Office of the Inspector General
U.S. Department of Justice

Audit of the Department's Use of Pretrial Diversion and Diversion-Based Court Programs as Alternatives to Incarceration

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AUDIT OF THE DEPARTMENT'S USE OF PRETRIAL DIVERSION AND DIVERSION-BASED COURT PROGRAMS AS ALTERNATIVES TO INCARCERATION

EXECUTIVE SUMMARY

The *Smart on Crime* initiative, announced by the Department of Justice (Department) in August 2013, highlighted five principles to reform the federal criminal justice system by, among other things, ensuring just punishments for low-level, non-violent offenders. *Smart on Crime* encouraged federal prosecutors in appropriate cases involving non-violent offenders to consider alternatives to incarceration such as pretrial diversion and diversion-based court programs where appropriate. Pretrial diversion and diversion-based court programs are alternatives to prosecution or incarceration that enable certain low-level and non-violent offenders to be diverted from traditional criminal justice proceedings, with the result being that the offender may receive no conviction or be sentenced to a lesser or no term of incarceration. Officials of the Executive Office for U.S. Attorneys (EOUSA) told us that, while the *Smart on Crime* initiative contemplates greater use of diversion programs nationally, it does not mandate that each U.S. Attorney's Office (USAO) increase the use of diversion regardless of other priorities or local circumstances.

Additionally, the Department's FY 2014-2018 Strategic Plan calls for the expansion of diversion programs as a way to reform and strengthen the federal criminal justice system and address prison overcrowding. The leadership of the Department has acknowledged that the level of federal prison spending is unsustainable. For fiscal year (FY) 2016, the Federal Bureau of Prisons (BOP) budget was $7.5 billion and accounted for 26 percent of the Department's discretionary budget, figures that have risen markedly in the past 15 years. As of September 2015, the BOP operated at 26 percent over capacity and is projected to remain overcrowded through FY 2016 and beyond.

Traditional pretrial diversion is initiated at the discretion of the USAOs. It generally involves a decision to defer prosecution in order to allow an offender the opportunity to successfully complete a period of supervision by the Probation or Pretrial Services offices of the U.S. Courts with the agreement that, if successful, the USAO will not prosecute the offender and any pending criminal charges will be dismissed.[1] Subject to the criteria in the U.S. Attorney's Manual, each USAO determines for itself which offenders are eligible for diversion.

Diversion-based court programs, by contrast, are generally run by the U.S. Courts in partnership with the USAOs and Probation and Pretrial Services. These

[1] We use the term "offender" because the U.S. Attorneys' Manual uses that term when referring to pretrial diversion eligibility even though such individuals have not been adjudged guilty.

programs typically address criminal charges filed against low-level, non-violent offenders through supervision, drug testing, and treatment services. Diversion-based court programs can target a range of offenses, though they often focus on specific offenses such as drug crimes or particular categories of offenders. While some diversion-based court programs result in a full dismissal of charges, others may result in a conviction with a sentence of probation or little incarceration.

The Office of the Inspector General (OIG) initiated this audit to evaluate the (1) design and implementation of federal pretrial diversion and diversion-based court programs, (2) variances in the usage of the programs among the USAOs, and (3) cost savings associated with successful program participants.

We found that, since the announcement of the *Smart on Crime* initiative, the Department has taken some steps to address its historically limited use of pretrial diversion and diversion-based court programs. Between August 2013 and March 2014, EOUSA distributed informational materials designed to inform the USAOs about diversionary court programs and provided training and workshops on alternatives to incarceration. EOUSA also conducts an annual survey of the USAOs' diversion programs.

We attempted to obtain from EOUSA the total number of offenders who were placed into a pretrial diversion program as well as the number of unsuccessful participants, which we believe are crucial metrics needed to evaluate the program's effectiveness. However, we were told that neither EOUSA nor the USAOs track this information. As a result, the Department cannot fully measure the success of its pretrial diversion program. We were able to obtain from EOUSA the number of offenders who successfully completed a pretrial diversion program from FY 2012 through FY 2014 for all 94 USAOs, which was 1,520 offenders.[2]

In order to assess whether additional offenders were potentially suitable for pretrial diversion, we determined the number of federal defendants convicted of low-level, non-violent offenses based on U.S. Sentencing Commission statistics. In undertaking this analysis, we applied the same criteria used by the Department's National Institute of Justice (NIJ) in its 1994 report identifying the universe of federal low-level, non-violent drug offenders, namely: (1) a category I criminal history, (2) zero criminal history points, (3) no weapons offense conviction, (4) no aggravated role adjustment, and (5) no prior arrest for a crime of violence or controlled substance.[3] We further restricted this universe by only including offenders who fell within Zone A of the U.S. Sentencing Commission sentencing table and therefore were eligible for a probationary sentence with no conditions of confinement. We also excluded those offenders sentenced under the guideline for

[2] For reasons we describe in the report, we found evidence that this figure likely underreports the number of offenders who successfully completed a pretrial diversion program.

[3] NIJ, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (February 1994). The 1994 NIJ report also used one U.S. Sentencing Commission statistic that was no longer available in the 2012 through 2014 data: offenders with "no prior arrest of any kind."

unlawfully entering or remaining in the United States because, as a practical matter, offenders illegally in this country are rarely considered for alternative dispositions. Applying all of these criteria, we identified 7,106 offenders during the 3-year period of our review as potentially suitable for pretrial diversion. Of this total, 1,520 offenders successfully completed a pretrial diversion program. We were unable to assess whether the remaining 5,586 potentially suitable offenders would have met the particular USAO's eligibility requirements for its pretrial diversion program or would have been deemed suitable candidates for supervision by Probation and Pretrial Services.

We also found, based on the data available to us, that the use of pretrial diversion appeared to be substantially less in some USAOs than in others. Forty-four USAOs (just under one-half of all USAOs), had between zero and five successful pretrial diversion participants.

With regard to diversion-based court programs, the vast majority of federal judicial districts (78 out of 94) had no program as of August 2015. Unlike for pretrial diversion, the Department had not established criteria that the USAOs must consider for determining admission into a diversion-based court program. We attempted to obtain from EOUSA the number of offenders who participated in a federal diversion-based court program in past years, but were told the information was not available.[4] As with our analysis of potentially suitable pretrial diversion offenders, we identified those offenders potentially suitable for a diversion-based court program from an analysis of U.S. Sentencing Commission statistics using the criteria from the 1994 NIJ report, but included offenders who fell within either Zone A or Zone B of the U.S. Sentencing Commission sentencing table.[5] Again excluding offenders sentenced for unlawfully entering or remaining in the United States, we determined that 12,468 offenders sentenced from FY 2012 through FY 2014 were potentially suitable for diversion-based court programs. However, as with traditional pretrial diversion, we were unable to assess whether these potentially suitable offenders would have met the entrance and eligibility requirements of diversion-based court programs in their individual sentencing jurisdictions.

We found the Department had not evaluated the effectiveness of the USAOs' pretrial diversion programs or its efforts to pursue their use. An evaluation would assess the Department's progress toward accomplishing the goals established in the Department's Strategic Plan and its *Smart on Crime* initiative.

The Department also has not evaluated the potential for pretrial diversion programs to reduce prosecution or incarceration costs, and we were unable to

[4] EOUSA officials told us that, in December 2015, it collected data on offenders who had participated in federal diversion-based court programs. However, because that data was not available until after we prepared our draft report, we were unable to analyze it as part of this review.

[5] We included Zone B offenders, who are eligible for probationary sentences but only with additional conditions of confinement, in addition to Zone A offenders in light of the greater range of sentences available through diversion-based court programs.

obtain data that would have allowed us to do so. Given this absence of data, we instead estimated the incarceration costs that the Department spent on offenders we identified as potentially suitable for pretrial diversion. We determined that of the 7,106 offenders who completed or who were potentially suitable to complete a pretrial diversion program, 4,530 received no prison sentence while 2,576 received some sentence of incarceration. Based on the amount of prison time these 2,576 offenders received, we estimated that from FY 2012 through FY 2014 the Department expended $26,313,168, or $10,215 per offender. These estimates do not take into account the additional costs to the Department to prosecute these cases or to the U.S. Courts to handle them. Nor does this amount include the costs of the pretrial diversion program itself. We believe the Department should consider how it can assess going forward whether prosecuting offenders meeting these criteria are consistent with two of the *Smart on Crime* initiative principles, namely that prosecutors should pursue the most serious cases that implicate clear, substantial federal interests, and that prosecutors should pursue alternatives to incarceration for low-level, non-violent crimes.

For diversion-based court programs, we were able to estimate incarceration costs avoided by a sample of successful participants in three judicial districts. Based on these estimates, we found that the potential for cost savings may be substantial. In the example with the largest sample size, our analysis of court records from the Central District of Illinois identified an estimated potential cost savings from $7,721,258 to $9,665,811 for 49 judgmentally selected successful program participants, or an average of $157,577 to $197,261 per offender.

We also found that the Department has not studied the effect pretrial diversion and diversion-based court programs may have on recidivism. We reviewed the Federal Bureau of Investigation's National Crime Information Center (NCIC) records for the 39 participants who had completed the Central District of Illinois diversion-based court program between November 2002 and February 2011 and found that 9 of these individuals (23 percent) were convicted for a new offense, re-arrested, or had their supervision revoked within 2 years of their diversion-based court program graduation date.[6] By comparison, the general recidivism rate for federal inmates has been estimated as high as 41 percent. We recognize that our sample size was small, and believe that a broader study by the Department of the effect of diversion-based court programs on recidivism is warranted to determine if these results are borne out on a more widespread and systemic basis.

We make 3 recommendations to the Office of the Deputy Attorney General and 2 recommendations to EOUSA to strengthen the use of pretrial diversion and diversion-based court programs in order to meet the Department's goals and ensure that alternatives to prosecution are available and utilized where appropriate.

[6] Seven of the 9 individuals' charges involved: (1) possession of a controlled substance, (2) supervision revocation, (3) probation violation, (4) theft, (5) possession of drug paraphernalia, (6) resisting a peace officer, and (7) negligent failure to perform. Two individuals' charges were unknown.

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INTRODUCTION

The President and the Department have made criminal justice reform a priority. In July 2015, the President visited a federal prison in Oklahoma where he highlighted the challenges and opportunities of criminal justice reform. In recognition of what it described as a "vicious cycle of poverty, criminality, and incarceration that traps too many Americans and weakens communities," the Department, in August 2013, announced reforms to the federal criminal justice system through an initiative called *Smart on Crime*.[7] These reforms were intended to among other things, ensure just punishments for low-level, non-violent offenders. *Smart on Crime* encouraged federal prosecutors in appropriate cases involving non-violent offenders to consider alternatives to incarceration such as pretrial diversion and diversion-based court programs where appropriate.

The leadership of the Department of Justice (Department) has acknowledged that federal detention and prison spending is at an unsustainable level.[8] From fiscal year (FY) 2001 to FY 2014, the Federal Bureau of Prisons' (BOP) population grew from 157,000 inmates to 214,000 inmates. As of September 2015, BOP operated at 26 percent over capacity. While the inmate population declined slightly in FY 2014 and FY 2015, the Department projects that BOP facilities will remain overcrowded through FY 2016 and beyond.

As a result of this growth, the federal prison system represents an increasing portion of the Department's budget. In FY 2000, the budget for BOP totaled $3.8 billion and accounted for about 18 percent of the Department's discretionary budget. In comparison, the BOP's enacted budget for FY 2016 totaled $7.5 billion and accounted for about 26 percent of the Department's discretionary budget. During the same time period, the rate of growth in BOP's budget was almost twice the rate of growth of the rest of the Department. In 2013, we found that BOP did not effectively manage its Compassionate Release Program, thereby reducing the potential to assist with prison capacity issues and lead to incarceration costs savings.[9] In 2011, we reviewed the Department's International Prisoner Transfer Program, which permits certain foreign national inmates from treaty nations to

[7] U.S. Department of Justice, *Smart on Crime: Reforming the Criminal Justice System for the 21st Century* (August 2013).

[8] U.S. Department of Justice Office of the Attorney General, *Fiscal Years 2014-2018 Strategic Plan*.

[9] U.S. Department of Justice Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program*, Evaluations and Inspections Report I-2013-006 (April 2013).

serve the remainder of their prison sentences in their home countries.[10] Overall, we found that the program was underutilized, resulting in another missed opportunity by the Department to potentially reduce its prison population. We recently completed a follow-up on the status of this program, which found that, while some progress has been made, more needs to be done by the Department and its leadership in order to ensure that the program is utilized as fully as possible.[11]

Prison overcrowding adversely affects the safety and security of correctional officers, staff, and inmates. A 2012 Government Accountability Office report on BOP overcrowding found that the elimination of common space and the sharing of cells to accommodate more inmates led to more prison violence because inmates with high risks of violence were brought together for longer periods of time.[12] In 2009, the National Prison Rape Elimination Commission found that operating correctional facilities beyond capacity placed vulnerable inmates at greater risk of sexual assault.[13]

Traditional pretrial diversion and diversion-based court programs (sometimes collectively referred to herein as "diversion programs") are alternatives to prosecution or incarceration that enable certain low-level and non-violent offenders to be diverted from traditional criminal justice proceedings, with the result being that the offender may be sentenced to a lesser or no term of incarceration, or even no conviction at all.[14] Like other alternatives to incarceration, these programs are intended to provide prosecutors and the courts with more options for determining a sentence or penalty that is appropriate for the crime, cost effective, and rehabilitative to the offender. Neither prosecutors nor the courts are required to offer these programs and, because the programs are voluntary, offenders may also decline to enter the programs and instead exercise their rights to trial through traditional charging and court proceedings.

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[10] U.S. Department of Justice Office of the Inspector General, *The Department of Justice's International Prisoner Transfer Program*, Evaluations and Inspections Report I-2012-002 (December 2011).

[11] U.S. Department of Justice Office of the Inspector General, *Status Review on the Department's International Prisoner Transfer Program*, Evaluations and Inspections Report 15-07 (August 2015).

[12] U.S. Government Accountability Office, *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, GAO-12-743 (September 2012).

[13] National Prison Rape Elimination Commission Report, 96 (June 2009).

[14] The term "low-level" appears often in the Department's *Smart on Crime* initiative as a description of the types of offenders suitable for diversion programs. EOUSA issued information to the USAOs about diversion-based court programs that stated diversion programs provide an alternative to offenders with low culpability (blameworthiness).

Although EOUSA's pretrial diversion policy did not expressly limit the application of pretrial diversion to offenders who were either low-level or non-violent, we found that the practice of some USAOs was to limit the program in that way, as we discuss later in the report.

Background

The Executive Office for U.S. Attorneys (EOUSA) provides administrative support for U.S. Attorney's Offices (USAO) that includes legal education, administrative oversight, technical support, and policies. As part of this support function, EOUSA issues to the USAOs informational memoranda related to pretrial diversion and diversion-based court programs.

U.S. Attorneys serve as the chief federal law enforcement officers within their respective districts and are responsible for most of the federal criminal prosecutions conducted each year. There are 93 U.S. Attorneys located throughout the United States.[15] U.S. Attorneys determine which cases will be prosecuted and establish policies and priorities within their federal judicial districts. U.S. Attorneys also decide which criminal offenders will be offered pretrial diversion and their offices are involved in the placement of offenders in diversion-based court programs.

U.S. Courts Agencies Involved in Providing Pretrial Diversion and Diversion-Based Court Programs

The federal judiciary is an independent branch of government, separate from the executive branch, and includes the District Courts and the Probation and Pretrial Services offices that support them. Both entities have critical roles in the provision of diversion programs and work closely with the USAOs for this purpose.

District Courts

District Courts are the principal trial courts in the federal court system and have general jurisdiction to hear federal criminal cases. There are 94 federal judicial districts, including one or more in each state, the District of Columbia, and the overseas territories. In districts where a diversion-based court program exists, a federal judicial officer provides leadership for the program. The U.S. Attorney, Probation and Pretrial Services officials, defense attorneys, and sometimes treatment providers also participate in the program.

Probation and Pretrial Services

U.S. Probation and Pretrial Services carries out probation and pretrial services functions for and under the direction of the District Courts. Probation and Pretrial Services officers investigate an offender's personal history and criminal record and make recommendations regarding eligibility for diversion programs. If the offender is accepted into the program, he or she is then supervised by a Probation and Pretrial Services official for a specified period of time.

[15] One U.S. Attorney is assigned to each of the judicial districts, with the exception of Guam and the Northern Mariana Islands where a single U.S. Attorney serves both districts.

Traditional Pretrial Diversion

Pretrial diversion is a program operated under the authority of the USAOs and moves certain offenders from traditional criminal justice processing into a program of supervision by U.S. Probation and Pretrial Services. Based on criteria in the U.S. Attorney's Manual and such additional requirements as the USAO may establish, each USAO determines which offenders are eligible for admission into the program.[16] The USAOs have discretion to determine whether they believe an offender meets the criteria for pretrial diversion. Once Probation and Pretrial Services concurs that an offender is suitable for the program, the offender enters into an agreement with the USAO pledging to meet certain conditions, including refraining from criminal activity. Probation and Pretrial Services also monitor offenders through their duration in the program.[17] Participants who successfully complete the program are either not charged with a criminal offense or, if they have been charged previously, will have the charges against them dismissed. Unsuccessful participants are considered for prosecution.

Diversion-Based Court Programs

EOUSA uses the term "diversion-based court programs" to refer to programs where the USAO partners with the U.S. Courts to handle cases involving low-level, non-violent offenders through supervision, drug testing, treatment services, and immediate sanctions and incentives. Diversion-based court programs can target a range of offenses or specific offenses such as drug offenses. When drug offenses are the primary target, these programs are sometimes referred to as "drug courts." Diversion-based court programs have also been created for particular types of offenders, such as veterans or juveniles. After successful participation in such a program, offenders receive a reduced period of incarceration, no prison time, or even dismissal of charges. Failure to successfully complete the program may result in an offender being sent to prison.

Unlike traditional pretrial diversion, a federal conviction is not always avoided under a diversion-based court program. While some diversion programs result in a full dismissal of charges, others may result in a sentence of probation or little to no incarceration. Also, a participant's entry into the program is not under the sole discretion of the USAO. Federal diversion-based court programs are generally run by the District Court. However, the USAO is an important participant in these

[16] While individuals recommended for pretrial diversion have not been adjudged guilty of an offense, the U.S. Attorneys' Manual refers to pretrial diversion eligibility of offenders; therefore, we use the term "offenders" in our report when referring to pretrial diversion.

U.S. Attorney's Manual § 9-22.100

[17] Our audit did not examine the use of informal diversion, which is when a USAO uses its prosecutorial discretion to decide a case is better kept out of the criminal justice system and not to pursue criminal charges if the offender does not comply with the conditions of the diversion agreement.

programs along with Probation and Pretrial Services, treatment and mental health professions, and the defense bar.

Recent Department Efforts that Address the Use of Alternatives to Incarceration Programs

Drug Court Feasibility Report to Congress, 2006

In June 2006, the Department submitted a report to Congress that discussed the use of drug courts on the federal level. The report examined the purpose of drug courts, reviewed operational drug treatment programs available on the federal level at that time, and assessed whether the types of cases prosecuted in federal court created a demand for drug courts.[18]

The report concluded that federal drug courts were inappropriate and unnecessary. Specifically, the report found that: (1) drug courts were not designed for offenders who committed serious offenses and had significant criminal histories typically prosecuted by the USAOs, (2) a diversion of resources would occur within the USAOs that would shift prosecutors away from prosecuting drug trafficking crimes and other serious offenses so that they may participate in a federal drug court program, and (3) a federal drug court program would be duplicative of existing state court programs. This report represented the Department's policy on the use of diversion-based court programs until it was reversed in 2011.

Alternatives to Prosecution and Incarceration Options Report, 2009

In April 2009, the Attorney General formed a Sentencing and Corrections Working Group comprised of the Department's legal and policy components and the Federal Bureau of Prisons. The purpose of the working group was to conduct a comprehensive review of federal sentencing and corrections policy and prepare possible sentencing legislation recommendations for submission to the President and Congress. As part of this working group, an Alternatives to Prosecution and Incarceration Subcommittee was created to focus on drug court programs. In November 2009, the Alternatives Subcommittee submitted a report to the Deputy Attorney General that examined the alternatives to incarceration available to federal prosecutors and judges (the Alternative Options Report).[19] The Alternative Options Report suggested nine options for reform intended to increase the use of alternatives to incarceration in the federal system that included:

- supporting diversion and drug treatment;

[18] U.S. Department of Justice, *Report to Congress on the Feasibility of Federal Drug Courts* (June 2006).

[19] U.S. Department of Justice, *Alternatives to Prosecution and Incarceration: Options in the Federal System* (November 2009).

- promoting gang, gun crime, and drug market intervention;
- developing better evaluations of alternatives to incarceration;
- expanding opportunities for the use of alternatives to incarceration in the federal system;
- studying evidence-based risked assessments to determine which offenders are suitable for alternative sentencing;
- articulating prosecution policies and guidance on pre-judgment probation for minor drug offenders and study outcomes;
- expanding the use of electronic monitoring;
- expanding program capacity to accommodate sentencing reforms; and
- enlisting the assistance of the Pew Center to evaluate alternatives to incarceration in the federal system.

Pretrial Diversion Policy Revision, 2011

In April 2011, as a result of the aforementioned Alternatives Options Report, the Deputy Attorney General approved the removal of U.S. Attorney's Manual language that disqualified offenders with substance abuse addictions from the pretrial diversion program. An EOUSA official told us that this policy change had the effect of increasing the pool of offenders eligible for pretrial diversion.

Smart on Crime Initiative, 2013

In January 2013, the Department began a review of the federal criminal justice system to identify reforms in an effort to ensure federal laws were enforced more fairly and efficiently. The goals of the review were to:

- ensure finite resources are devoted to the most important law enforcement priorities;
- promote fairer enforcement of the laws and alleviate disparate impacts of the criminal justice system;
- ensure just punishments for low-level, non-violent convictions;
- bolster prevention and reentry efforts to deter crime and reduce recidivism; and
- strengthen protections for vulnerable populations.

As a result of this review, the Department released the *Smart on Crime* initiative in August 2013. The initiative proposed five principles intended to modernize the federal criminal justice system by:

- prioritizing prosecutions to focus on the most serious cases;
- reforming sentencing to eliminate unfair disparities and reduce overburdened prisons;
- pursuing alternatives to incarceration for low-level, non-violent crimes;
- improving reentry to curb repeat offenses and re-victimization; and
- focusing resources on violence prevention and protecting the most vulnerable populations.

In launching the initiative, the Department stated that incarceration was not the answer in every criminal case and called for prosecutors to consider the use of drug courts and other diversion programs for non-violent offenses when appropriate. Additionally, the initiative called for the issuance of a best practice memorandum to U.S. Attorneys encouraging more widespread adoption of diversion polices. Subsequently, EOUSA distributed additional written policy guidance on diversion-based court programs and provided training and workshops on alternatives to incarceration. These materials discussed the value of drug and diversion-based courts within the criminal justice system and provided a list and description of diversion-based court programs in operation. EOUSA also conducts an annual survey of the USAOs' use of diversion programs and other programs designed to assist persons recently released from incarceration.

Creation of an Alternative to Federal Prosecution Case Management Category, 2014

In March 2014, EOUSA changed the way it recorded and tracked pretrial diversion case activity within its Legal Information Office Network System (LIONS). Prior to March 2014, EOUSA used a separate code to record offenders who had successfully completed pretrial diversion. In March 2014, it directed the USAOs to begin using a new code for alternatives to federal prosecution. This new code was intended to record cases where the defendant could have been federally prosecuted but an alternative to prosecution was pursued. EOUSA stated that pretrial diversion and diversion-based court programs are types of alternative dispositions that are captured by the new code, which indicates use of the diversion program.[20]

[20] In addition to pretrial diversion cases, the new code is intended to record civil, administrative, or other disciplinary alternatives; restitution or arrearage payments; and suspect cooperation. Deferral to a state or local prosecution is captured by LIONS as a separate code.

Office of the Inspector General Audit Approach

Our audit objectives were to evaluate the: (1) design and implementation of federal pretrial diversion and diversion-based court programs, (2) variances in the usage of the programs among the USAOs, and (3) costs savings associated with successful program participants.

We interviewed officials from the Deputy Attorney General's Office, EOUSA, the USAOs, U.S. Probation and Pretrial Services, the District Courts, and the Federal Public Defender, and private defense attorneys. We visited the Northern District of Georgia, District of South Carolina, Eastern District of New York, Central District of California, Central District of Illinois, Middle District of North Carolina, and the District of Columbia.[21] We observed diversion-based court planning sessions and proceedings in the District of South Carolina, Central District of California, and the Central District of Illinois. Additionally, we reviewed the Department's and judicial districts' records and documentation pertaining to diversion-based court programs.

Our objectives, scope, and methodology are discussed in more detail in Appendix 1.

[21] We judgmentally selected districts to visit to obtain a sample of districts with both high and low levels of pretrial diversion activity.

FINDINGS AND RECOMMENDATIONS

The Department has not evaluated the effectiveness of the USAO's pretrial diversion program or its efforts to pursue the use of diversion-based court programs, and the absence of sufficient reliable data maintained by the USAOs makes it impossible for us to do so comprehensively. We found that the pretrial diversion information that EOUSA captured may have been underreported, as it did not always require the USAOs to record pretrial diversion participation and, when such information was recorded, it was done inconsistently. However, we were able to determine that the number of successful pretrial diversion program participants varied greatly among the USAOs, suggesting that the use of pretrial diversion likewise varied significantly among the different districts. The USAOs' participation in diversion-based court programs was also limited, with 16 out of the 94 judicial districts having operational programs. Finally, we found that the Department has not evaluated, but should evaluate the USAOs' progress in this area, and that there is substantial potential for pretrial diversion and diversion-based court programs to reduce both prosecution and incarceration costs. The potential for pretrial diversion and diversion-based court programs to reduce recidivism should also be evaluated, and we found that the Department had not assessed the potential of diversion programs to reduce recidivism.

The USAO Pretrial Diversion Program

The Department's pretrial diversion policy, revised in April 2011, states that a U.S. Attorney may place a person faced with federal prosecution into a pretrial diversion program if the person is not:

- accused of an offense which under Department guidelines should be diverted to the state for prosecution;
- convicted of two or more felonies;
- a current or former public official accused of an offense arising out of an alleged violation of a public trust; or
- accused of an offense related to national security or foreign affairs.[22]

We obtained from EOUSA the number of offenders who successfully completed pretrial diversion from FY 2012 through FY 2014 for all 94 USAOs. To achieve our audit objectives, we relied on computer-processed data contained within EOUSA's Legal Information Office Network System. As we will discuss later in this report, our review of system controls and interviews

[22] U.S. Attorney's Manual § 9-22.100

with EOUSA and USAO staff caused us to doubt the data's accuracy. However, when the data is viewed in context with other available evidence, we believe the opinions, conclusions, and recommendations in this report are valid.

We compared the data on these participants to the number of federal offenders sentenced from FY 2012 through FY 2014 who had low-level and non-violent characteristics. We identified these offenders from our analysis of U.S. Sentencing Commission statistics for persons who could potentially be suitable for alternative to incarceration programs encouraged by the *Smart on Crime* initiative.[23] To accomplish our analysis, we used the methodology from a 1994 report from the Department's National Institute of Justice (NIJ) that found a substantial number of drug law violators sentenced to incarceration in federal prison facilities in FY 1992 were low-level, non-violent offenders.[24] The report found these low-level offenders had common characteristics captured by U.S. Sentencing Commission statistics that included: (1) a category I criminal history, (2) zero criminal history points, (3) no weapons offense conviction, (4) no aggravated role adjustment, and (5) no prior arrest for a crime of violence or controlled substance offense.[25] These criteria are defined in Appendix 5.

The NIJ study considered these criteria important because offenders meeting the criteria were considered to be less likely to be violent or to reoffend following release from prison. While the NIJ report is now more than two decades old, we believe that its rationale remains valid and that the factors it considered are generally appropriate for assessing the extent to which the federal prison population contains offenders who possess the low-level and non-violent characteristics that might make them suitable for diversionary dispositions. Although the NIJ report focused solely on offenders sentenced for drug offenses, we included all offenders sentenced from FY 2012 through FY 2014 who met these criteria as reported by the U.S. Sentencing Commission. Next, we further refined our population by

[23] We limited our analysis of U.S. Sentencing Commission data to cases that had complete guideline information, which were 74,495 out of 84,173 cases for FY 2012, 71,004 out of 80,035 cases for FY 2013, and 67,672 out of 75,836 cases for FY 2014. The U.S. Sentencing Commission defines a case as one sentencing event for an individual defendant.

[24] U.S. Department of Justice National Institute of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (February 1994).

[25] For the "no prior arrest for a crime of violence or controlled substance" criterion, we used the U.S. Sentencing Commission's career offender adjustment statistic, which is defined as the defendant's commission of a felony that was a crime of violence or controlled substance offense with two priors of either type.

The 1994 NIJ report also used one U.S. Sentencing Commission statistic that was no longer available in the FY 2012 through FY 2014 data: offenders with "no prior arrest of any kind."

selecting only those offenders who were also within Zone A of the U.S. Sentencing Commission sentencing table shown in Appendix 3, reflecting those offenders who were eligible for non-incarceration sentences with no conditions of confinement.[26] Lastly, we excluded those offenders sentenced under the federal sentencing guideline for unlawfully entering or remaining in the United States, U.S.S.G. § 2L1.2, because, as a matter of federal immigration policy, such offenders are rarely considered for alternative dispositions.

As shown in Figure 1, using these criteria, we identified 7,106 offenders as potentially suitable for pretrial diversion. Of this total, 5,586 offenders did not complete a pretrial diversion program, while 1,520 offenders successfully completed a pretrial diversion program over the 3-year period of our review. This EOUSA figure of 1,520 does not reflect the offenders who were placed into but did not complete a pretrial diversion program or the offenders initially considered for placement but determined to be unsuitable for supervision. However, our analysis suggests that the USAO's pretrial diversion program could be made available to more low-level, non-violent offenders consistent with the principle in the Department's *Smart on Crime* initiative that prosecutors should pursue alternatives to incarceration for low-level, non-violent crimes.

Based on the available information, we cannot be certain whether the offenders eligible for non-incarceration sentences if convicted who satisfy these criteria would have met the eligibility requirements for pretrial diversion or would have been selected by a federal prosecutor based on the exercise of his or her discretionary authority. We also cannot be certain that these offenders would have been determined by Probation and Pretrial Services to be suitable candidates for supervision. However, Figure 1 compares the USAO's use of pretrial diversion to the number of offenders potentially eligible for pretrial diversion, which represented the closest population of offenders we could obtain to make a reasonable comparison.[27]

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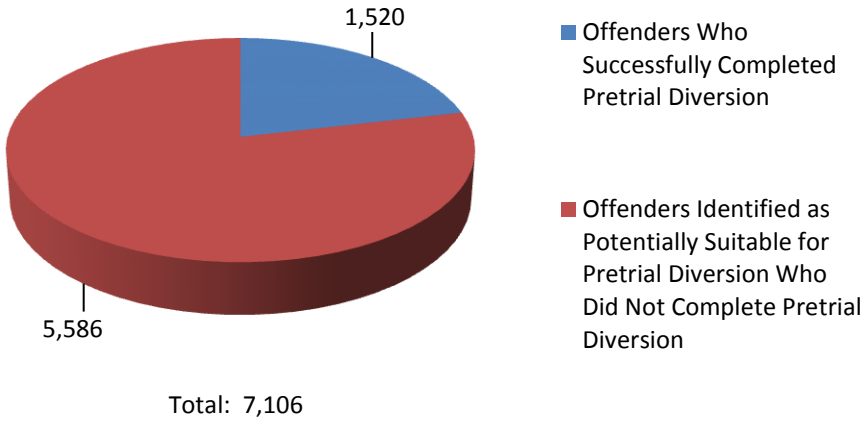
[26] The Sentencing Reform Act of 1984 requires that the federal sentencing guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases where the defendant is a first offender and has not been convicted of a crime of violence or serious offense. Defendants are eligible for non-incarceration sentences with no conditions of confinement if their sentencing range falls within Zone A of the U.S. Sentencing Guidelines sentencing table (shown in Appendix 3). U.S.S.G. § 5B1.1(a)(1). Though imposition of a probation-only sentence is not required in Zone A, from FY 2012 to FY 2014, Zone A offenders received probation-only sentences more frequently than offenders in other zones.

[27] We attempted to obtain from EOUSA the number of offenders who would have been eligible for pretrial diversion but was told the information was not available. We also attempted to obtain the number of offenders who USAOs attempted to place in pretrial diversion but who were determined not to be suitable for supervision, as well as the number of offenders who were approved and placed in pretrial diversion but did not successfully complete the program, but that information was not available either. Therefore, we use the number of offenders successfully completing the program as the only available measure of the use of such programs by the USAOs.

Figure 1

Comparison of Successful Pretrial Diversion Participants to Offenders Identified as Potentially Suitable for Pretrial Diversion Who did not Complete Pretrial Diversion Based on an OIG Analysis of U.S. Sentencing Commission Statistics from FY 2012 through FY 2014



Total: 7,106

Source: OIG Analysis of Executive Office for U.S. Attorneys Records and U.S. Sentencing Commission statistics, FY 2012-FY 2014

We also determined the number of successful pretrial diversion participants and offenders potentially suitable for pretrial diversion for each USAO from FY 2012 through FY 2014. We found the number of successful participants among these districts varied significantly, suggesting that the use of pretrial diversion also varied significantly. As shown in Appendix 2, the most active district appeared to be the Southern District of California with 326 successful participants while 12 districts had no successful participants. Forty-four USAOs, or just under one-half of all USAO districts, had between 0 and 5 successful pretrial diversion participants. As previously stated, the use of diversion is an exercise of local prosecutorial discretion, and prosecutors are not obligated to divert an offender. We also recognize that USAOs may be declining to accept for federal prosecution as a matter of policy cases that would otherwise be a candidate for pretrial diversion.

Diversion-Based Court Programs

Unlike for pretrial diversion, the Department had not established criteria that the USAOs must consider to determine admission into a diversion-based court program.[28] We attempted to obtain from EOUSA any data on offenders who had

[28] EOUSA had distributed informational materials to the USAOs that portrayed best practices of diversion-based court programs and highlighted the programs in operation at the federal level.

participated in a federal diversion-based court program in past years, but were told that EOUSA had no mechanism to track such information.[29]

Similar to our analysis of federal offenders potentially suitable for a pretrial diversion program, we sought to determine the population of federal offenders that had the type of low-level, non-violent characteristics that could potentially make them suitable for a diversion-based court program. However, because EOUSA could not provide any numbers of diversion-based court program participants prior to March 2014, we compared our population of potentially suitable diversion-based court program offenders to all federal offenders sentenced from FY 2012 through FY 2014.[30]

To accomplish our analysis, we used the same population of federal offenders who met the five U.S. Sentencing Commission criteria we used in our pretrial diversion analysis. Next, we further refined our population by selecting those offenders who were also within Zones A or B (defined in Appendix 5) of the U.S. Sentencing Commission sentencing table (shown in Appendix 3).[31] Also, as previously explained, we excluded those offenders sentenced for unlawfully entering or remaining in the United States. As shown in Figure 2, we identified 12,468 offenders based on these criteria as potentially suitable for inclusion in a diversion-based court program over the 3-year period of our review compared to the total number of offenders during the same period of time.

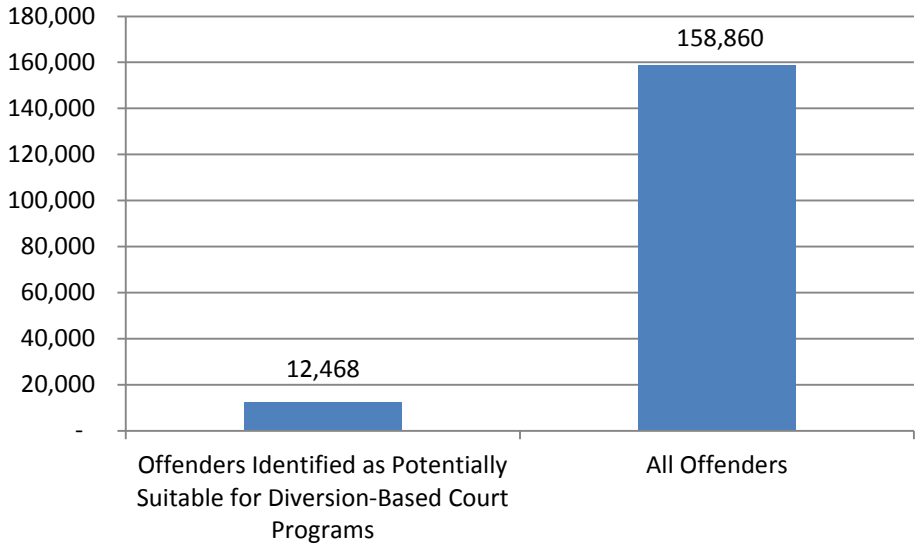
[29] EOUSA officials told us that as a result of two *Smart on Crime* initiative surveys, it had collected data on offenders who had participated in federal diversion-based court programs in December 2015. Because the data was not available until after we prepared our draft report, we were unable to analyze the data in this review.

[30] We removed those cases where offenders were sentenced under U.S.S.G. § 2L1.2, the guideline provision for unlawfully entering or remaining in the U.S., which were 19,257 cases in FY 2012; 18,498 cases in FY 2013; and 16,556 cases in FY 2014.

[31] In light of the greater range of sentences available through diversion-based court programs, we included offenders within Zone B in addition to those within Zone A of the U.S. Sentencing Commission sentencing table because Zone B offenders would also be eligible for non-incarceration sentences, albeit with conditions requiring intermittent confinement, community confinement, or home detention, or relatively short incarceration sentences. U.S.S.G. § 5B1.1(a)(2).

Figure 2

Comparison of Offenders Identified as Potentially Suitable for Diversion-Based Court Programs to All Offenders Based on an OIG Analysis of U.S. Sentencing Commission Statistics from FY 2012 through FY 2014



Source: OIG analysis of FY 2012-FY 2014 U.S. Sentencing Commission statistics

We recognize that not all offenders identified from our pretrial diversion and diversion-based court program analyses would be eligible for pretrial diversion or a diversion-based court program. For example, as noted previously, diversion-based court programs have varied entrance and eligibility requirements, and U.S. Attorneys retain broad discretionary authority in determining which offenders to divert short of a criminal conviction. However, our results are useful in illustrating that there remains a population of offenders for whom a diversionary disposition may be a possibility.

We believe a more in-depth, evidence-based assessment of both pretrial diversion and diversion-based court program offender populations would allow the Department to more accurately determine the possibility for increasing its use of pretrial diversion and of directing additional offenders to diversion-based court programs. Given issues that we previously found and discuss below with the USAOs own recordkeeping, such an assessment should use current and reliable data, including U.S. Sentencing Commission statistics, to determine whether the use of pretrial diversion and the availability of diversion-based court programs adequately reflects the population of potentially suitable offenders.

Existing Federal Diversion-Based Court Programs

We visited diversion-based court programs in the District of South Carolina, the Eastern District of New York, the Central District of California, and the Central District of Illinois, which are listed in Table 1. Each had similar program components but varied in design, characteristics shared among participants,

eligibility requirements, involvement from the USAO, type and duration of drug treatment, degree of judicial monitoring and intervention, and the use of sanctions for non-compliance. As of August 2015, we identified 16 judicial districts with alternative to incarceration programs, including diversion-based court programs, which are listed in Appendix 4.

Table 1

Diversion-Based Court Programs Visited by the OIG

District	Name of Court	Type of Court	Successful or Active Participants	Unsuccessful Participants
District of South Carolina	BRIDGE[a]	Substance Abuse	49[b]	23
Central District of California	Convictions and Sentence Alternative	Offenses vary	124[c]	9
Central District of Illinois	Pretrial Alternatives to Detention Initiative	Substance Abuse	104[d]	10
Eastern District of New York	Pretrial Opportunity Program, Special Options Services	Substance Abuse	19[e]	8

[a] The name "BRIDGE" is not an acronym but is the name given to the diversion-based court program by District of South Carolina officials.

[b] The number of program participants reported to us by the District of South Carolina as of August 2015.

[c] The number of program participants reported to us by the Central District of California as of July 2015.

[d] The number of successful program participants reported to us by Central District of Illinois officials as of October 2014.

[e] Eastern District of New York, *Alternatives to Incarceration in the Eastern District of New York: The Pretrial Opportunity Program and The Special Options Services Program* (August 2015).

Source: Central District of California, Central District of Illinois, Eastern District of New York, and the District of South Carolina. We did not verify the number of successful participants.

Evaluating the Effectiveness of Diversion Programs

The *Government Performance and Results Act* (GPRA) and the *GPRA Modernization Act of 2010* require government agencies to develop long-term strategic plans defining general goals and objectives for their programs. One of the Department's goals within its FY 2014-2018 Strategic Plan is to ensure the fair, impartial, efficient, and transparent administration of justice at the federal level. Within the plan, the Department acknowledges the unsustainable growth of its inmate population and detention spending and has established performance measures related to reducing prison overcrowding. The BOP has projected its inmate population will reach 38 percent overcapacity by FY 2018. Prison overcrowding remains the Department's only agency-wide material weakness, and

the BOP continues to face dangerous levels of overcrowding at its institutions.[32] To accomplish its strategic goals, the Department plans to expand the use of diversion programs. The Department's strategic goals and objectives also underscore the importance of performance-based management in order to accomplish its goals and has stated that improved performance is realized through greater focus on its mission, agreement on goals and objectives, and the timely reporting of results. The President's budget for FY 2016 also addressed prison spending and overcrowding and included funding for research to evaluate the efficacy of *Smart on Crime* initiative efforts.

The value of a performance-based evaluation in measuring overall program effectiveness was cited in the Department's 2009 Alternatives to Prosecution and Incarceration Options Report. The report suggested that studies be considered that would evaluate the outcomes of pretrial diversion programs and other forms of alternative sentencing.[33] In making this suggestion, the report stated that the Attorney General had adopted a data-driven, non-ideological approach to fighting crime. Further, the report noted that an evidence-based evaluation of alternative programs and the selection of participating offenders would identify alternative programs that promoted public safety and were cost effective.

Pursuant to these requirements and suggestions, we asked an EOUSA official about any progress by the Department in commissioning an evaluation of pretrial diversion program outcomes and other program measures as suggested in the 2009 Alternatives Options Report. In a written statement, EOUSA indicated that the suggestion to the Department to commission an evidence-based evaluation had not been followed. The statement added that some individual USAOs had engaged research partners to assess particular programs, and EOUSA is considering funding options for research and evaluations going forward.[34]

EOUSA also did not keep sufficient data to permit a comprehensive evaluation of the effectiveness of the USAOs' use of pretrial diversion programs and their participation in diversion-based court programs. We believe that the Department needs to collect this information and use it, in conjunction with data from the U.S. Sentencing Commission, to conduct such an evaluation to determine if the Department has met its strategic goals in this area and assess its progress toward achieving the reforms outlined in the *Smart on Crime* initiative. In doing so, the Department should ensure that its program assessment addresses the factors identified below that we found attributed to the USAOs' varying levels of use of pretrial diversion and participation in diversion-based court programs.

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[32] See also U.S. Department of Justice Office of the Inspector General, *Top Management and Performance Challenges Facing the Department of Justice* (November 2015).

[33] U.S. Department of Justice, *Alternatives to Prosecution and Incarceration: Options in the Federal System* (November 2009).

[34] In the response, EOUSA did not name or provide a description of the programs where some individual USAOs had engaged research partners to assess, or the results of any such assessments.

Use of Pretrial Diversion and Diversion-Based Court Programs Among the USAOs

To determine the reasons for the varied levels of the USAOs' use of pretrial diversion and participation in diversion-based court programs, we reviewed the Department's diversion policies, and interviewed officials from the Deputy Attorney General's Office, EOUSA, the USAOs, U.S. Probation and Pretrial Services, the District Courts, the Federal Public Defender, and private defense attorneys. We discussed the use of and participation in such programs, including any obstacles that prevented or limited use of the programs within each official's respective district or elsewhere.

Policies Discouraging Use of and Participation in Diversion Programs

We found that Department and USAO policies did not consistently support the use of diversion programs. As discussed above, recent Department policy initiatives have favored increased consideration of pretrial diversion as an alternative to traditional prosecution. However, we found that policies in the districts we visited did not always support the use of pretrial diversion, based on the available data. For example, as of November 2014, one district we visited that had used infrequently pretrial diversion had a policy that appeared to limit the application of pretrial diversion within that district more narrowly than the Department's current policy. Specifically, the policy stated, "pretrial diversion is discouraged, and will be permitted only in exceptional circumstances." We were unable to determine based on the limited available data the effect this policy had on the use of pretrial diversion within that district; however, during the 3-year period from FY 2012 to FY 2014, the district had less than 6 successful pretrial diversion participants.[35] This level of use could be attributable to the district's policies, the exercise of its discretionary authority to decline prosecution outright in lieu of utilizing diversion, or other factors. We did not find a similar general policy within the other USAOs we visited, and are unable to assess the extent to which other districts may have policies and practices that may impact the availability of pretrial diversion in some circumstances.[36] Although we recognize a certain degree of variation among the USAOs' approach and use of alternatives to incarceration is necessary and may be warranted based on varying local conditions and priorities, EOUSA needs to address those USAO policies that are inconsistent with the Department's commitment to pursue the increased use of diversion programs where appropriate as part of the *Smart on Crime* initiative.

Similarly, while the Department's pretrial diversion policy does not specify which criminal offenses qualify for program admission, we found that some USAOs restricted the offenses eligible for diversion and had varying standards. We asked

[35] In FY 2014, the district recorded 17 cases or matters where alternatives to prosecution were exercised, though we cannot tell from the available data how many of these were pretrial diversion as opposed to other forms of alternative dispositions.

[36] We visited six other USAOs.

EOUSA if the USAOs were allowed to have local pretrial diversion policies and were told that the USAOs could establish local policies as long as the policies did not conflict with the Department's policy. Additionally, EOUSA stated that the USAOs had discretion to exclude an offender from pretrial diversion for other reasons beyond the four categories outlined in the Department policy. As discussed above, one district had a general policy that "discouraged" the use of pretrial diversion, and only permitted it in "extraordinary circumstances." An Assistant U.S. Attorney who was a supervisor in the district told us that they would not consider for pretrial diversion any case that had victims or in which restitution was outstanding. The same Assistant U.S. Attorney also said that pretrial diversion cases usually involved low-level offenders and would not be granted in cases involving violence or drug distribution. In another district we visited, the policy stated that as a matter of practice, pretrial diversion may be offered to any first-time offender with certain restrictions. An Assistant U.S. Attorney who was a supervisor in the district told us that their office uses pretrial diversion primarily in low-level financial crimes, which U.S. Probations materials from that district described as fraud, theft, and embezzlement. Similarly, in another district, which we were told had no written pretrial diversion policy, a Probation Officer told us most of the cases considered for pretrial diversion in that district were federal mail or low-level financial crimes.

With regard to diversion-based court programs, as previously noted, the Department's policy discouraged the use of drug courts by the USAOs until the policy was reversed in 2011. Based on the information that we received, we were not able to assess how the Department's former view of drug courts affected the USAOs current participation in diversion-based court programs, and we cannot say how many such programs would now exist had there been a different policy. The former policy did not prohibit drug or diversion-based court programs, although it may well have suppressed the creation of these programs because it would not have been unreasonable for the USAOs to conclude that participation in such programs would not have the support of the Department.[37]

In our judgment, if the Department wishes to achieve its plans for a more widespread adoption of diversion programs, EOUSA should ensure that the USAOs' approaches to diversion are consistent with the Department's commitment to pursue the increased use of diversion programs where appropriate as part of the *Smart on Crime* initiative. To accomplish this, we recommend that the Department evaluate the effectiveness of diversion programs and work with the USAOs to ensure that their policies and practices are consistent with the Department's stated commitment to increase the use of diversion programs where appropriate as part of the *Smart on Crime* initiative. We asked an EOUSA official if alternative to incarceration programs were included in the Evaluation and Review Staff

[37] Although there are a relatively small number of districts that have these programs, we note that, despite the policy prior to 2011, the Central District of Illinois' diversion-based court program was created in 2002 and was operational when the Department issued its report to Congress in 2006.

evaluations performed under EOUSA direction in each USAO.[38] The official told us alternative programs were not included. We believe that such periodic office evaluations would provide a good opportunity for EOUSA to address the USAOs' use of diversion programs. Moreover, a comprehensive evaluation of the Department's efforts to pursue the use of diversion programs also would allow EOUSA to identify best practices among the USAOs. A more consistent application of the Department's diversion policy informed by such reviews could play an important role in helping the Department meet its goal of increasing the use of diversion programs.

Prosecutorial Reluctance to Support Diversion

Federal prosecutors and other officials in five of the seven judicial districts we visited made comments to us about the general reluctance of some prosecutors to use diversion programs. While necessarily anecdotal, we believe that these examples are helpful in reflecting a mindset of at least some prosecutors toward diversionary dispositions that will have to be addressed for the Department to make significant progress in increasing the use of such programs. Specifically:

- An Assistant U.S. Attorney told us that for drug crimes the public generally prefers to see people incarcerated for a long time.

- U.S. Probation officials in one district told us that although that district had increased the use of pretrial diversion in the past 3 years, the USAO historically neither favored diversion nor had interest in creating a drug court.

- An Assistant U.S. Attorney said that some prosecutors see alternative to incarceration programs as a foreign concept and are unlikely to embrace them. A Public Defender in the same district said that the USAO had an institutional resistance to offering pretrial diversion.

- An Assistant U.S. Attorney told us that some Attorneys were not in favor of diversion programs and that obtaining a criminal conviction was more important. A District Judge in that district stated that some prosecutors are not willing to consider alternative courts such as diversion-based court programs.

- A District Judge told us that having a prosecutor who was progressive in the use of alternative to incarceration programs was necessary to make such programs effective.

[38] Under Title 28 C.F.R. Part 0.22, EOUSA is required to evaluate the performance of the USAOs, make appropriate reports and inspections, and take corrective action. EOUSA uses the Evaluation and Review Staff (EARS) program to assess on a cyclical basis how well each USAO is following Departmental policies and Attorney General priorities by examining strategic planning, senior management operations, relations with law enforcement and the judiciary, case and personnel management, and the Department's priority programs.

Each U.S. Attorney has the authority to use their resources to further the priorities of their local jurisdiction and surrounding community. U.S. Attorneys retain broad discretion to enforce federal criminal laws and determine which offenders are eligible for diversionary dispositions. However, the comments expressed during our interviews suggest that at least some prosecutors continue to have doubts about the value of diversion programs. In our judgment, these doubts could hinder the Department's goal of achieving more widespread adoption of diversion programs by the USAOs. For the Department to make progress on its stated goal of increasing use of diversion programs, it must work to address prosecutors' concerns. We believe a detailed evaluation by the Department of the effort to expand the use of diversion programs where appropriate as part of the *Smart on Crime* initiative would allow the Department to comprehensively identify such concerns and develop ways to address them that would lead to an increased and more consistent use of diversion programs. The evaluation should also assess the training and outreach that EOUSA provides regarding diversion programs.

EOUSA Case Management System

The Legal Information Office Network System (LIONS) is the primary case management system used by the USAOs. It is designed to allow users to input information, execute reports, and run queries. We reviewed the LIONS manual and obtained from EOUSA the pretrial diversion cases of successful participants reported within LIONS from FY 2012 through FY 2014 for each USAO (shown in Appendix 2).

Until March 2014, we were unable to find a requirement in the LIONS manual to record pretrial diversion activity, and EOUSA officials told us that pretrial diversion was not required to be entered into LIONS to record pretrial diversion activity. Officials also told us the U.S. Attorney's Manual had no requirement that mandated pretrial diversion activity be recorded into LIONS. However, in March 2014, EOUSA began requiring the USAOs to record the use of alternatives to federal prosecution that would include pretrial diversion or diversion-based court program activity.

During our district site visits we noted that USAO officials were not consistent in recording their pretrial diversion cases. In one district, we noted that pretrial diversion cases were being entered into LIONS, but were sometimes inaccurately recorded because of human error. In another district, officials told us that, because of a low volume of such cases, they were not keeping any logs of pretrial diversion cases and were not sure of how to identify diversion cases in LIONS. In a separate district, officials told us that pretrial diversion participants probably were recorded in LIONS during certain program milestones, but that they were not sure this occurred consistently. An Assistant U.S. Attorney told us that sometimes in cases with two or more offenders, a defendant who is offered pretrial diversion is forgotten by the case attorney and, as a result, the case is not recorded in LIONS.

We interviewed EOUSA officials regarding the procedures for recording and tracking pretrial diversion case activity. One EOUSA official told us that LIONS pretrial diversion reports were not reliable because district offices were not

consistent in entering pretrial diversion data into LIONS. Another EOUSA official told us that pretrial diversion is not used often and that EOUSA did not require the USAOs to record pretrial diversion activity.

We asked EOUSA officials about how they could better ensure pretrial diversion case activity entered in LIONS is complete and accurate. One official suggested that more clear guidance could come from EOUSA about the importance of entering accurate pretrial diversion data in LIONS. Another EOUSA official told us a reminder to the USAOs on the subject may improve the recording of pretrial diversion cases. We agree that these efforts would likely improve the accuracy of pretrial diversion data in LIONS and we recommend that EOUSA undertake these efforts.

Like pretrial diversion, the use of diversion-based court programs was not always required to be tracked or recorded in LIONS by the USAOs. In our judgment, it is necessary for all the USAOs to consistently record accurate pretrial diversion and diversion-based court program case activity for the Department to measure and evaluate the use of diversion by prosecutors. While EOUSA issued guidance to the USAOs on recording diversion-based court program activity, effective March 2014, it still needs to ensure that the USAOs record accurate data to better evaluate the use of diversionary dispositions and progress with the *Smart on Crime* initiative and the Department's performance-based management goals.

Potential for Cost Savings

The *Government Performance and Results Act* (GPRA) and the *GPRA Modernization Act of 2010* require government agencies to develop long-term strategic plans defining general goals and objectives for their programs. The Department's *Smart on Crime* initiative reforms were intended, in part, to reduce the taxpayer expense of incarceration by increasing the use of diversion programs and programming meant to address and prevent recidivism.

Pretrial Diversion

We requested any records from EOUSA reflecting the cost savings from the use of pretrial diversion, but officials told us they did not maintain any such cost savings records. We also attempted to determine the incarceration costs avoided for successful completion of pretrial diversion programs in some of the districts we visited. However, the districts we visited did not have documentation available that would have allowed us to estimate the amount of incarceration costs avoided for pretrial diversion.

Since neither EOUSA nor the USAOs we visited had cost savings data regarding the pretrial diversion program, we used the analysis of offenders potentially suitable for pretrial diversion discussed earlier in this report to estimate the amount of money the Department spent incarcerating offenders who potentially could have participated in pretrial diversion programs. As we reported in Figure 1 above, we identified 7,106 offenders sentenced from FY 2012 through FY 2014 as

potentially suitable for a pretrial diversion program. Of those offenders, as shown in Table 2, 4,530 received no prison time while 2,576 received some prison time. For those offenders who received prison time, we multiplied the amount of prison time (in months) by BOP's average cost of imprisonment during the fiscal year the offender was sentenced.[39]

Table 2

Analysis of Estimated Incarceration Costs for Offenders Potentially Suitable for Pretrial Diversion Based on U.S. Sentencing Commission Criteria

	Cases of Potentially Suitable Pretrial Diversion Offenders That Received Prison Time	Cases That Did Not Receive Prison Time	Total	Total Prison Sentence (in months)	BOP Monthly Imprisonment Cost	Total Incarceration Costs Per Offender
FY 2012	902	1,505	2,407	3,569	$2,419	$8,633,411
FY 2013	916	1,584	2,500	3,821	$2,441	$9,327,061
FY 2014	758	1,441	2,199	3,273	$2,552	$8,352,696
Total	**2,576**	**4,530**	**7,106**	**10,663**		**$26,313,168**

Note: Amounts were rounded

Source: OIG analysis of FY 2012-FY 2014 U.S. Sentencing Commission statistics

As shown in Table 2, we found that the total estimated incarceration cost over the 3-year period was $26,313,168. This figure very likely overestimates the amount that the Department could have avoided through expanded use of pretrial diversion because in all likelihood a number of the offenders within our analysis would not have met the eligibility requirements for pretrial diversion or would not have been found by Probation and Pretrial Services and the USAOs to be suitable candidates for diversion. Our calculation also does not take into account the costs of a pretrial diversion program. From our calculation, we determined that about 64 percent of these offenders received a probationary sentence. We recognize that the exact cost savings would depend on the amount of prison time the offender ultimately serves, which is unknown at the time of sentencing. We are not extrapolating a total for how much the Department spent to incarcerate all defendants potentially eligible for pretrial diversion programs because those programs have specific additional entrance requirements that are beyond the control of the USAOs and the costs for the defendants potentially eligible would be included within them. However, our analysis demonstrates that the Department's stated interest in pursuing pretrial diversion for low-level, non-violent offenders would result in reduced incarceration costs, and we believe the Department needs

[39] The U.S. Sentencing Commission data from which this statistic was derived adds together the imprisonment days and months, including the time already served and the months of a concurrent state sentence. The data does not include any months on probation, including months of alternative confinement such as time spent in home detention or halfway houses.

to further explore this potential. In our judgment, the cost savings potential of pretrial diversion should be measured, to the extent possible, through the maintenance and review of data, both collected internally and obtained from the U.S. Sentencing Commission, necessary to determine progress toward the Department's goals outlined in the *Smart on Crime* initiative. While we understand that individual districts may not have access to all the necessary data regarding incarceration costs, we recommend the Department collect sufficient information to enable it to assess the performance of the USAOs' use of pretrial diversion in reducing prosecution and incarceration costs, and that it conduct such a review in a timely fashion.

Diversion-Based Court Programs

We estimated the cost savings potential for some offenders who successfully completed diversion-based court programs in three districts we visited: the Central District of Illinois, the Central District of California, and the Eastern District of New York. We selected the first two districts for our analysis because district officials had documentation available that allowed us to determine the offense level and criminal history category for some of their offenders. Under the federal criminal justice system, an offender's offense level and criminal history category is used to determine the offender's advisory guideline sentencing range.[40] The documents we used were presentence investigative reports prepared by the U.S. Probation Office in the Central District of Illinois and plea agreements negotiated between the USAO and the defendant in the Central District of California. We also reviewed an August 2015 report from the Eastern District of New York that included estimated cost savings from its two court programs.[41] Additionally, we obtained diversion-based

[40] A defendant's advisory sentencing range is determined by the U.S. Sentencing Guidelines, which take into account both the seriousness of the criminal conduct (offense level) and the defendant's criminal record (criminal history). Based on the severity of the offense, the guidelines assign most federal crimes on a scale from 1 to 43 for the offense level. Each offender is also assigned on a scale from I to VI for their criminal history based on the extent of past misconduct and recent past misconduct. The point at which the offense level and criminal history category intersect on the sentencing table (as shown on Appendix 3) determines a defendant's advisory sentencing guideline range. The sentencing judge must consider this range, but retains discretion to sentence a defendant outside the range. According to U.S. Sentencing Commission statistics, from FY 2009 to FY 2013, more than half of all cases sentenced in federal court were within the recommended sentencing range. The availability of alternatives to incarceration under the guidelines is determined by the Zone in which the sentencing range falls on the sentencing table, as noted above.

[41] Each of the four court programs we visited managed their diversion-based court programs using different records. While the records we used to perform our cost-savings analysis varied, our use of the court program's sentencing information to estimate an imprisonment cost savings was consistent. We could not perform a similar analysis from documents obtained from the fourth court program we visited, which was in the District of South Carolina.

A presentence investigative report summarizes for the District Court the background information needed to determine the appropriate sentence that includes an examination of the circumstances of the offense and the defendant's criminal background. Presentence reports may not be required if the sentencing judge determines they are not necessary in a particular case.

court program cost-savings records from the District Courts of the districts we visited. Although we did not independently review these U.S. Courts' records, we asked Central District of Illinois and Central District of California officials for any comments about our calculation and the differences between our cost savings calculations and theirs. Their responses are noted below.

To assess the potential cost savings, we determined the sentencing range for each participant.[42] Next, we multiplied the defendant's sentencing range by BOP's average cost of imprisonment during the year the offender would have been sentenced or the date of the presentence report or plea agreement. As of FY 2014, the cost to incarcerate one person was about $84 daily and $30,620 annually, as shown in Table 3. This analysis resulted in the costs that would have been incurred had each participant served their sentence in a BOP facility.[43]

Table 3

Federal Bureau of Prisons Imprisonment Costs as of FY 2014

Term	Imprisonment Cost
Daily	$84
Monthly	$2,552
Annual	$30,620

Source: Federal Register, Vol. 80, No. 45

The following is our analysis of incarceration costs potentially avoided from the diversion-based court programs of the Central District of Illinois and the Central

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A plea agreement is a negotiated agreement between a prosecutor and a criminal defendant to set forth the terms whereby the defendant pleads guilty, often to a lesser offense or in exchange for some concession regarding the government's position on sentencing.

The federal sentencing guidelines are amended annually and sometimes on a more frequent basis. For each defendant in our analysis, we used the sentencing table available on the date of the presentence investigative report or plea agreement.

[42] In the prior section where we estimated the potential cost savings from an increased use of pretrial diversion, we used a slightly different methodology to perform our analysis. Because neither EOUSA nor the USAOs we visited maintained cost data for pretrial diversion, in that prior section we used a combination of U.S. Sentencing Commission and a National Institute of Justice report (NIJ) criteria to estimate potential cost savings. In this section, the District Courts maintained records and data that allowed us to estimate potential cost savings without the use of U.S. Sentencing Commission or NIJ report criteria.

[43] We did not know whether these participants would have been prosecuted and convicted absent their respective diversion-based court programs, and our analysis did not include any possible "good time" that might have reduced the actual time spent in custody by inmates to satisfy their sentences. Our analysis also did not account for the costs to the Department to prosecute these cases or the court costs either incurred or avoided by diversion-based court programs, including personnel costs of U.S. Courts and Probation and Pretrial Services officials. Although the result of our analysis is only an estimate of the incarceration costs that could be avoided, we believe that it is useful in showing the potential diversion-based court programs have for cost savings.

District of California and the imprisonment costs based on the offender's recommended sentence as reported by the Eastern District of New York.

Central District of Illinois

As of October 2014, 114 offenders had participated in the Central District of Illinois program from November 2002 to March 2014. Central District of Illinois officials reported that 104 of these offenders successfully completed the program while 10 offenders were terminated from the program. We judgmentally selected 49 successful participants.[44] As shown in Table 4, we found the total incarceration costs potentially avoided for those 49 offenders was between $7,721,258 and $9,665,811, which calculates to an average of $157,577 to $197,261 saved per offender. Central District of Illinois officials reported $7.9 million in cost savings from 40 offenders who successfully completed its diversion-based court program as of November 2013. District officials estimated the cost savings by multiplying the average sentence for the 40 offenders (89 months) by its estimated monthly imprisonment cost ($2,412). The resulting amount ($8,586,720) was then reduced by the total cost of treatment provided to the 40 offenders ($657,011).[45] In a written response, district officials did not disagree with our cost calculations and indicated that the difference between our calculation and theirs resulted from the span of time covered by the two calculations.[46]

Table 4

Estimated Incarceration Costs Potentially Avoided for Sampled Participants Who Successfully Completed the Central District of Illinois Program from November 2002 to March 2014

	Offense Level	Criminal History Category	Sentencing Range (in months)		Incarceration Costs Avoided Range	
			Low	High	Low	High
1	28	II	87	108	$210,453	$261,252
2	31	III	135	168	$325,080	$404,544
3	26	V	110	137	$268,510	$334,417
4	24	II	57	71	$139,137	$173,311
5	21	IV	57	71	$119,928	$149,384
6	24	I	51	63	$124,491	$153,783
7	27	II	78	97	$187,824	$233,576
8	13	I	12	18	$29,292	$43,938
9	18	III	33	41	$68,541	$85,157
10	25	II	63	78	$135,954	$168,324

[44] These 49 participants represented those who successfully completed the Central District of Illinois program from November 2002 to March 2014 and had sentencing data we could use to assess potential cost savings. We explain the methodology for our judgmental sample in Appendix 1.

[45] Central District of Illinois U.S. Probation Service, *Pretrial Alternatives to Detention Initiative: Save Money Save Lives.*

[46] We also note that, in addition to analyzing potential cost savings for a different number of offenders, the District utilized an overall average sentence as opposed to calculating the individual sentencing ranges and considered additional costs of the diversion-based court program.

	Offense Level	Criminal History Category	Sentencing Range (in months)		Incarceration Costs Avoided Range	
			Low	High	Low	High
11	21	I	37	46	$77,848	$96,784
12	26	III	78	97	$190,398	$236,777
13	27	I	70	87	$147,280	$183,048
14	29	III	108	135	$263,628	$329,535
15	29	II	97	121	$228,629	$285,197
16	21	I	37	46	$90,317	$112,286
17	27	I	70	87	$170,870	$212,367
18	25	II	63	78	$135,954	$168,324
19	29	II	97	121	$236,777	$295,361
20	7	III	4	10	$8,308	$20,770
21	19	II	33	41	$80,553	$100,081
22	29	III	108	135	$263,628	$329,535
23	31	I	108	135	$260,064	$325,080
24	28	III	97	121	$209,326	$261,118
25	17	I	24	30	$51,792	$64,740
26	34	III	188	235	$364,532	$455,665
27	32	III	151	188	$368,591	$458,908
28	27	I	70	87	$168,560	$209,496
29	28	II	87	108	$212,367	$263,628
30	6	III	2	8	$4,838	$19,352
31	21	II	41	51	$86,264	$107,304
32	15	IV	30	37	$64,740	$79,846
33	32	III	151	188	$368,591	$458,908
34	19	I	30	37	$72,570	$89,503
35	32	II	135	168	$329,535	$410,088
36	23	III	57	71	$116,109	$144,627
37	35	III	210	262	$436,170	$544,174
38	15	III	24	30	$49,848	$62,310
39	27	I	70	87	$170,870	$212,367
40	15	II	21	27	$51,261	$65,907
41	24	I	51	63	$98,889	$122,157
42	31	I	108	135	$224,316	$280,395
43	21	I	37	46	$90,317	$112,286
44	15	II	21	27	$43,617	$56,079
45	21	I	37	46	$90,317	$112,286
46	13	I	12	18	$29,292	$43,938
47	21	I	37	46	$71,743	$89,194
48	10	I	6	12	$14,646	$29,292
49	28	II	87	108	$168,693	$209,412
TOTAL					**$7,721,258**	**$9,665,811**

Source: OIG analysis of Central District of Illinois diversion-based court program records, U.S. Sentencing Commission Guidelines, and the Federal Register

Central District of California

As of July 2015, 133 offenders had participated in the Central District of California program from June 2012 to July 2015. Central District of California officials reported that 76 of these offenders successfully completed the program, 48 were currently participating, and 9 offenders were terminated. We judgmentally

selected 13 successful participants.[47] As shown in Table 5, we found the total incarceration costs avoided for those 13 offenders was between $1,232,437 and $1,593,352, which calculates to an average of $94,803 to $122,566 saved per offender.

The Central District of California reported in February 2014 cost savings of $2.8 million for its first 27 program participants. Because of the difference between our calculation of incarceration costs and the Central District of California calculation of its costs savings, we asked District officials for an explanation on how it calculated its cost-savings. In a written response, a district official did not disagree with our cost calculations and stated that the district did not intend its cost estimates to be more than a snapshot of costs that might be saved from the diversion-based court program.

Table 5

Estimated Incarceration Costs Potentially Avoided for Sampled Participants Who Successfully Completed the Central District of California Program from June 2012 to March 2014

	Offense Level	Criminal History Category	Sentencing Range (in months)		Incarceration Costs Avoided Range	
			Low	High	Low	High
1	7	IV	8	14	$19,352	$33,866
2	21	I	37	46	$89,503	$111,274
3	12	CND[a]	10	16	$24,190	$38,704
4	12	CND[a]	10	16	$24,190	$38,704
5	26	VI	120	150	$290,280	$362,850
6	27	I	70	87	$169,330	$210,453
7	13	I	12	18	$29,292	$43,938
8	CND[a]	I	0	6	$0	$14,646
9	27	I	70	87	$169,330	$210,453
10	12	CND[a]	10	16	$24,190	$38,704
11	20	III	41	51	$100,081	$124,491
12	22	VI	84	105	$203,196	$253,995
13	21	I	37	46	$89,503	$111,274
TOTAL					**$1,232,437**	**$1,593,352**

[a] We could not determine four participants' criminal history category or offense level as that information was not included in the plea agreements we reviewed. For the offender with a missing offense level, we used the lowest offense level of 1. For those offenders with missing criminal history categories, we used the lowest criminal history category of I, in both instances so as not to overestimate the potential cost savings

Source: OIG analysis of Central District of California diversion-based court program records, U.S. Sentencing Commission Guidelines, and the Federal Register

[47] These 13 participants represented those who successfully completed the Central District of California program as of March 2014 and had sentencing data we could use to assess potential cost savings. We explain the methodology for our judgmental sample in Appendix 1.

Eastern District of New York

As of August 2015, the Eastern District of New York reported that 19 offenders successfully completed 2 separate diversion programs from January 2012 through January 2015, while 8 offenders were terminated from the programs during that period. Unlike the Central District of Illinois and the Central District of California, we could not calculate the sentence range for the Eastern District of New York program participants based on the documentation we reviewed because the documentation did not include the offender's offense level and criminal history category. Instead, we relied on an Eastern District of New York August 2015 alternatives to incarceration report about its two court programs. In the report, the district quantified the potential costs saved from the completion of its 19 successful program participants.[48] As shown in Table 6, for these 19 successful participants, the total potential estimated imprisonment costs saved based on the offender's recommended sentence under the sentencing guidelines was $2,225,344, or an average of $117,123 per offender.[49] The district further reported a potential estimated cost savings of over $2,141,128 for the 19 successful participants after deducting the actual costs of any prison time served ($84,216) by program participants from the otherwise applicable incarceration costs.

Table 6

Incarceration Costs Potentially Avoided for Participants Who Successfully Completed the Eastern District of New York Programs Reported from January 2012 to January 2015

	Sentence (in months)	Imprisonment Costs Based on the Offender's Recommended Sentence
1	27	$68,904
2	27	$68,904
3	78	$199,056
4	57	$145,464
5	27	$68,904
6	52	$132,704
7	42	$107,184
8	52	$132,704
9	42	$107,184
10	3	$7,656
11	37	$94,424
12	24	$61,248
13	97	$247,544
14	97	$247,544

[48] Eastern District of New York, *Alternatives to Incarceration in the Eastern District of New York: The Pretrial Opportunity Program and The Special Options Services Program* (August 2015).

[49] The district determined the recommended sentence by using the median guideline range or mandatory minimum faced by each defendant who successfully completed the terms of the court programs.

	Sentence (in months)	Imprisonment Costs Based on the Offender's Recommended Sentence
15	51	$130,152
16	33	$84,216
17	33	$84,216
18	41	$104,632
19	52	$132,704
Total		**$2,225,344**

Source: Eastern District of New York, *Alternatives to Incarceration in the Eastern District of New York: The Pretrial Opportunity Program and The Special Options Services Program* (August 2015)

The Eastern District of New York has noted certain limitations inherent in its cost figures. Specifically, it noted that the district's cost savings estimate did not account for additional costs that would have been incurred had the offenders been incarcerated outside the program, such as the cost of caring for a defendant's family, loss of tax revenue resulting from the loss of employment, or the costs associated with any increase in recidivism. It also noted that its cost savings estimate did not capture the true costs of the type of intensive supervision and assistance necessary for diversion programs or the costs of the judges' additional time spent on program matters. The district thus concluded that a systemic study on the issue of cost savings was needed to fully analyze the true costs and benefits of its diversion programs.

Additionally, during our interviews, officials spoke often about the "human" cost savings achieved by the use of diversion-based court programs. One Assistant U.S. Attorney told us that pretrial diversion is an opportunity to help people get back on track with their lives. A District Judge told us the district's program changed lives and the cost savings were tremendous. Another District Judge said their program saved families, lives, and people from incarceration.

Based on the savings that appear to be available through diversion-based court programs, the well-placed concerns noted in the Eastern District of New York's August 2015 report about the difficulty of quantifying the full costs and benefits of diversion programs, and the Department's commitment to pursuing diversionary programs, we believe that a more formal cost-benefit assessment is needed for diversion-based court programs. Although EOUSA did not maintain cost-saving documentation for pretrial diversion, we think a similar assessment for pretrial diversion is needed as well. Such analyses would allow the Department to measure more accurately its progress in implementing the goals of the *Smart on Crime* initiative in reducing incarceration costs, and it would allow the Department to make a more informed judgment about what guidance to issue to U.S. Attorneys regarding the availability of and eligibility requirements for diversion programs nationwide. In our view, the cost-benefit analysis should account for more than just the costs of federal incarceration, probation and pretrial supervision, and treatment services. We recommend that the Department coordinate with the U.S. Sentencing Commission and the U.S. Courts to collect the necessary data and that

it evaluate the performance of pretrial diversion and diversion-based court programs in reducing prosecution and incarceration costs.

Recidivism

The U.S. Sentencing Commission has defined recidivism as the occurrence of any of the following events within a 2-year period following an offender's release into the community: a re-conviction, a re-arrest, or a revocation of supervised release. Given the extent of such recidivism, even a small reduction in its rate can lead to significant prosecution and incarceration costs savings.

We asked EOUSA for any recidivism studies on participants in pretrial diversion and diversion-based court programs. EOUSA officials told us that they had not conducted any studies. In our judgment, the potential for diversion programs to reduce recidivism needs to be measured by the Department to determine its progress toward the goals outlined in the *Smart on Crime* initiative. Diversion's recidivism reducing potential also needs to be measured to further the Department's effort to use performance-based management in compliance with GPRA and the GPRA Modernization Act of 2010 in order to efficiently achieve the goals of prosecution and reduce crime.

To make an initial effort to determine the potential for such programs to reduce recidivism, we judgmentally selected 39 participants who had successfully completed the Central District of Illinois program between November 2002 and February 2011. We then reviewed the criminal histories of these individuals from the FBI National Crime Information Center database. We found that 9 of the 39 graduates (or 23 percent) were re-convicted for a new offense, re-arrested, or had their supervision revoked within 2 years of their diversion-based court program graduation date.[50] By comparison, the general recidivism rate for federal inmates has been estimated as high as 41 percent. Of course, this is just an initial and very limited effort, but we believe that it helps to confirm that a broader study of the effect of pretrial diversion and diversion-based court programs on recidivism is warranted. If positive results are proven to occur on a more widespread and systemic basis, the Department should undertake more substantial efforts to pursue the use of diversion programs by the USAOs. We recommend the Department assess the USAOs' use of pretrial diversion and participation in diversion-based court programs in reducing recidivism.

Conclusion

The Department's *Smart on Crime* initiative was intended to reform the federal criminal justice system by in part, ensuring just punishments for low-level, non-violent offenders. *Smart on Crime* outlined a range of options for federal

[50] Seven of the 9 individuals' charges involved: (1) possession of a controlled substance, (2) supervision revocation, (3) probation violation, (4) theft, (5) possession of drug paraphernalia, (6) resisting a peace officer, and (7) negligent failure to perform. Two individuals' charges were unknown.

prosecutors to consider to meet this objective, including the increased use of alternatives to incarceration such as pretrial diversion and diversion-based court programs where appropriate. However, we could not determine the Department's progress toward accomplishing this goal because the Department had not evaluated the effectiveness of the USAOs' use of pretrial diversion or their participation in diversion-based court programs, and there was not sufficient reliable data to enable us to comprehensively do so. We did find that about one-half of the USAOs appear to have used pretrial diversion five times or fewer from FY 2012 through FY 2014, and the great majority of judicial districts had no diversion-based court program at all. Additionally, we found that the Department had not assessed the potential for pretrial diversion or diversion-based court programs to reduce recidivism or prosecution and incarceration costs, though our preliminary analyses lead us to believe there may be potential for cost savings in both areas.

We therefore believe that the Department needs to perform an evaluation of the effectiveness of the USAO's pretrial diversion program and its efforts to expand the use of diversion-based court programs where appropriate as part of the *Smart on Crime* initiative. Such an evaluation should include a consideration of individual USAOs' local diversion policies to ensure that the Department is consistent in its commitment toward the increased use of diversion programs. The evaluation should also assess low-level, non-violent offender populations based on current and reliable data, including U.S. Sentencing Commission statistics, to determine the availability of suitable offenders for pretrial diversion and diversion-based court programs. Moreover, the evaluation should assess the concerns offered by some federal prosecutors about the use of diversion, and the training and outreach that EOUSA provides regarding such programs. We also believe that EOUSA should ensure that the USAOs are collecting accurate data within its LIONS system or elsewhere regarding its use of and participation in diversionary programs to facilitate such evaluation. In order to assess the impact of its efforts, we believe that the Department needs to utilize current and reliable data from both inside and outside the Department to assess the performance of diversionary programs in reducing both prosecution and incarceration costs and recidivism. Such assessments will enable the Department to set policies tailored to ensure that it moves forward in an informed fashion to achieve its policies and meet statutory requirements in this area consistent with its obligations to use taxpayer dollars efficiently and protect the public from crime. Lastly, we believe the Department should coordinate with the U.S. Courts to assess the impact of the USAOs' use of pretrial diversion and participation in diversion-based court programs in reducing recidivism.

Recommendations

We recommend the Office of the Deputy Attorney General:

1. Take steps to ensure that the Department promptly evaluates the effectiveness of the USAOs' pretrial diversion programs and its efforts to pursue the use of pretrial diversion and diversion-based court programs

where appropriate as part of the *Smart on Crime* initiative. Such steps should include, but not be limited to:

- an assessment of individual USAOs' local diversion policies and practices to ensure that they reflect the Department's commitment toward pursuing alternatives to incarceration for low-level, non-violent offenders;

- an assessment of its low-level, non-violent offender populations based on current and reliable data, including U.S. Sentencing Commission statistics, to determine the universe of potentially suitable offenders for diversion;

- an assessment of the reasons for prosecutorial concerns about the use of diversion programs and strategies to address such concerns; and;

- an assessment of the substance and efficacy of its efforts to provide training and outreach to the USAOs about the use of pretrial diversion and participation in diversion-based court programs.

2. Take steps to ensure that the Department promptly conducts an assessment based on current and reliable data, including information from the U.S. Sentencing Commission and the U.S. Courts, of the impact of the USAOs' use of pretrial diversion and participation in diversion-based court programs in reducing prosecution and incarceration costs.

3. Take steps to ensure that the Department, in coordination with the U.S. Courts, conducts an assessment of the impact of the USAOs' use of pretrial diversion and participation in diversion-based court programs in reducing recidivism.

We recommend EOUSA:

4. Identify and assist the USAOs in revising local diversion policies as may be necessary to ensure that they are consistent with the Department's commitment to increase the use of diversion programs consistent with the *Smart on Crime* initiative.

5. Develop and implement procedures to ensure that pretrial diversion and diversion-based court program activities are accurately recorded within the Legal Information Office Network System.

STATEMENT ON INTERNAL CONTROLS

As required by the *Government Auditing Standards*, we tested, as appropriate, internal controls significant within the context of our audit objectives. A deficiency in an internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to timely prevent or detect: (1) impairments to the effectiveness and efficiency of operations, (2) misstatements in financial or performance information, or (3) violations of laws and regulations. Our evaluation of EOUSA's internal controls was not made for the purpose of providing assurance on its internal control structure as a whole. EOUSA management is responsible for the establishment and maintenance of internal controls.

Through our audit testing, we did not identify deficiencies in EOUSA's internal controls that were significant within the context of the audit objectives and that, based upon the audit work performed, we believe would adversely affect EOUSA's ability to effectively and efficiently operate, to correctly state financial information, and to ensure compliance with laws and regulations.

However, we did identify weaknesses regarding EOUSA's controls over the reporting of pretrial diversion cases that may have resulted in inaccuracies when reporting other statistics. To achieve our audit objectives, we relied on computer-processed data contained within EOUSA's Legal Information Office Network System. Our review of system controls and interviews with EOUSA and USAO staff caused us to doubt the data's reliability. However, when the data is viewed in context with other available evidence, we believe the opinions, conclusions, and recommendations in this report are valid. EOUSA officials acknowledged these discrepancies and expressed interest in strengthening their processes.

Because we are not expressing an opinion on EOUSA's internal control structure as a whole, this statement is intended solely for the information and use of EOUSA. This restriction is not intended to limit the distribution of this report, which is a matter of public record.

STATEMENT ON COMPLIANCE WITH LAWS AND REGULATIONS

As required by the *Government Auditing Standards*, we tested as appropriate given our audit scope and objectives, procedures, practices, and controls, to obtain reasonable assurance that EOUSA's management complied with federal laws and regulations for which noncompliance, in our judgment, could have a material effect on the results of our audit. EOUSA's management is responsible for ensuring compliance with applicable federal laws and regulations. In planning our audit, we identified the following laws and regulations that concerned the operations of the auditee and that were significant within the context of the audit objectives.

- Relevant portions of the Office of Management and Budget Circular A-123, Management's Responsibility for Internal Control

- Government Performance and Results Act of 1993 (GPRA) and the GPRA Modernization Act of 2010, Public Law 111-352

Nothing came to our attention that caused us to believe that EOUSA was not in compliance with the laws and regulations cited above.

APPENDIX 1

AUDIT OBJECTIVES, SCOPE, AND METHODOLOGY

Objectives

The objectives of this audit were to evaluate the (1) design and implementation of federal pretrial diversion and diversion-based court programs, (2) variances in the usage of the programs among the USAOs, and (3) costs savings associated with successful program participants.

Scope and Methodology

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. We conducted field work at the following locations:

Office of the Deputy Attorney General	Washington, D.C.
Executive Office for U.S. Attorneys	Washington, D.C.
District of Columbia	Washington, D.C.
Northern District of Georgia	Atlanta, Georgia
District of South Carolina	Columbia and Charleston, South Carolina
Eastern District of New York	Brooklyn, New York
Central District of California	Los Angeles, California
Central District of Illinois	Peoria, Illinois
Middle District of North Carolina	Greensboro, North Carolina

To evaluate the design and implementation of pretrial diversion and diversion-based court programs, we interviewed officials from the Deputy Attorney General's Office, the Executive Office for U.S. Attorneys, and judges from the U.S. Courts. We interviewed officials from the U.S. Attorney's Office, and the U.S. Courts in the Northern District of Georgia, District of South Carolina, Eastern District of New York, Central District of California, Central District of Illinois, and the Middle District of North Carolina. We also interviewed Federal Public Defenders in the District of South Carolina and the Central District of California. Additionally, we interviewed private defense attorneys in the Central District of Illinois. The officials we interviewed included 3 U.S. Attorneys, 15 District and Magistrate Judges, 11 Assistant U.S. Attorneys, 4 Federal Public Defenders, 17 Probation and Pretrial Services Officers, and 4 private defense attorneys who represented clients that participated in a diversion-based program. We observed planning sessions and court proceedings for the BRIDGE Court in the District of South Carolina, the Presentence Alternative to Detention Initiative Court in the Central District of Illinois, and the Conviction and Sentence Alternative Court in the Central District of

California for the purpose of obtaining a broad understanding of each program's operations. We also discussed diversion-based court programs with program graduates from the District of South Carolina and the Central District of Illinois. While we were not auditing the U.S. Courts, we obtained documentation about diversion-based court programs from court officials and are appreciative.

To evaluate the variances in the usage of diversion programs among the USAOs we:

- obtained and analyzed the number of pretrial diversion cases closed by each district from FY 2012 through FY 2014;
- interviewed EOUSA and USAO officials about the use of pretrial diversion and participation in diversion-based court programs; and
- interviewed EOUSA and USAO officials about the practice of recording and reporting diversion program activity.

To evaluate cost savings as a result of successful diversion program offenders we:

- obtained costs savings documentation from U.S. Court officials; and
- interviewed U.S. Probation officials about supervising diversion program participants.

We obtained U.S. Sentencing Commission statistics for offenders sentenced from FY 2012 through FY 2014 to identify offenders potentially suitable for pretrial diversion or diversion-based court programs. We limited our analysis of these statistics to cases that had complete guideline information, which were 74,495 out of 84,173 cases for FY 2012, 71,004 out of 80,035 cases for FY 2013, and 67,672 out of 75,836 cases for FY 2014. The U.S. Sentencing Commission defines a case as one sentencing event for an individual defendant.

We judgmentally selected successful diversion-based court program participants from the Central District of Illinois and the Central District of California to determine the incarceration costs avoided from successful participation. We limited our testing to those participants who had completed their respective program by the date of our field visit or testing and had documentation on file that contained most participants' offense level and criminal history category according to U.S. Sentencing Guidelines. We also reviewed and relied on an Eastern District of New York alternatives to incarceration report dated August 2015.

APPENDIX 2

COMPARISON OF PRETRIAL DIVERSION OFFENDERS TO OFFENDERS POTENTIALLY SUITABLE FOR PRETRIAL DIVERSION ACCORDING TO U.S. SENTENCING COMMISSION GUIDELINES FROM FY 2012 THROUGH FY 2014

District	Offenders Who Successfully Completed Pretrial Diversion	Offenders Potentially Suitable for Pretrial Diversion Based on Our Analysis of U.S. Sentencing Commission Statistics
Southern California	326	92
Eastern Virginia	132	99
Eastern Missouri	102	69
South Carolina[ab]	101	143
Eastern Michigan	85	89
Eastern Louisiana	67	86
Hawaii	42	67
Western Washington	41	63
Puerto Rico	38	154
Eastern Arkansas	30	31
Western Pennsylvania	28	43
Northern Texas	26	58
Western Texas	24	673
Wyoming	23	30
Middle Pennsylvania	19	75
South Dakota	17	165
Eastern North Carolina	16	32
Middle Georgia	16	214
Middle Alabama	15	52
Western Arkansas	14	52
Northern Alabama	14	49
Northern New York	13	54
Western Louisiana	12	75
Middle Tennessee	12	11
New Hampshire	12	15
Arizona	11	98
Guam	11	63
Eastern California	11	44
New Jersey	10	71
Eastern Washington	10	81
Middle Florida	9	173
Eastern Texas	9	77
Western Oklahoma	9	37
Western Michigan	9	59
Northern Iowa	8	40
Eastern New York[ab]	8	127
Idaho	8	44
Northern Mississippi	8	30
Southern Georgia	8	94
Southern Ohio	8	59
Oregon	7	39
Northern California	7	42

District	Offenders Who Successfully Completed Pretrial Diversion	Offenders Potentially Suitable for Pretrial Diversion Based on Our Analysis of U.S. Sentencing Commission Statistics
Northern West Virginia	7	33
Connecticut	7	30
Delaware	7	8
Northern Illinois	6	63
Southern West Virginia	6	37
Montana	6	38
Eastern Oklahoma	6	20
New Mexico	6	303
Southern Alabama	5	83
Northern Georgia[a]	5	20
Kansas	5	106
Eastern Tennessee	5	57
Western Missouri	4	39
Eastern Kentucky	4	56
Nevada	4	52
Middle North Carolina[a]	4	28
Maine	4	52
Southern Iowa	4	25
Southern Texas	4	102
Northern Ohio	3	85
Western Virginia	3	57
Western New York	3	145
Middle Louisiana	3	41
Rhode Island	3	21
Central California[ab]	3	106
Central Illinois[ab]	2	51
Massachusetts	2	38
Utah	2	19
North Dakota	2	122
Eastern Wisconsin	2	36
Southern Illinois	2	50
Western Kentucky	2	57
Colorado	2	53
Western Tennessee	2	61
Southern Indiana	2	37
Western North Carolina	2	27
Northern Oklahoma	2	33
Southern Florida	1	614
Western Wisconsin	1	20
Northern Florida	1	61
Southern New York	0	128
Nebraska	0	50
Northern Indiana	0	50
Virgin Islands	0	20
Maryland	0	54
Alaska	0	15
District of Columbia[a]	0	47
Minnesota	0	18
Southern Mississippi	0	58
Northern Mariana Islands	0	16

District	Offenders Who Successfully Completed Pretrial Diversion	Offenders Potentially Suitable for Pretrial Diversion Based on Our Analysis of U.S. Sentencing Commission Statistics
Eastern Pennsylvania	0	80
Vermont	0	15
Total	**1,520**	**7,106**

[a] Denotes a judicial district we visited

[b] Denotes a judicial district we visited with an operational diversion-based court program

Source: OIG Analysis of Executive Office for U.S. Attorneys Records and U.S. Sentencing Commission statistics

APPENDIX 3

2015 U.S. SENTENCING TABLE

(in months of imprisonment)
Criminal History Category (Criminal History Points)

	Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
Zone D	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365

(in months of imprisonment)
Criminal History Category (Criminal History Points)

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

Source: U.S. Sentencing Commission 2015 Guidelines Manual

APPENDIX 4

FEDERAL ALTERNATIVE TO INCARCERATION PROGRAMS, INCLUDING DIVERSION-BASED COURT PROGRAMS AS OF AUGUST 2015

	District	Name of Court	Type of Court
1	Central District of California	Convictions and Sentence Alternative	Substance Abuse
2	Southern District of California	Alternative to Prison Sentence Program	Substance Abuse
3	District of Connecticut	Support Court	Immigration and Drug Trafficking
4	Central District of Illinois	Pretrial Alternatives to Detention Initiative	Substance Abuse
5	District of New Hampshire	Law Abiding, Sober, Employed, and Responsible	Substance Abuse
6	Eastern District of New York	Pretrial Opportunity Program, Special Options Services	Substance Abuse and Non-violent Crime
7	District of South Carolina	BRIDGE	Substance Abuse
8	Western District of Virginia	Veterans Treatment Court	Veterans
9	Western District of Washington	Drug Reentry Alternative Model	Substance Abuse
10	District of Oregon	Courts Assisted Pretrial Supervision	Substance Abuse
11	District of Massachusetts	Repair Invest Succeed Emerge	Varied
12	Southern District of Ohio	Special Options Addressing Rehabilitation	Not Specified
13	Eastern District of Missouri	Sentencing Alternatives Improving Lives	Varied
14	District of Utah[a]	Basin Program	Substance Abuse
15	Western District of Texas	Adelante Program	Substance Abuse
16	Eastern District of California	Better Choices Court	Unknown

[a] The District of Utah anticipates adding a pretrial diversion component to its Basin Program in 2016

Source: Eastern District of New York, *Alternatives to Incarceration in the Eastern District of New York: The Pretrial Opportunity Program and The Special Options Services Program* (August 2015).

APPENDIX 5

U.S. SENTENCING GUIDELINES CRITERIA USED IN OUR TESTING TO IDENTIFY THOSE OFFENDERS POTENTIALLY SUITABLE FOR PRETRIAL DIVERSION AND DIVERSION-BASED COURT PROGRAMS

Criteria	Description
Criminal History (Category I)	Defendant's record of past criminal conduct relevant for the purpose of sentencing. The defendant is assigned a category from I to VI based on the extent of past conduct and how recently it occurred. A defendant with a record of prior criminal behavior is placed in a higher criminal history category, and is considered deserving of greater punishment.
Criminal History Points	Defendant's criminal history rating determined by the total criminal history points assigned from application of the U.S. Sentencing Guidelines. Generally, this is based on the length of any prior imposed sentenced and its recency. For our analysis, we used those offenders whose sentencing reflected zero criminal history points.
Weapon Involvement	Case identified either by application of the U.S. Sentencing guideline enhancement for weapon involvement or a firearm conviction, or both.
Aggravated Role Adjustment	Defendant's role in the offense as an organizer, leader, manager, or supervisor of one or more other participants.
Career Offender Adjustment (No prior arrest for a crime of violence or controlled substance)	Defendant's commission of a felony that was a crime of violence or controlled substance offense with two priors of either type.
Zone A	A guideline range is in Zone A when the minimum term of imprisonment specified is 0 months.
Zone B	A guideline range is in Zone B when the minimum term of imprisonment specified is at least one but not more than 6 months, and there are alternatives to incarceration available such as a probationary sentence with conditions requiring intermittent confinement, community confinement, or home detention.

Source: U.S. Sentencing Commission

APPENDIX 6

OFFICE OF THE DEPUTY ATTORNEY GENERAL AND EXECUTIVE OFFICE FOR U.S. ATTORNEYS RESPONSE TO THE DRAFT REPORT

U.S. Department of Justice

950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

MEMORANDUM

JUN 2 4 2016

TO: Ferris B. Polk
Regional Audit Manager
Atlanta Regional Audit Office
Office of the Inspector General
Department of Justice

FROM: Carlos Felipe Uriarte
Associate Deputy Attorney General
Office of the Deputy Attorney General

Monty Wilkinson
Director
Executive Office for United States Attorneys

SUBJECT: Response to OIG's Audit of the Department's Use of Pretrial Diversion and Diversion-Based Court Programs as Alternatives to Incarceration

The Office of the Deputy Attorney General (ODAG) and the Executive Office for United States Attorneys (EOUSA) appreciate the opportunity to comment on the audit undertaken by the Office of the Inspector General (OIG) regarding the use of pretrial diversion and diversion-based court programs as alternatives to incarceration. We agree that more can be done to examine the effectiveness of pretrial diversion and concur in the specific recommendations in the report. The recommendations may assist the Department in reviewing the appropriate use of diversion in the United States Attorneys' offices (USAOs).

We note initially that although fostering greater understanding and consideration of diversion programs within the USAO community is an important development, there are a number of factors that could limit the expansion of diversion practices that are not reflected in the audit report. For instance, one of the key principles of the Smart on Crime initiative directs prosecutors to prioritize federal prosecutions to focus on "the most serious cases that implicate clear, substantial federal interests." Smart on Crime, August 2013, at p. 2. This principle should result in low level, non-violent offenders being declined for federal prosecution and/or referred to the state system rather than being diverted from the federal prison system. In addition, diversion-based court programs require the involvement of other entities. Sometimes these

entities do not want to participate in diversion programs, which is beyond the USAOs' control. Furthermore, existing diversion-based court programs handle small numbers of offenders, typically less than 20 per year. For example, the PADI program in the Central District of Illinois, the longest running such program, hosted 114 participants from 2002 to 2014, fewer than nine people per year. Based on our discussions with practitioners in the field, these programs cannot easily be expanded to accommodate significantly more participants because of limited time and resources.

Additionally, while the Department's strategic objectives and the Smart on Crime principles may foster an expanded use of diversion programs, they do not state that the Department's goal is to increase the number of federal offenders participating in diversion. Specifically, Strategic Objective 3.4 in the Department's Strategic Plan for Fiscal Years 2014 – 2018 seeks to "[r]eform and strengthen America's criminal justice system by targeting the most serious offenses for federal prosecution, expanding the use of diversion programs, and aiding inmates in reentering society." Although this strategic objective refers to "expanding" diversion, the explanatory text is more circumspect, referring only to "taking steps to identify and share best practices for enhancing the use of diversion programs, such as drug treatment and community services initiatives that can serve as effective alternatives to incarceration." Strategic Plan, at p. 51. Similarly, the Smart on Crime initiative requires USAOs to *consider* pretrial diversion, not necessarily to increase its use. As the Smart on Crime announcement states, "*In appropriate instances* involving non-violent offenses, prosecutors ought to *consider* alternatives to incarceration, such as drug courts, specialty courts, or other diversion programs." Smart on Crime, August 2013, at p. 4 (emphasis added).[1] Read together in context, Strategic Objective 3.4 and the Smart on Crime initiative focus on removing barriers to the use of diversion and facilitating the availability of diversion as an option, rather than simply increasing the numbers of offenders in diversion programs as a cost-savings measure.

The Department agrees, however, that pretrial diversion can be an effective option to achieve justice in appropriate cases and may possibly save prosecutorial and incarceration resources in certain circumstances. The Smart on Crime initiative has prompted greater awareness of diversion, and as alluded to in the audit report, EOUSA has taken a number of significant steps to inform USAOs about new and creative forms of diversion. These steps include issuing memoranda to all USAOs describing successful diversion-based court programs, hosting in-person training for all United States Attorneys and key USAO staff, and creating an informative and targeted toolkit to assist the USAOs. In addition, EOUSA has been integrally involved in planning a two and a half day workshop on alternatives to incarceration on June 27-28, 2016, which is being co-sponsored by the Department and the Federal Judicial Center.

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[1] EOUSA's memorandum to USAOs describing court-based diversion programs, issued as part of the original Smart on Crime announcement on August 12, 2013, stated that "USAOs are encouraged to thoughtfully consider creative ways to address the unique crime problems that affect each district. Post-plea drug or specialty court programs can form a part of an effective prosecution program."

The Department's encouragement for prosecutors to more carefully consider diversion has in fact led to greater utilization of diversion. In 2013, there were fewer than 10 federal diversion-based court programs in existence across the country. In 2016, there are 31 such programs. This is a significant accomplishment that makes clear that the USAOs are following Smart on Crime's principle of considering diversion where appropriate. With that in mind, we now turn to the specific recommendations.

Recommendation 1. Take steps to ensure that the Department promptly evaluates the effectiveness of the USAOs' pretrial diversion programs and its efforts to pursue the use of pretrial diversion and diversion-based court programs where appropriate as part of the Smart on Crime initiative. Such steps should include, but not be limited to:

- ***an assessment of individual USAOs' local diversion policies and practices to ensure that they reflect the Department's commitment toward pursuing alternatives to incarceration for low-level, nonviolent offenders;***
- ***an assessment of its low-level, non-violent offender populations based on current and reliable data, including U.S. Sentencing Commission statistics, to determine the universe of potentially suitable offenders for diversion;***
- ***an assessment of the reasons for prosecutorial concerns about the use of diversion programs and strategies to address such concerns; and***
- ***an assessment of the substance and efficacy of its efforts to provide training and outreach to the USAOs about the use of pretrial diversion and participation in diversion-based court programs.***

Response: The Smart on Crime initiative requires each USAO to fully consider whether diversion or other alternatives to incarceration can be effectively incorporated into the district's prosecution strategy. These recommendations are designed to provide USAOs with more information about current attitudes and understanding about diversion, and to ensure that current USAO policies and training are appropriate and as effective as possible. Accordingly, the Department agrees with this recommendation. Of course, the fact that a USAO considers diversion for a potentially suitable candidate does not mean that the offender should ultimately be diverted. The decision to divert an offender must always be based on the facts and circumstances of that offender's particular case. For that reason, we must be careful not to mistake the universe of potentially suitable offenders for diversion for a numeric performance measure.

Recommendation 2. Take steps to ensure that the Department promptly conducts an assessment based on current and reliable data, including information from the U.S. Sentencing Commission and the U.S. Courts, of the impact of the USAOs' use of pretrial diversion and participation in diversion-based court programs in reducing prosecution and incarceration costs.

Response: The Department agrees to take steps to assess the impact of diversion in reducing prosecution and incarceration costs. While, as noted earlier, the ultimate decision to use

diversion in any given case must be based on the facts and circumstances of the case, cost data may help the Department and the USAOs improve their analysis of which types of cases to prosecute, decline for federal prosecution, refer for state prosecution, or divert.

Recommendation 3. Take steps to ensure that the Department, in coordination with the U.S. Courts, conducts an assessment of the impact of the USAOs' use of pretrial diversion and participation in diversion-based court programs in reducing recidivism.

Response: The Department agrees to take steps to assess the impact of diversion programs on recidivism. Historical recidivism data cannot predict future outcomes in individual cases. However, like cost data, an assessment of recidivism may help to inform an analysis of the appropriate use of diversion.

Recommendation 4. Identify and assist the USAOs in revising local diversion policies as may be necessary to ensure that they are consistent with the Department's commitment to increase the use of diversion programs consistent with the Smart on Crime initiative.

Response: As the audit report correctly notes, "the use of diversion is an exercise of local prosecutorial discretion, and prosecutors are not obligated to divert an offender." Audit Report, at p. 12. In implementing this recommendation, EOUSA agrees to assist USAOs in assessing whether their local diversion policies are consistent with the intent of the Smart on Crime initiative. EOUSA will work to clarify policies where necessary and also to increase awareness of the use of pretrial diversion as a prosecutorial option where appropriate.

Recommendation 5. Develop and implement procedures to ensure that pretrial diversion and diversion-based court program activities are accurately recorded within the Legal Information Office Network System [LIONS].

Response: Increased interest in and utilization of diversion over the last several years supports the need for this recommendation, which EOUSA fully embraces. As described in the audit report, the development of new types of diversion has complicated the data-gathering process. In particular, a participant can successfully complete a diversion-based court program and still receive a federal conviction, a situation that has been difficult to capture in LIONS. To implement this recommendation, EOUSA will update LIONS to facilitate the tracking of (1) those who participate in traditional pretrial diversion, (2) those who participate in a court-based diversion program, and (3) the outcome of diversion, including the length of any sentence ultimately imposed, whether it was imposed as a result of the success or failure of pretrial diversion.

Again, thank you for the opportunity to respond to this audit report, and we look forward to following up on these recommendations.

APPENDIX 7

OFFICE OF THE INSPECTOR GENERAL ANALYSIS AND SUMMARY OF ACTIONS NECESSARY TO CLOSE THE REPORT

The Department of Justice (DOJ or Department) Office of the Inspector General (OIG) provided a draft of this audit report to the Office of the Deputy Attorney General (ODAG) and the Executive Office for U.S. Attorneys (EOUSA) for review and official comment. The ODAG and EOUSA provided a joint response, which is incorporated in Appendix 6 of this final report. The ODAG concurred with recommendations 1, 2, and 3; and EOUSA concurred with recommendations 4 and 5. The following provides the OIG analysis of the response and summary of actions necessary to close to the report.

Analysis of the Joint Response

In their joint response, the ODAG and EOUSA assert that our audit report does not reflect a number of factors that could limit the expansion of diversion practices. We disagree with this statement as our audit report addresses the factors highlighted by the ODAG and EOUSA.

First, the joint response states that one *Smart on Crime* principle, prioritizing prosecutions to focus on the most serious cases that implicate clear, substantial federal interests, should result in low-level, non-violent offenders being declined for federal prosecution or referred to a state system. We noted this principle in our audit report and its implication for another *Smart on Crime* principle, which was to pursue alternatives to incarceration for low-level, non-violent offenders. Although we understand that declining prosecution or referring a matter to a state system is often appropriate, we believe that adherence to both of these *Smart on Crime* principles is achievable and should not limit the expansion of the Department's diversion practices. In fact, the Department discussed the interplay between these two principles in accompanying guidance to *Smart on Crime*. This guidance states that "the Attorney General's plan begins with an emphasis on prioritizing prosecutions. This means focusing on the most critical cases rather than the sheer number of cases."[51] The guidance added that "for those cases that do get filed, it makes sense to consider alternatives to incarceration for low-level, non-violent offenses. This means an increased use of diversion programs, such as drug courts, that reduce taxpayer expense and have the potential to be more successful at preventing recidivism."[52] In our opinion, this guidance clearly suggests that *Smart on Crime's* focus on the most serious cases does not diminish the importance of expanding the use of diversion programs for low-level, non-violent offenders.

[51] *Message Guidance on Justice Department's "Smart on Crime" Initiative* (August 12, 2013).

[52] Ibid.

Furthermore, the ODAG's and EOUSA's view in the joint response that a focus on the most serious cases should limit the number of suitable offenders for diversion is contrary to the results of our audit work. As discussed in our audit report, we found a population of federally sentenced low-level, non-violent offenders, for which diversion may have been appropriate. Although we recognized in the audit report that not all offenders identified from our analyses would necessarily be eligible for a diversion program; we believe that our results are useful in illustrating that there remains a population of offenders for whom a diversionary disposition may be a possibility. In implementing the *Smart on Crime* reforms, we believe federal prosecutors should consider the use of diversion for low-level, non-violent offenders for whom a decision to prosecute has been made when they meet the local diversion program's entrance and eligibility requirements.

Next, the joint response states that diversion-based court programs require involvement from other entities and that sometimes these entities do not want to participate, which is beyond the U.S. Attorney's Offices' (USAO) control. The inherent partnership of diversion-based court programs among the USAOs, U.S. Courts, Probation and Pretrial Services, and others, is an aspect we discussed at length in our audit report, and we recognize that some non-DOJ agencies may choose not to participate in a diversion-based court program. However, to be consistent with *Smart on Crime* and the Department's Strategic Plan, we believe the USAOs should consider participating in diversion-based court programs in those districts where non-DOJ agencies have expressed an interest in establishing a program.

Moreover, the response suggests that limited time and resources affects diversion program enrollment. However, the joint response later reports that diversion-based court programs have increased from fewer than 10 programs in 2013 across the country, to 31 programs in 2016.[53] This rapid growth in such a short timeframe strongly suggests that time and resources are not necessarily insurmountable obstacles toward the expansion of diversion programs.

Finally, the response asserts that while the Department's FY 2014-2018 Strategic Plan and *Smart on Crime* initiative may foster an expanded use of diversion programs, these authorities do not state that the Department's goal is to increase the number of federal offenders participating in diversion. The response asserts that the Strategic Plan's call for the expansion of diversion, when read with other parts of the Plan and *Smart on Crime*, was intended to focus on removing barriers to the use of diversion and facilitating the availability of diversion as an option rather than simply increasing the numbers of offenders in diversion programs as a cost-savings measure. As additional support, the response points to the *Smart on Crime* instruction for USAOs to *consider* (emphasis added) pretrial diversion and not necessarily to increase its use. We agree that *Smart on Crime* and the Strategic Plan encourages both the removal of barriers against diversion

[53] In our audit report, we noted that 16 diversion-based court programs were in operation or being planned as of August 2015 according to an Eastern District of New York report.

programs and facilitating the availability of diversion programs. However, despite the implication, we are not suggesting that the Department simply increase its use of diversion to save money. Instead, we are suggesting that when barriers to diversion are removed and consideration for using the programs occurs with more frequency among USAOs, the number of participants in the programs will naturally expand. As we note throughout the report, the net effect of this expanded use could be significant cost savings for the Department and lower recidivism rates.

Summary of Actions Necessary to Close the Report

1. **We recommend the ODAG take steps to ensure that the Department promptly evaluates the effectiveness of the USAOs' pretrial diversion programs and its efforts to pursue the use of pretrial diversion and diversion-based court programs where appropriate as part of the *Smart on Crime* initiative. Such steps should include, but not limited to:**

    - **an assessment of individual USAOs' local diversion policies and practices to ensure that they reflect the Department's commitment toward pursuing alternatives to incarceration for low-level, non-violent offenders;**

    - **an assessment of its low-level, non-violent offender populations based on current and reliable data, including U.S. Sentencing Commission statistics, to determine the universe of potentially suitable offenders for diversion;**

    - **an assessment of the reasons for prosecutorial concerns about the use of diversion programs and strategies to address such concerns; and**

    - **an assessment of the substance and efficacy of its efforts to provide training and outreach to the USAOs about the use of pretrial diversion and participation in diversion-based court programs.**

    Resolved. The ODAG agreed with our recommendation; however, it did not provide information on how it would implement the recommendation. This recommendation can be closed when we receive evidence of the Department's evaluation of the effectiveness of the USAOs' pretrial diversion programs and its efforts to pursue the use of pretrial diversion and diversion-based court programs, where appropriate, as part of the *Smart on Crime* initiative.

2. **We recommend the ODAG take steps to ensure that the Department promptly conducts an assessment based on current and reliable data, including information from the U.S. Sentencing Commission and the U.S. Courts, of the impact of the USAOs' use of pretrial diversion and**

participation in diversion-based court programs in reducing prosecution and incarceration costs.

Resolved. The ODAG agreed to take steps to assess the impact of diversion in reducing prosecution and incarceration costs; however, it did not provide information on how it would implement the recommendation. This recommendation can be closed when we receive evidence that the Department has conducted an adequate assessment and acted on the results as appropriate.

3. **We recommend the ODAG take steps to ensure that the Department, in coordination with the U.S. Courts, conducts an assessment of the impact of the USAOs' use of pretrial diversion and participation in diversion-based court programs in reducing recidivism.**

   Resolved. The ODAG agreed to take steps to assess the impact of diversion programs on recidivism; however, it did not provide information on how it would implement the recommendation. This recommendation can be closed when we receive evidence that the Department has conducted an adequate assessment and acted on the results as appropriate.

4. **We recommend EOUSA identify and assist the USAOs in revising local diversion policies as may be necessary to ensure that they are consistent with the Department's commitment to increase the use of diversion programs consistent with the *Smart on Crime* initiative.**

   Resolved. EOUSA agreed to assist the USAOs in assessing whether their local diversion policies are consistent with the intent of the *Smart on Crime* initiative. EOUSA also stated that it will work to clarify policies where necessary and to increase awareness of the use of pretrial diversion as a prosecutorial option where appropriate. This recommendation can be closed when we receive evidence that EOUSA has worked with the USAOs to revise local diversion policies consistent with the *Smart on Crime* initiative.

5. **We recommend EOUSA develop and implement procedures to ensure that pretrial diversion and diversion-based court program activities are accurately recorded within the Legal Information Office Network System (LIONS).**

   Resolved. EOUSA stated that an increased interest in and utilization of diversion over the last several years supports the need for this recommendation, which it fully embraces. EOUSA also stated that to implement this recommendation it will update LIONS to facilitate the tracking of: (1) those who participate in traditional pretrial diversion; (2) those who participate in a court-based diversion program; and (3) the outcome of diversion, including the length of any sentence ultimately imposed, whether it was imposed as a result of the success or failure of pretrial diversion. This recommendation can be closed when we receive EOUSA's procedures that

ensure pretrial diversion and diversion-based court program activities are accurately recorded within LIONS.

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