1973.

This initial report is being published due to the great amount of interest in this experimental program.

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INTRODUCTION

Chapter 2.5 of the Campbell-Moretti-Deukmejian Drug Abuse Act established special proceedings for "Narcotics and Drug Abuse Cases." These proceedings are referred to as the Drug Diversion Program. (See Appendix A.) The generally stated objectives of this program are:

- a. To decriminalize specific drug statutes for first time drug offenders.
- b. To reduce the court workload.
- c. To provide for the rehabilitation of first time offenders.

Those accepted do not enter the court system (i.e., they are diverted) and are referred to community resources for education, treatment or rehabilitation for a period of from six to 24 months. The defendant who successfully completes the program and is not arrested and convicted while in the program has the charges against him dismissed. Defendants arrested and convicted for any offense while under the program are referred to the court for arraignment and disposition as if they had not been diverted. The program went into effect on December 15, 1972 and will terminate on January 1, 1975.

The enactment of this program raised many legal questions. These are discussed in the section entitled, "Attorney General Interpretation." (Also see Appendix B.)

SUMMARY

If utilization of a program is a criteria for the measurement of success, this program certainly qualifies. From a somewhat hesitant beginning in February 1973, it appears to have stabilized at approximately 2,000 new cases per month and as a result over 10,000 cases had been diverted by August 31, 1973. Based on continuation of the same rate of growth for the next 18 months, a total of 43,000 cases will have been diverted by January 1, 1975, the statutory end of this program.

One out of every two cases entering the program would have not been placed under probation department supervision if the Drug Diversion Program had not been enacted.

Because of the differences in interpretation and implementation from one county to another, it is virtually impossible to make generalized, noncontroversial statements in this initial report.

This program is still in the developmental stage, as evidenced by the many questions being asked by operating agencies.

STATISTICS

Program Growth

As of August 31, 1973, 49 of the 58 counties in California had diverted over 10,000 adults. The 43,000 which will enter the diversion program by December 31, 1974 is equivalent to an annual rate of 24,000. The number diverted in each county is shown in Table 1 on the following page. The numbers are based on individual reports forwarded to the Bureau of Criminal Statistics (BCS) by county probation departments, with the exception of Los Angeles County. For comparative purposes, it is estimated that in 1972 approximately 8,000 adults were placed under probation department supervision because of a marijuana conviction as a result of 52,000 marijuana felony arrests and an unknown number of misdemeanor arrests.

The annual cost of this program to county probation departments is estimated to be \$4.5 million. One-half of the adults diverted would not have been referred to probation departments if the Drug Diversion Program had not been signed into law. The program is therefore costing county probation departments an estimated \$2.25 million more than they would have expended. In terms of workload, probation departments will be responsible for the supervision of an additional 21,500 adults between March 1973 and December 1974.

Those who would not have been placed under probation department supervision if the program had not been enacted would either have been placed on summary (court) probation, the charges would have been dismissed due to lack of evidence, or a fine or jail sentence would have been imposed.

Although the number of adults diverted have been emphasized, most of the cost to probation departments is involved in the investigation process. The usual workload standard is 15 to 17 investigations per probation officer per month.

Characteristics of Those Diverted

A 10 percent sample of individuals who were diverted as of June 30, 1973 was hand tallied to obtain data on program and personal characteristics. In summary, 45 percent were diverted for an unspecified or variable number of months; almost 60 percent of those diverted were in the 20-24 year old age bracket; 83 percent were white; the most common charged offense was possession of marijuana (75.3 percent); 10 percent had a prior narcotic or drug arrest, but only 0.3 percent were convicted, and 5 percent were on probation when arrested. The tables from which the above statistics were extracted do not include Los Angeles County and to the extent that characteristics for Los Angeles County are different from the remainder of the state, statewide characteristics may vary from that shown in the following tables.

TABLE 1

ADULTS DIVERTED TO THE DRUG DIVERSION PROGRAM AS OF AUGUST 31, 1973

County	Total	County	Total
Total	10,258		
Alameda	310	Orange	1,511
Alpine ^a	-	Placer	60
Amador	5	Plumas ^a	-
Butte	1	Riverside	276
Calaveras	13	Sacramento	188
Colusa	1	San Benito	20
Contra Costa	210	San Bernardino	271
Del Norte	4	San Diego	800
El Dorado	30	San Francisco	211
Fresno	128	San Joaquin	82
Glenn	16	San Luis Obispo	139
Humboldt	54	San Mateo	145
Imperial	73	Santa Barbara	127
Inyo	2	Santa Clara	572
Kern	108	Santa Cruz	117
Kings	36	Shasta	8
Lake	3	Sierra ^a	-
Lassen ^a	-	Siskiyou ^a	-
Los Angeles ^b	3,913	Solano	122
Madera	12	Sonoma	39
Marin	82	Stanislaus	136
Mariposa	7	Sutter	1
Mendocino	21	Tehama	9
Merced	6	Trinity ^a	-
Modoc ^a	-	Tulare	78
Mono	20	Tuolumne ^a	-
Monterey	67	Ventura	137
Napa ^a	-	Yolo	63
Nevada	9	Yuba	15

^aCounty either has not reported or has no cases to report.

^bAugust 31, 1973 caseload provided by Narcotic Coordinator's Office, Los Angeles Probation Department.

TABLE 2

LENGTH OF DIVERSION PERIOD

Length of diversion	Number	Percent	Cumulative percent
Total	389	100.0	-
Six months	81	20.8	20.8
Twelve months	69	17.7	38.5
Eighteen months	5	1.3	39.8
Twenty-four months	45	11.6	51.4
Months specified but other than above ..	13	3.3	54.7
Months unspecified	176	45.3	100.0

Some counties tend to divert some cases for six months, some for twelve, etc., presumably based on the type of program or severity of the offense, while others divert all cases for six months, or all for 12 months, etc. Whether the latter reflects diversion practices, the type of rehabilitation, the court process or some other factor, is unknown.

TABLE 3

RACIAL CHARACTERISTICS OF ADULTS DIVERTED

Race	Number	Percent ^a
Total	389	
Unknown	34	
Total known	355	100.0
White	296	83.4
Mexican-American	32	9.0
Negro	20	5.6
Other	7	2.0

^aPercentages computed by excluding unknowns from base.

The above distribution is similar to that for the 1972 superior court dispositions by charged offense which shows that 81.2 percent of those charged with a marijuana offense are white.

TABLE 4
AGE OF ADULTS DIVERTED

Age	Number	Percent ^a	Cumulative percent ^a
Total	389		
Unknown	6		
Total known	383	100.0	-
Less than 20	94	24.5	24.5
20-24	218	57.0	81.5
25-29	58	15.1	96.6
30 or more	13	3.4	100.0

^aPercentages computed by excluding unknowns from base.

Those diverted are much younger than those convicted in superior or lower court and placed on probation. In superior court 42.5 percent of the caseload and in lower court 40.4 percent were less than 25 years of age on December 31, 1972, compared to the 81.5 percent of those diverted in 1973.

TABLE 5
CHARGED OFFENSE OF ADULTS DIVERTED

Charged offense	Charged offense code ^a		Number	Percent ^b
	Prior	Current		
Total			389	
Unknown			3	
Total known			386	100.0
Possession of marijuana	11530 HS	11357 HS	291	75.3
Visiting a place where narcotics are unlawfully used	11556 HS	11365 HS	29	7.5
Possession of narcotics other than marijuana	11500 HS	11350 HS	28	7.3
Possession of restricted dangerous drugs without prescription	11910 HS	11377 HS	26	6.7
Possession of paraphenalia	11555 HS	11364 HS	10	2.6
Under influence of dangerous drugs .	-	647f PC	1	0.3
Drunk driving	-	23102 VC	1	0.3

^aCodes under "Prior" are those listed in PC 1000. Codes listed under "Current" reflect renumbering of statutes.

^bPercentages computed by excluding unknowns from base.

^cShould not have been diverted.

○○○○

In 1972 only 29 percent of those convicted of a drug law violation were placed under probation department supervision for a marijuana offense, compared to the 75.3 percent of those diverted which were charged with possession of marijuana.

TABLE 6

ARREST RECORD PRIOR TO DRUG ARREST FOR WHICH ADULTS WERE DIVERTED^a

Prior arrests	Number	Percent ^b
Total	389	
Unknown ^c	28	
Total known	361	100.0
No prior	242	67.0
Minor prior ^d	102	28.3
Major prior ^e	17	4.7
Prison commitment	-	-

^aBased on Bureau of Identification (formerly CII) rap sheets.

^bPercentages computed by excluding unknowns from base.

^cRap sheet information not available. CII numbers not reported.

^dOne or more arrests, or convictions of less than 90 days or probation of less than two years.

^eOne or more convictions of 90 days or more or probation of two years or more.

TABLE 7

NARCOTIC OR DRUG ARRESTS PRIOR TO ARREST FOR WHICH ADULTS WERE DIVERTED^a

Prior drug record	Number	Percent ^b
Total	389	
Unknown ^c	28	
Total known	361	100.0
No prior drug arrest	324	89.8
Prior drug arrest	37	10.2
No disposition reported	9	2.5
Juvenile arrest only	7	1.9
Released by law enforcement or charge dismissed by district attorney	20	5.5
Convicted of drug law violation ^d	1	0.3

^aBased on Bureau of Identification (formerly CII) rap sheets.

^bPercentages computed by excluding unknowns from base.

^cRap sheet information not available. CII number not reported.

^dArrest occurred in 1965 when defendant was 20 years old. Disposition was \$160 fine or 15 days in jail.

The law states that one of the conditions of entry to the program is the absence of prior convictions for any offense involving narcotics or restricted dangerous drugs. Table 7 shows that out of the 361 cases where the rap sheet was available, one adult (20 years of age) had been convicted in 1965 and was fined \$166 or 15 days in jail. Although a larger sample might reveal more cases and a greater percentage, it appears that this particular provision of the law is being strictly followed.

Characteristics of Those Removed

A traditional method for evaluating program success is to compare the number who successfully complete a program to the number of failures. Sufficient time has not elapsed to allow for this type of evaluation. Program evaluation is described in detail in the section of this report entitled, "Program Evaluation."

Los Angeles County

A survey of Los Angeles County drug diversion cases was conducted by the Los Angeles County Probation Department Narcotic Coordinator. The survey was based on a review of 701 adult reports completed prior to April 1, 1973 to determine the type of cases referred for investigation. The survey points out that incomplete reporting may bias some of the results. In addition, the data are not directly comparable with data in Tables 2-7 because all referrals are included in the Los Angeles survey instead of those that were diverted. Following are the results of the survey:

Sixty percent were 18-21 years of age; 21 percent were 22-25.

Thirty-one percent had a prior adult conviction or juvenile record.

Six percent were being supervised by probation departments or on court probation or parole.

Ten to 20 percent of those referred were denied entrance to the diversion program.

The reasons for recommendations against entry to the program were:

Thirty-one percent had a prior drug or narcotic experience.

Thirteen percent had used drugs too much to be included in the program.

Twenty-two percent were uncooperative.

Twelve percent did not appear for the interview.

Six percent denied their guilt and wanted a trial.

Other data obtained in the survey showed that 72 percent were single; 64 percent had a job; educational achievement was split almost equally among those who had not completed high school, those who had completed high school and those who had completed high school and entered college or other advanced learning institutions. Seven percent were from out-of-county and most of these were from nearby counties.

Data Collection Methods and Cost

Due to the probable amount of interest in this new program, the Bureau of Criminal Statistics initiated a statistical reporting system in 57 counties on January 15, 1973. (See Appendix C.) The initial scope of the reporting system was to determine the number of adults diverted, some basic characteristics about those who have been diverted and evaluative information such as the percent who successfully complete the program. Follow-up (recidivism) studies one to three years after the adult leaves the program are also required to determine program success. However, funds are not available to process the information currently being received and for this reason a sample of 10 percent of those who entered the program through June 30 was hand tallied to obtain the data shown in Tables 2-7.

A complete statistical reporting system to include data collection, coding/keypunching, design of tabulations, programming effort, computer costs, analysis and reporting will cost approximately \$62,000 for the first year. Second year costs will be slightly less because one-time programming costs will have been completed the first year. Information which could be available as a result of the statistical reporting system is shown in Appendix D. Most of the information shown is already being reported or is available.

The fact that this information and other information contained in this report is available is due to the cooperation and interest in this program by county probation departments.

ATTORNEY GENERAL INTERPRETATION

The following questions arose as counties began planning to implement this new program.

- A. Are those charged with other violations of the Penal Code not specifically enumerated in PC 1000 eligible for diversion?
- B. When should diversion occur?
- C. Does the possession of a weapon constitute a threat of violence?
- D. Does the term "no evidence" refer only to evidence which would be admissible in a court of law?
- E. What is a community program?
- F. Does the concurrence of the district attorney in the court's ultimate decision constitute an interference in the judicial process?
- G. Can criminal proceedings be reinstated if a person diverted does not satisfactorily participate in the assigned program?

The answers to these questions can be found in a memorandum to all of the district attorneys by Deputy Attorney General Rodney S. Blonien, dated March 8, 1972 and shown in Appendix B to this report. Another memorandum from Chief Assistant Attorney General Edward A. Hinz, Jr., addressed itself to "The status of PC 1000 in light of the revision of Health and Safety Code by former AB 192 (Statutes 1407-1972)." The memorandum concluded "that the offenses enumerated in PC Section 1000 are still divertable."

PROGRAM IMPLEMENTATION

In August 1973 a telephone survey was conducted in the eight counties which had diverted the largest number of adults as of June 30, 1973. Cases diverted by these counties comprised 83 percent of the total number of adults who had entered the program by that date. Based on this survey, the estimated annual cost of the program to county probation departments is 4.5 million dollars a year. This may increase when the semiannual reports to the courts are begun. The 4.5 million dollars is equivalent to 214 full-time professional and 53 clerical positions. However, one-half of the cost would have been expended anyway because one-half of those diverted would have been placed under probation department supervision if this program did not exist. The 50 percent who would not have been placed under probation department supervision would have been placed on summary (court) probation, the charges would have been dismissed, or a fine or jail sentence imposed.

Because of the variability in interpretation of the law, and the systems and procedures utilized for enforcement, adjudication and correctional efforts, a few probation departments might actually experience an increase in workload of exactly 50 percent. However, those counties surveyed had varying responses; the responses were not based on formal studies and in fact the exact percentage may never be known because of the complexity of the justice system. The considered judgment from individuals in six of the eight counties (two counties did not wish to estimate the percentage) weighted by the cost of the program in that county was that approximately 50 percent would have been convicted and placed under the supervision of the probation department if the Drug Diversion Program did not exist. Comparison of the number diverted through August 1973 with the number of adults placed under probation department supervision in 1972 indicates that the 50 percent estimate is as good an estimate as is available at this time.

One county estimated that 90 percent of those diverted would have been supervised by the probation department if the diversion program had not been enacted, while at the other end of the spectrum none would have been placed under probation department supervision in another county. Other responses ranged from 33 percent to 50 percent.

Most of the adults who would not have been supervised by probation departments would have either been placed under the supervision of the court had the drug diversion program not existed or the case would have been dismissed for lack of evidence. The number or percentage of cases which would have been dismissed for lack of evidence is unknown. Presumably this program was initiated to divert cases from the system of criminal justice. However, in some cases where there is lack of evidence to convict, the individual is diverted into a neo-justice system instead of leaving the system. As far as the individual is concerned, it is assumed that the rehabilitative program is of course to his advantage.

In some agencies more stringent conditions of probation have been established for cases diverted than for cases convicted and placed under probation department supervision. Two hearings are required in some counties before diversion occurs because the court holds a hearing to determine whether the probation department should make an investigation, although the statute is specific that this is the responsibility of the district attorney.

The statute requires that the defendant benefit from "education, treatment, or rehabilitation." However, the statute is silent in regard to whether the treatment or educational program should continue for the entire period of the diversion program. If the probation department is considered as a community resource, the question is partially resolved. At the conclusion of the two week, four week, or three month, etc., treatment or educational program, the probation department could supervise the defendant until the diversion is concluded as successful or unsuccessful. Several departments expressed concern about the lack of a courtesy supervision program.

PROGRAM EVALUATION

Program evaluation should be concerned with how well the three objectives of the program are met. Passage of the law and its implementation has of course been achieved and therefore one objective appears to have been met. Another objective, reduction of the court workload, may or may not have been achieved. A special study will be required to determine this. Also, in regard to objectives, the terms "reduce court dockets" and "decrease court costs" appear to have been used interchangeably when in fact they are two separate objectives. If costs are an objective, then the additional costs of probation, the district attorney and law enforcement should be obtained and compared to previous costs to determine the cost-benefit ratio. The fact that 50 percent of the cases would not have been placed under probation department supervision will have to be considered, as well as the costs of summary probation and the percentage of cases which would have been dismissed due to lack of evidence. A complete cost study should of course include the cost of rehabilitation and the recidivism rate. However, the latter is a long-range objective not easily achieved.

The third objective, rehabilitation and treatment, will require: (a) that the success-failure rate be determined, (b) that the recidivism rate be determined by conducting follow-up studies on those who have completed the program and (c) that a control group be established to use as a base against which to measure (a) and (b) above.

Unfortunately, because of lack of funds, the Bureau of Criminal Statistics may not be able to produce data necessary for the third objective. If funds are provided, sufficient time must elapse to determine both the success-failure rate and recidivism rate. For example, of those diverted through June 1973, some were diverted for two years or for unspecified periods. Sufficient program

knowledge may be available by October of 1974 to make a determination of those who had been in the program one year, but if a great proportion of those diverted for unspecified periods are not terminated until March to June of 1975, it is obvious that evaluation can not be begun prior to that time.

In general, probation departments are laudatory about the concept of the program, even though some questions are unresolved and evaluative information is not yet available.

APPENDICES

APPENDIX A

Chapter 2.5. SPECIAL PROCEEDINGS IN NARCOTICS AND DRUG ABUSE CASES

Section 1000. (a) This chapter shall apply whenever a case is before any court upon an accusatory pleading for violation of Section 11500, 11530, 11555, 11556, 11910, or 11990 of the Health and Safety Code and it appears to the district attorney that all of the following apply to the defendant:

(1) The defendant has no prior conviction for any offense involving narcotics or restricted dangerous drugs.

(2) The offense charged did not involve a crime of violence or threatened violence.

(3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision.

(4) The defendant has no record of probation or parole violations.

(b) The district attorney shall review his file to determine whether or not paragraphs (1) to (4), inclusive, of subdivision (a) are applicable to the defendant.

Section 1000.1 (a) If the district attorney determines that this chapter may be applicable to the defendant, he shall advise the defendant or his attorney of such determination. If the defendant consents and waives his right to a speedy trial the district attorney shall refer the case to the probation department. The probation department shall make an investigation and take into consideration the defendant's age, employment and service records, educational background, community and family ties, prior narcotics or drug use, treatment history, if any, demonstrable motivation and other mitigating factors in determining whether the defendant is a person who would be benefited by education, treatment, or rehabilitation. The probation department shall also determine which community programs the defendant would benefit from and which of those programs would accept the defendant. The probation department shall report its findings and recommendation to the court.

(b) No statement, or any information procured therefrom, made by the defendant to any probation officer which relates to the specific offense with which the defendant is charged, which is made during the course of any investigation conducted pursuant to subdivision (a), and prior to the reporting of the probation department's findings and recommendations to the court, shall be admissible in any action or proceeding brought subsequent to the investigation, with respect to the specific offense with which the defendant is charged.

Section 1000.2. The court shall hold a hearing and, after consideration of the probation department's report and any other information considered by the court to be relevant to its decision, shall determine if the defendant consents to further proceedings under this chapter and waives his right to a speedy trial and if the defendant should be diverted and referred for education, treatment, or rehabilitation. The defendant's case shall not be diverted unless the district attorney concurs with the court's determination that the defendant be so referred though such concurrence is not necessary with respect to the program to which the defendant is referred. If the court does not deem the defendant a person who would be benefited by diversion, or if the district attorney or the defendant do not consent to participate, the proceedings shall continue as in any other case.

The period during which the further criminal proceedings against the defendant may be diverted shall be for no less than six months nor longer than two years. Progress reports shall be filed by the probation department with the court not less than every six months. If the defendant is arrested and convicted of any criminal offense during the period of diversion, the case for which he has been diverted shall be referred to the court for arraignment and disposition as if he had not been diverted and the case is a regular criminal matter. If the defendant has performed successfully in the education or treatment program, at the end of the period of diversion, the charges shall be dismissed.

Section 1000.3. Any record filed with the Bureau of Criminal Identification and Investigation shall indicate the disposition in those cases diverted pursuant to this chapter.

Section 1000.4. This chapter shall remain in effect until January 1, 1975, and on such date is repealed.

APPENDIX B

MEMORANDUM CONCERNING THE DIVERSION OF NARCOTIC AND
DANGEROUS DRUG OFFENDERS FROM THE CRIMINAL PROCESS -
PENAL CODE SECTIONS 1000 - 1000.3

On December 15, 1972, Governor Reagan signed into law Senate Bill 714. This bill contained an urgency statute which mandated that it go into effect immediately upon signing.

Senate Bill 714 was drafted by the Governor's Office to expand drug treatment facilities and to revise the administration of existing treatment programs. This bill also provides for the diversion of first-time drug offenders from the criminal process to various community treatment programs. Many questions have arisen regarding the District Attorney's role in the Diversion Program. The following analysis is intended to answer those questions referred to our attention:

Chapter 2.5, sections 1000 - 1000.3, provides for the diversion of first-time drug offenders from the criminal process to educational and counseling services. Diversion was instituted for the following three reasons: (1) to give "the experimental or accidental drug user a second chance;" (2) to unclog court dockets; (3) to lower the cost of trials, and the administration of justice. However, the chief reason for founding the diversion program was to de-criminalize "simple possession of controlled substances" for first offenders, who are otherwise good citizens, so that their records will not be permanently marred by one act of indiscretion.

SECTION 1000(a)

"(a) THIS CHAPTER APPLIES WHENEVER A CASE IS BEFORE ANY COURT UPON AN ACCUSATORY PLEADING FOR VIOLATION OF SECTION 11500, (POSSESSION OF A NARCOTIC OTHER THAN MARIJUANA), 11530 (POSSESSION OF MARIJUANA), 11555 (POSSESSION OF AN OPIUM PIPE), 11556 (PRESENCE IN A ROOM WHERE NARCOTICS ARE BEING USED), 11910 (POSSESSION OF DANGEROUS DRUGS), 11990 (POSSESSION OF METHYLENE WITH INTENT TO MANUFACTURE). . ."

Question: Are those charged with a violation of Penal Code section 647(f) under the influence of a drug and Health and Safety Code section 11915 (possession of an instrument or paraphernalia for injection a drug) eligible for diversion?

Answer: A defendant is eligible for diversion only if he is charged with the commission of one of the offenses listed. A defendant charged with sale, possession for sale, trafficking or any of the more serious crimes is not eligible for diversion. The authors of this legislation intended only for defendants charged with crimes of possession or lesser crimes to be eligible for diversion.

Violations of Penal Code section 647(f) and Health and Safety Code section 11915 are crimes which fall into the general class of offenses which are divertible. However, they are not specifically listed as divertible offenses. The authors of the "Diversion Program" recognize that these two crimes fall into the general class of divertible offenses; and but for an oversight at the time of drafting, they would have been listed as divertible.

A strong argument for the inclusion of the offense described in Health and Safety Code section 11915 is presented by the addition of section 11364 to the Health and Safety Code.^a Section 11364 makes it unlawful to possess an opium pipe or any device, contrivance, instrument or paraphernalia used for unlawfully injection or smoking a controlled substance. The Legislature in section 11364 combined the offenses which were formerly found in sections 11555 and 11915 and broadened the language to include all paraphernalia. This action demonstrates the Legislature's intent to classify all paraphernalia offenses together and not to view some more seriously than others. It can be argued that the Legislature in passing Code section 11364, subsequent to the enactment of Penal Code section 1000, has expressed its intent to make possession of all paraphernalia divertible offenses. We are presently proposing that section 1000(a) be amended to specifically include violations of Penal Code section 647(f).

Question: When is the ideal time for a defendant to be diverted from the criminal process?

Answer: Section 1000(a) merely states that diversion applies whenever a case is before any court on an accusatory pleading without indicating the precise moment it should take place. However, the authors have indicated that diversion should take place as soon as possible after the filing of the complaint. It was not the intent of the Legislature to have diversion take place at some later time, e.g., after the preliminary hearing. Diverting a defendant at this late stage will only frustrate the legislative intent to unclog court dockets and to lower the cost of the judicial process. The earlier diversion takes place, the less merit defendant's possible Esteybar and Tenorio contention will have on appeal.^b

SECTION 1000(a)(2)

"(2) THE OFFENSE CHARGED DID NOT INVOLVE A CRIME OR VIOLENCE OR THREATENED VIOLENCE."

^aThis addition to the Health and Safety Code will become law on March 7, 1973.

^bThe Esteybar - Tenorio problem is discussed infra.

Question: What is "threatened violence?" Does the possession of a weapon constitute a threat of violence?

Answer: There can be little doubt that brandishing a weapon about in a menacing manner does constitute a threat of violence. Possession of a weapon and a verbal indication by a defendant that he intends to make use of a weapon can also be said to be a threat of violence. In both of the above instances there is some external act demonstrating an intent to use a weapon coupled with the actual possession of a weapon.

The more troubling question is whether possession alone without any manifestation of intent to use a weapon constitutes a threat of violence. The unlawful possession of a weapon by one who is arrested for a narcotic violation does present the potential for violence. In some cases this potential can indeed constitute a threat of violence. The chief reason for the establishment of the Diversion Program was to give first-time drug offenders, who are otherwise good citizens, a second chance. The public policy argument of diverting those who commit drug offenses for the first time does not logically extend to defendants who at the time of arrest are armed. The presence of a weapon suggests that the defendant is not an experimenter or one who has succumbed to this one act of indiscretion. Being armed suggests a deeper involvement in criminal activity, and an association with drugs and narcotics which goes beyond possession. It could therefore be contended that those arrested and found to be armed pose a threat of violence, and are therefore ineligible for the Diversion Program.

SECTION 1000(a)(3)

"(3) THERE IS NO EVIDENCE OF A VIOLATION RELATING TO NARCOTICS OR RESTRICTED DANGEROUS DRUGS OTHER THAN A VIOLATION OF THE SECTIONS LISTED IN THIS SUBDIVISION."

Question: Does the term "no evidence" only refer to that evidence which would be admissible in a court of law?

Answer: the word "evidence" refers to any testimony, writings, natural objects, or other things which are offered to prove the existence of a fact. The word "evidence" itself is not concerned with quantity or quality. The quantity or quality of evidence only becomes important when the evidence is introduced in a court of law. Since the term "no evidence" refers only to evidence which is considered by the District Attorney, and the evidence is not bound for court, the District Attorney can consider any evidence which comes to his attention. The informality of the procedure by which the District Attorney determines one's eligibility for diversion indicates that in making this decision he should not be bound by legal technicalities. Thus, "no evidence" does not mean evidence which would satisfy the requirements of a court of law.

SECTION 1000.1(a)

"(a) THE PROBATION DEPARTMENT SHALL ALSO DETERMINE WHICH COMMUNITY PROGRAMS THE DEFENDANT WOULD BENEFIT FROM AND WHICH OF THESE PROGRAMS WOULD ACCEPT THE DEFENDANT."

Question: What does the term "community programs" refer to and include?

Answer: Section 1000.1 indicates that the community program should have as its goal the education, treatment and rehabilitation of narcotic and drug abusers, but it does not provide any additional standards. However, section 5901.5 of the Welfare and Institutions Code lists a number of specific programs which qualify as community programs.^c Some of these programs are halfway houses, drop-in centers, free clinics, detoxification centers, and methadone programs. In addition, section 5901.5 also provides for non-specific drug programs. Some of these programs provide or offer therapy, referral, advice, care, treatment, or rehabilitation services. A community program, therefore, can include one of the specific treatment modalities referred to above, or any other approved program which offers some of the above services.

The term "community program" can thus refer to one of the typical treatment modalities, or it can refer to any other approved program which offers the services set forth in section 1000.1 and 5901.5. Probation, for example, would qualify as a community program.

SECTION 1000.2

"THE DEFENDANT'S CASE SHALL NOT BE DIVERTED UNLESS THE DISTRICT ATTORNEY CONCURS WITH THE COURT'S DETERMINATION THAT THE DEFENDANT BE SO REFERRED THOUGH SUCH CONCURRENCE IS NOT NECESSARY WITH RESPECT TO THE PROGRAM TO WHICH THE DEFENDANT IS REFERRED."

Question: Does the concurrence of the District Attorney in the court's ultimate decision constitute an interference in the judicial process? Is this provision constitutional in view of the California Supreme Court's decision in *Esteybar v. Municipal Court*, 5 Cal.3d 119 (1971), and *People v. Tenorio*, 3 Cal.3d 89 (1970)?

Answer: Although the ultimate answer to these questions can only be answered by appellate court decisions, there are strong arguments which can be made on behalf of the District Attorney's concurrence. The decision in *Esteybar* was based on the court's determination that the reduction of a charge from a felony to a misdemeanor is a judicial function, rather than an administrative one. The court in reiterating its holding in *Tenorio*, declared that the exercise of a judicial power may not be conditioned upon the approval of either the executive or legislative branches of government.

^cThis is contained in Part 3, Chapter 1, of Senate Bill 714.

However, the court in Esteybar did recognize that, "The prosecution of a case by the District Attorney involves an exercise of executive power." Supra at 527.

Clearly, the District Attorney has the discretion to decide whether or not criminal charges should be lodged against a person. We contend that the decision to prosecute or to divert is an executive decision which is properly vested in the District Attorney. The involvement of the judge in this decision should not turn this executive function into a judicial one. In *People v. Municipal Court*, 27 Cal.App.3d 193, 204 (1972), it was recognized that the judiciary should not meddle in the executive functions of the District Attorney, just as the District Attorney must not interfere with the functioning of the judiciary.

The decision of when and against whom criminal proceedings are to be instituted is one to be made by the executive, the District Attorney. Thus, if a diversion takes place very early in the criminal process, the District Attorney does have the discretion to divert a defendant. The executive function of determining who should be prosecuted must not now be made a judicial function by this section. The later a diversion takes place during the criminal proceedings, the more persuasive will be defendant's argument on a possible Esteybar issue. Thus, it may be advisable to divert the defendant as soon as possible so as to avoid a possible Esteybar issue.

Question: Can criminal proceedings be reinstated if a person who is diverted does not satisfactorily participate in the assigned program?

Answer: Although this question is not answered specifically, the answer is suggested in section 1000.2. The last sentence of section 1000.2 provides for the dismissal of the criminal charge if the person performs successfully in the assigned program for the established length of time. Obviously then, if the person fails to perform satisfactorily, the criminal charges should be reinstated - as soon as possible. If this is not the case, the District Attorney is in the ridiculous position of being able to do nothing when a person does not perform satisfactorily in the assigned program. Thus, it seems evident that the Legislature intended for diversion to be revoked when the conditions were not met by the defendant.

Rodney J. Blonien
Deputy Attorney General

N.B. Section 1000.1(a), provides for the District Attorney to advise the defendant that he is eligible for diversion. There may be some instances where the defendant at a later date will contend that he was never advised he was eligible for diversion. Prosecutors may wish to prevent defendants from raising this issue by routinely advising them of their eligibility for diversion either at the time of arraignment or on the face of the complaint.



Department of Justice
DIVISION OF LAW ENFORCEMENT
IDENTIFICATION AND INFORMATION BRANCH
BUREAU OF CRIMINAL STATISTICS
P.O. BOX 13427
SACRAMENTO, CALIFORNIA 95813

January 15, 1973

To: All Probation Departments

Attached is a copy of the Campbell-Moretti-Deukmejian Drug Abuse Act (Senate Bill 714, Chapter 1255) for your use. Chapter 2.5, Penal Code Section 1000.2, states that for those adults diverted "Progress reports shall be filed by the probation department with the court not less than every six months." It is assumed that some type of supervision will, therefore, be required by probation departments. To determine the incidence, length of stay on the program and the manner of removal from the program, a new statistical reporting system will be necessary. The Bureau of Criminal Statistics (BCS) is establishing this program as an integral part of the Adult Probation Statistical Reporting System.

For the present, diverted cases will be reported to BCS by utilizing the regular Adult Probation Statistical Reporting forms. Data to be included on the initial report form (JUS 732) is that which is usually reported when an adult is placed under probation supervision, except:

- a. Enter date of entry to the diversion program in the date of judgment section of the form.
- b. In the "case received for" section, enter PC 1000.2 on the line after "other." If the defendant is part of a county diversion program which is beyond the scope of the Drug Abuse Act, enter "CoDiv" for county diversion instead of PC 1000.2 after "other."
- c. In the "judgment of the court" section enter the length of the diversion period in months or if the length is unspecified, enter "unspecified."

An example is attached as Enclosure 1.

At the conclusion of the diversionary period, use the regular removal form (JUS 787B or the IBM card, whichever form is being used for your statistical reports), enter identifying data and the following:

- a. Enter the date removed from the diversion program in the "date removed" section.
- b. Actual time in the diversion program is entered in the months on probation block in terms of completed months.
- c. When the defendant is removed from the program, enter the reason for the removal, such as "charge(s) dismissed," "new arrest and conviction," etc., in Section "C" of the removal report.

An example of an adult removed from the diversion program is shown in Enclosure 2.

It is anticipated that these initial instructions may change when the Department of Mental Hygiene, which is responsible for this new program, determines their specific program needs. If you are already supervising adults under this program, please complete a card for each and forward them with your regular adult probation reports to the Bureau of Criminal Statistics. The cards you submit in this program should be counted in with the regular lower court cases on the Monthly Transmittal Form (JUS 770). If you have any questions in regards to this new reporting program, please call me.

Best regards,

Ken Olsen
Crime Studies Analyst

KO:pd
Enclosures

REPORT OF A DEFENDANT PLACED UNDER SUPERVISION OF THE PROBATION DEPARTMENT
UNDER PROVISIONS OF THE CAMPBELL-MORETTI-DEUKMEJIAN DRUG ABUSE ACT

A. Using current report form.

INDIVIDUAL STATISTICAL REPORT—LOWER COURT ADULT PROBATION											
Name		Last		First		M.I.		Country		Ct. No. 1234567	
Doe		Richard		Z		A				Prob. No. 7654	
Sex	<input checked="" type="checkbox"/> M <input type="checkbox"/> F	Yr. of Birth	45		Race	<input checked="" type="checkbox"/> White <input type="checkbox"/> Negro <input type="checkbox"/> Mexican <input type="checkbox"/> Other (specify)	Convicted Offense		H & S 11500		
Method of Conviction	<input type="checkbox"/> Guilty Plea <input type="checkbox"/> Nolo Contendere <input type="checkbox"/> Verdict—Court <input type="checkbox"/> Verdict—Jury	Date of Referral		Mo.	Day	Yr.	Case received for:		Leave blank		
Date of Judgment		Mo.	Day	Yr.	Was probation recommended		<input type="checkbox"/> Investigation and report to court <input type="checkbox"/> Reinstatement—give date <input type="checkbox"/> Summary probation—not referred <input type="checkbox"/> Other PC 1000.2				
3		7	73	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> No Rec.				<input checked="" type="checkbox"/> Probation department to supervise <input type="checkbox"/> Defendant responsible to court only			
Judgment of Court											
15 mo. (or unspecified)											
Remarks											
Bureau of Criminal Statistics, P.O. Box 1583, Sacramento, California 95807 FORM JUS 732											

B. Using new report form to be available July 1973

INDIVIDUAL STATISTICAL REPORT - LOWER COURT ADULT PROBATION																							
County		Name		Last		First		M.I.		Ct. No. 1234567													
A		SAMPLE								CII No. 1234567													
Sex		Yr. of Birth		Race		Date of Judgment		Date of Referral		Judge													
<input checked="" type="checkbox"/> Male <input type="checkbox"/> Female		45		<input checked="" type="checkbox"/> White <input type="checkbox"/> Mexican-American <input type="checkbox"/> Negro <input type="checkbox"/> Other (specify)		3/7/73																	
Convicted Offense		Was probation recommended		Probation Officer		Case received for:		Jail		Subsidy													
H & S 11500		<input type="checkbox"/> Yes <input type="checkbox"/> No				<input type="checkbox"/> Investigation and report to court <input type="checkbox"/> Supervision-not referred <input type="checkbox"/> Reinstated on <input type="checkbox"/> Other PC 1000.2		<input type="checkbox"/> Return from abscond status <input type="checkbox"/> Payment of fine or restitution only		<table border="1"> <tr> <th>In</th> <th>Out</th> <th>Time</th> <th>In</th> <th>Out</th> <th>Time</th> </tr> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> <td></td> </tr> </table>		In	Out	Time	In	Out	Time						
In	Out	Time	In	Out	Time																		
Judgment of Court																							
A. Placed on supervised probation <u>15</u> Mos. probation <input type="checkbox"/> Payment of fine or restitution only <input type="checkbox"/> Jail suspended _____ Mos. CTS _____ Days <input type="checkbox"/> Prison suspended Fine _____ Restitution _____ B. Probation denied _____ Mos. or _____ Days in Jail <input type="checkbox"/> Prison <input type="checkbox"/> CYA Fine _____ Restitution _____ Other _____ C. <input type="checkbox"/> Court Probation																							
Bureau of Criminal Statistics, P.O. Box 13427, Sacramento, Ca. 95813 JUS 732 Rev. 1/73																							

A. Diversion Was Successful

HOLGERSON MARK G										123456					1235555					20		22		200					99																																																		
NAME										COURT NO					CII NO					DATE JUDGMENT		DATE TERM		OFFENSE					SUBSIDY		COUNTY																																																
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										1 DATE REMOVED					MONTH		DAY		YEAR																																																												
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										3. TYPE OF REMOVAL																																																																					
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CALIFORNIA DEPARTMENT OF JUSTICE										BUREAU OF CRIMINAL STATISTICS																																																																					
DPB-7 REV.3 (1-72)										ADULT PROBATION-REMOVAL REPORT 97335-552 1-3 OSP																																																																					

B. Defendant Was Arrested and Convicted

HOLGERSON MARK G										123456					1235555					20		22		200					99																																																		
NAME										COURT NO					CII NO					DATE JUDGMENT		DATE TERM		OFFENSE					SUBSIDY		COUNTY																																																
CT CODE	CO	AM	COURT	CII	SEX	YEAR OF BIRTH	RACE	DATE OF JUDGMENT	OFF	DISPO	SENT	TERM	CRIM	ACTUAL	TYPE	SUMMARY	SUBSIDY	ADP																																																													
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										1 DATE REMOVED					MONTH		DAY		YEAR																																																												
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CALIFORNIA DEPARTMENT OF JUSTICE										BUREAU OF CRIMINAL STATISTICS																																																																					
DPB-7 REV.3 (1-72)										ADULT PROBATION-REMOVAL REPORT 97335-552 1-3 OSP																																																																					

APPENDIX D

DRUG DIVERSION PROGRAM (PC 1000)

DATA OUTPUT FOR ADULTS PLACED UNDER PROBATION DEPARTMENT SUPERVISION

Data and analysis of this program will consist of tables describing characteristics of adults entering the program, characteristics of those in the program, removal characteristics and follow-up recidivism studies. Specific data output for each of the four is described in detail below.

A. Characteristics of adults entering the program.

1. Age
2. Sex
3. Race
4. Charged offense
5. Length of diversion period
6. Prior arrest record
7. Prior narcotic or drug record
8. Criminal status at time of arrest
9. County

The above will be available on all adults who have entered the program, assuming Los Angeles County can provide comparable data. In addition, elements describing type of rehabilitation or educational programs can be obtained in the future. Data to be available on an annual basis.

B. Characteristics of those in the program.

The same information as described in A above.

C. Characteristics of those removed.

1. Type of removal (i.e., success or failure)
2. Length of diversion period
3. Length of rehabilitation period
4. Correlate age, race, charged offense, prior arrest record, prior narcotic record and criminal status with type of removal, type of program, length of diversion program, etc.
5. County

D. Recidivism study. Ten percent of the successful terminations - about 2,000 cases.

1. Subsequent arrest, conviction record
2. Mobility
3. Correlate data elements described in C-4 with subsequent arrest and conviction record.
4. County

END