

# Deferred Prosecution Programs

IMPLEMENTATION GUIDE



THE UNIVERSITY OF  
**CHICAGO**

**SMART  
DECARCERATION  
PROJECT**

Crown Family School of Social Work, Policy, and Practice

# Author Overview

This document was written and released in August 2018 by leaders of Smart Decarceration Initiative (SDI). SDI was a joint initiative of the Center for Social Development at Washington University's Brown School and the University of Chicago School of Social Service Administration.

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# Acknowledgments

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# Executive Summary

The increase of prosecutorial diversion efforts is an exciting development in the Smart Decarceration movement, which seeks to reduce incarceration rates in ways that are effective, sustainable, and socially just. Prosecutors possess enormous influence over the course of a criminal proceeding, as they alone decide whether to bring charges against an individual and specify how many and what type of charges are pursued. Additionally, as prosecutors participate in plea-negotiations, bail hearings, and provide sentencing recommendations to judges and juries they are perfectly positioned to accelerate decarceration by advocating for diversion programs designed to shift individuals with first-time, low-risk, or non-violent criminal offenses away from the criminal legal system, connect those individuals with community resources to better meet their needs, and foster desistance (or the cessation of criminal offending behavior).

**Deferred prosecution** is one diversion mechanism which has the potential to reduce incarceration rates while maximizing public safety. Although probation and other diversion programs allow individuals to remain in the community while they serve out their sentence, only deferred prosecution programs provide individuals with the opportunity to avoid accruing criminal charges on their record or to have the original charges dismissed (or expunged) after they successfully complete the program.

The Deferred Prosecution Program Implementation Guide offers uniform terminology and uses the wisdom of 60 key stakeholders to identify the steps needed to design an effective, sustainable deferred prosecution program capable of diverting individual defendants out of the criminal legal system and into relevant behavioral health and social service programs, reducing burden on the prosecutor's office caseload, and maximizing public safety.

# Introduction and Background

## What is Diversion?

Diversion represents a range of alternatives to traditional justice case processing for individuals who make contact with the criminal legal system [i]. According to the National Survey of Criminal Justice Diversion Programs and Initiatives (2013), diversion programs may occur in any of the following three phases: law enforcement, pre-trial or prosecution level, or problem-solving or specialty court. The law enforcement phase typically involves partnerships between local law enforcement and community behavioral health providers with the goal of increasing public safety and connecting individuals with treatment. Diversion at the pre-trial or prosecution phase – the focus of this implementation guide – is designed to reduce docket pressure, lower costs, and focus prosecution resources on cases which demand more time and attention. Like diversion efforts which occur in the law enforcement phase, pre-trial or prosecution phase diversion programs also attempt to connect individuals to targeted community services as a means to reduce future criminal offending behavior. Diversion efforts at the problem-solving or specialty court phase are designed to reduce recidivism and provide additional oversight to cases involving a range of special populations [ii].

## What is Deferred Prosecution?

Deferred prosecution refers to a number of programs which occur in the pre-trial or prosecution phase of the case. These programs are pursued explicitly at the discretion of the prosecutor on the case, and are typically implemented as early as possible in the case, ideally during charge and plea-entry [iii]. Unlike probation, which allows individuals to remain in the community while serving out the terms of their sentence, deferred prosecution offers individuals the chance to avoid conviction and, by extension, the collateral consequences of conviction.

Deferred prosecution programs are overseen explicitly by the prosecutor's office and do not require the approval of arresting officers, probation officers, or judges—although the cooperation and support of these stakeholders may facilitate successful program implementation.

Eligible defendants are generally first-time, low-risk, or non-violent offenders. These individuals are identified by the prosecutor's office and provided the opportunity to engage a variety of community behavioral health and social services to achieve mutually agreed upon program goals. The underlying legal assumptions for deferred prosecution program eligibility are that the charge or charges are provable, and that the defendant does not have a legitimate fourth, fifth, or sixth Amendment claim [iv]. Most deferred prosecution programs match program goals and requirements to the needs of the participant, however in general, program components include: mental health treatment, substance use disorder treatment, behavior modification, education and employment services, community service, and financial restitution [v].

Deferred prosecution programs are implemented during one of the following time periods:

**Pre-charge.** The eligible defendant is offered entrance into the deferred prosecution program prior to a formal charge being filed. Successful completion of the program ensures charges are withheld. Pre-charge programs typically target low-risk defendants with little or no prior criminal legal system contact.

**Pre-plea.** Charges are filed, and the eligible defendant is offered entrance into the deferred prosecution program prior to entering a guilty plea. Successful completion of the program ensures charges are dismissed. Pre-plea programs typically target low-risk defendants with little or no prior criminal legal system contact.

**Post-plea.** Charges are filed, and the eligible defendant is offered entrance into the deferred prosecution program on the condition that they must enter a guilty plea. Successful completion of the program ensures the individual is able to withdraw their guilty plea, and the prosecutor declares *nolle prosequi*, or "do not prosecute." Charges are dismissed. Post-plea programs typically target higher-risk defendants with more serious charges or a longer history of prior criminal legal contact.

In all three cases, deferred prosecution program failure results in the resumption of traditional criminal legal system court proceedings. For those defendants who enter a post-plea deferred prosecution program, failure moves them immediately to sentencing.

# Why Implement a Deferred Prosecution Program?

Although many diversion programs exist, deferred prosecution programs have tangible benefits for defendants, prosecutors, and the community [vi].

**Defendants** are offered the opportunity to avoid conviction as well as the collateral consequences of having a criminal record. Additionally, individuals are granted access to a range of community resources and services which have been demonstrated to foster desistance (or the cessation of criminal offending behavior).

**Prosecutors** reduce docket pressure by diverting individuals with first-time, low-risk, or non-violent criminal offenses to the behavioral health and social service sector and are better able to focus limited resources on cases which are more likely to impact public safety.

**Communities** avoid spending tax dollars on hearings, trials, and incarceration for eligible defendants without having to sacrifice public safety. Likewise, long-term research suggests that connecting individuals to behavioral health and social services makes communities safer.

## The Survey

Researchers from the Smart Decarceration Initiative (SDI) interviewed 60 key stakeholders (40 professionals and 20 program participants) from six deferred prosecution programs across three jurisdictions in the Midwest. Stakeholders included prosecutors, public defenders, private attorneys, judges, probation officers, court personnel, community behavioral health and social service providers, and program participants. The goal of the interviews was to provide a blueprint for the expansion of deferred prosecution programs into other jurisdictions. Stakeholders represented one pre-charge program, two pre-plea programs, and three post-plea programs. These programs were chosen because they varied in structure, capacity, target population, and founding date (which ranged from 2007 to 2015).

Stakeholders were asked to identify relevant community and criminal legal system partnerships, discuss stakeholder roles and responsibilities (e.g., official duties, the extent of discretion, and program satisfaction), describe how eligible clients were identified, detail common issues which hampered success for both prosecutors and participants, discuss local conditions that affected program implementation or sustainability, and explore participant experiences of deferred prosecution program participation.

In addition to conducting interviews and focus groups, SDI researchers observed court proceedings and program staff meetings, reviewed program development and implementation documents, and analyzed administrative data of program participants. The goal of this phase of data collection was to identify the range and variety of program characteristics (e.g., inclusion and exclusion criteria, and program requirements), assess the relationships between criminal legal system personnel, program personnel, and participants, and to explore factors associated with successful program completion.

All data were collected 2016-2017. Results were synthesized by SDI researchers; key themes are presented below.

## Findings

The overarching mission of deferred prosecution programs is to provide individuals with the opportunity to accept responsibility for their actions, engage in behavioral health treatment and social service programs, and to desist from criminal offending behavior and become productive members of their community. However, among the six programs we examined, program structure varied greatly, as each program targeted a specific population of defendants and designed program goals to meet the needs of defendants, prosecutors, and the community. Results were synthesized to help those considering developing a new program identify the target population and program structure, maximize community relationships for success, and work towards effectiveness and sustainability.

## Identifying the Target Population

Identifying the target population was noted as the first-step to building a deferred prosecution program, as the characteristics and needs of the target population were closely linked to program design, goals, and capacity. The majority of deferred prosecution programs (nationally, as well as in the current sample) target low-risk or first-time defendants with non-violent misdemeanor criminal charges.



However, some programs were designed specifically for defendants with violent or felony charges or individuals with a more extensive criminal legal history. The common metrics used to describe the target population included the type and number of charges, prior criminal legal history, level of risk (as established by a standardized risk assessment tool), and – in cases where the crime had a victim – whether or not the victim consented to program participation. Prior participation in a deferred prosecution program was also considered as part of eligibility by most programs. However, although some programs would not enroll an individual who had signed a deferred prosecution program agreement before, other would consider an applicant if they successfully completed their prior program.

For each program, the identified target population was selected because it represented a substantial proportion of defendants on the office caseload who also had extensive service needs. Diverting these defendants to the deferred prosecution program thus provided the greatest amount of relief to prosecutors. In one case, two discreet programs were implemented: one designed specifically for low-risk defendants and the other serving higher-risk or higher-need defendants.

In general, programs targeting low-risk defendants have fewer program goals, require less contact between the participant and the prosecutor's office or judge, and may be completed in a relatively short amount of time. These programs are often implemented pre-charge or pre-plea. Programs serving higher-risk or higher-need defendants, however, have more extensive service requirements and more program goals, require more contact between the participant and the prosecutor's office or judge, sometimes place participants under the supervision of a probation officer, and may last a year or longer. These programs were most often implemented post-plea, so that participants who failed to meet the terms of the deferred prosecution program agreement would move immediately to sentencing.

## Choosing the Appropriate Service Model

Stakeholders described three primary organizational models. The organizational model employed by each program varied based on the needs of the target population, the capacity of the prosecutor's office, and the availability and accessibility of community services.

**Service Brokerage.** One point of contact (often a program manager) is housed within the prosecutor's office. This person identifies relevant community partners and facilitates service referrals for program participants.

**Service Coordination.** Specialized staff within the prosecutor's office provide case management and service coordination for program participants. Service coordination avoids the challenge of program disruption due to staff turnover while allowing for close monitoring of participant progress toward program goals. Relationships with community partners are strengthened, program processes are more standardized, and there is more structural support for data tracking and program evaluation.

**Service Provision.** Specialized staff within the prosecutor's office provide a range of direct services to program participants, using referrals to community partners only for specialty behavioral health or job training services. Service provision ensures that program participants have access to all of the services needed to complete program goals. Service provision is standardized and structural support for maintaining program fidelity, data tracking, and program evaluation is strong.

## Matching Program Intensity to Participant Needs

The length, intensity, and goals of the deferred prosecution program should be tailored to meet the needs of program participants. For low-risk or misdemeanor defendants with few needs, program goals may be achieved in a few months with virtually no regular contact with the prosecutor's office; programs targeting higher-risk, higher-need, felony defendants with more extensive criminal legal histories, on the other hand, may enroll participants for extended periods of time and require frequent check-ins and supervision.

In more intensive programs, participants may gradually be granted more autonomy as they complete program goals. [See the section below entitled "Incentives and Sanctions for suggestions on manipulating intensity to facilitate success.] Regardless of the service model and intensity of the program, care should be taken to ensure that all participants have access to the prosecutor's office to address any issues or obstacles to program completion as they arise.

## Assessing Local Service Capacity

For many stakeholders, identifying the target population and capacity of the prosecutor's office enabled them to select a service model and begin to think about the parameters of program intensity and length.

However, stakeholders emphasized that a comprehensive assessment of the availability and accessibility of behavioral health and social services in the local community was imperative to program success. Identifying services which met the needs of the target population and were accepting new clients was a challenge for many new programs, especially those located outside of the city center.

Although the needs of each target population vary, common program components include: mental health treatment, substance use disorder treatment, cognitive behavioral therapy, behavior modification (e.g., anger management and parenting classes), education or vocational training, and employment services or job placement. Care must be taken to ensure that community agencies have the capacity to serve program participants in a timely manner and that they can be accessed by public transportation at low, or no cost. Whenever possible, agencies using evidence-based treatment modalities should be highlighted for service referrals.

[See the section below entitled “Problem Solving” for suggestions on how to facilitate participant success when community service availability and accessibility is challenging.]

## Recruiting Eligible Participants

Stakeholders noted that they worked to identify eligible program participants as quickly as possible after arrest. The earliest possible intervention point varied based on local factors and with whom the prosecutor’s office had the strongest relationships. Many stakeholders noted that determining how they could identify and recruit eligible participants guided subsequent relationship building to strengthen and support that process. [See the section below entitled “Building the Team” for suggestions on relationship building].

Common eligibility partners included law enforcement, jail intake staff, bond court administrators, staff at the warrant’s office, and judges. In collaboration with these partners, the prosecutor’s office was able to quickly identify potential program participants, explain program goals, and determine eligibility for program entrance. Many stakeholders developed a screening tool specifically for their law enforcement or jail staff partners to easily determine whether or not a defendant was eligible to sign a deferred prosecution program agreement.

# Building the Team

**In the prosecutor's office.** Implementing a deferred prosecution program typically represents a shift in both culture and process at the prosecutor's office. Stakeholders noted that securing buy-in from in-house attorneys and staff was absolutely essential to the health and sustainability of their program. Training for attorneys and staff oriented both new hires and current employees on the purpose, function, and objectives of the deferred prosecution program and how program goals reflected the overall mission of the prosecutor's office to seek justice and maximize public safety.

**In the criminal legal system.** Although deferred prosecution programs are prosecutor-led, effective programs require partnership with a range of other criminal legal system stakeholders to quickly identify and recruit eligible program participants, effectively communicate about participant progress, and find solutions to participant barriers to program completion.

Law enforcement, jail intake staff, bond court administrators, staff at the warrant's office, and judges were all identified as critical to identifying eligible participants early in the case and facilitating program entry. Early intervention allowed for participants to avoid pre-trial detention and immediately begin working toward program goals. Strong relationships with pre-trial staff provided a standardized process for program referrals, while relationships with judges were integral to post-plea programs and increased flexibility and problem-solving for participants struggling to meet program goals.

Many program participants (especially low-risk individuals with misdemeanor charges) did not need to engage a defense attorney to enter into a deferred prosecution agreement. However, stakeholders from programs serving these participants noted that relationships with defense attorneys helped to increase program awareness and defense attorneys were able to advocate on behalf of clients facing removal from the program.

Higher-risk individuals or those with felony charges were sometimes required to be under community supervision during program participation. In programs serving these participants, relationships with probation officers were critical for program success. The probation officer served a dual role – monitoring program compliance while also facilitating service referrals. Deferred prosecution programs which specifically targeted higher-risk or felony participants were also able to substitute probation officer contact for routine check-ins with the judge or prosecutor's office.

**In the community.** Stakeholders noted that the most important relationships to the health and sustainability of their deferred prosecution program were the relationships they had with behavioral health and social service providers in the community. Successful program completion simply could not be achieved without timely referral to high-quality, evidence-based services and effective communication between community providers and the prosecutor's office about progress and obstacles.

## Incentives and Sanctions

Inevitably, stakeholders noted that many participants struggled to complete program goals in a timely manner and to sustain motivation to engage in the program over long periods of time. Therefore, different programs developed a range of incentives as well as sanctions to keep participants moving forward in the program.

Although the long-term incentive of having one's criminal charges dismissed might appear to be enough of an incentive for program participants, many stakeholders noted that program completion improved when incentives were tied to project goals. Decreasing program intensity (e.g., requiring fewer check-ins or eliminating classes), reducing fees, and reporting progress to the judge were all suggested as effective incentives.

Sanctions, on the other hand, were suggested as ways to manage participants' undesirable behavior, including chronic tardiness or absences, missed check-ins, positive drug screens, or failure to make progress toward program goals. Common sanctions included increasing program intensity (e.g., requiring more check-ins, adding mandatory classes, or more frequent drug screens), increasing community service hours, increasing fees, and ultimately incarceration and dismissal from the deferred prosecution program.

# Problem Solving

Stakeholders noted that problem solving was necessary at both the program or process level and the participant level. Service accessibility was identified as a key facilitator of program completion by attorneys, social workers, and participants. However, not all behavioral health programs and social service agencies were accessible by public transportation or had the capacity to serve program participants in a timely manner, at low, or no cost. Program stakeholders noted that problem solving around this issue took several forms, including hiring a program manager to coordinate referrals and identify alternative services and moving from a Service Coordination model to a Service Provision model to ensure that all participants were able to receive the services they needed to meet program goals.

At the participant level, stakeholders noted that problem solving generally involved being more flexible and finding solutions to common challenges which occurred in participant's lives. Although family support was noted by both professional and participant stakeholders as critical to successful program completion, family caretaking responsibilities and lack of childcare often complicated participant's engagement in the program. Based on family demands, participants struggled to find and retain employment, attend check-ins and meetings, and access services. Therefore, flexibility in deferred prosecution program design and approach was necessary to find solutions. In some cases, this meant providing childcare or more intensive case management to participants.

Likewise, program participation requires participants to attend classes, outpatient behavioral health treatment, program meetings, and to make court appearances. Challenges increased for participants in high-intensity programs as they struggled to meet program goals while also fulfilling their other obligations toward family, employers, and the community. These demands are difficult to reconcile with employment, especially those jobs which require a typical full-time schedule. Flexibility and communication with employers to help participants keep their job while also meeting program requirements was necessary.

Fees and lack of transportation were identified by both professional and participant stakeholders as critical obstacles to successful program completion. Some deferred prosecution programs charge a fee (or recurring fees) to participants to enroll and remain in the program. Fees may also be required to access behavioral health services (in the form of payment or health insurance co-payment), submit drug screens, and meet with court personnel. Although these fees are typically nominal, they create profound challenges for participants living in poverty with little or no income. The failure to meet program goals, in this context, may indicate lack of capital rather than lack of desire or motivation. Transportation barriers also kept participants from attending meetings, check-ins, and court dates. Professional stakeholders underscored the importance of asking questions and finding solutions before a participant is dismissed from the program for failing to meet program goals.

As the foundation of the deferred prosecution program is prosecutorial discretion, stakeholders encouraged those building a new program to use their discretion, maximize flexibility, and tailor all aspects of the program (rather than just program requirements) to the needs of program participants. Rather than enforcing rigid rules or punishing participants for not meeting expectations, stakeholders suggested that all aspects of the program should be approached in a problem-solving manner. Processes and policies should continually be refined, deadlines should be evaluated to ensure that participants can achieve program goals in the specified amount of time, and participant feedback should be solicited to hone program functioning.

## Problem Solving

The termination process and outcomes of deferred prosecution programs vary based on the target population, program type, and program goals. Because program requirements are tailored to meet individual participant's needs, "successful completion" may look different for each participant. Likewise, prosecutors may exercise a great deal of discretion to determine whether and how each participant has met the requirements of the program (achieved program goals without having accrued new criminal charges).



fees or restitution, secure employment, complete community service hours, or meet behavioral health treatment goals. In cases where participants were clearly attempting to meet program requirements and goals, program staff advocated to extend the deferred prosecution agreement rather than dismiss the participant from the program. In some programs, these extensions were granted informally through a conversation between the participant and the prosecutor. Others programs called in the defense attorney to make a case for why a program extension was warranted and formal legal agreements were drafted.

Discretion is also applied to participant's who are arrested or acquire new charges during program enrollment. Although some stakeholders noted that an arrest or new charges result in immediate program termination, other stakeholders indicated that program intensity is increased as a response to an arrest or new charges. In the latter circumstances, prosecutors often advocated for program participants in court, helping to reduce sanctions to increased program enrollment or additional community service hours.

## Expungement

Although the goal of deferred prosecution programs is reduce criminal legal system involvement (and the collateral consequences of that involvement) while maximizing public safety, programs may not be able to guarantee expungement to all participants. The process for expungement varies dramatically between jurisdiction and state, and the process for obtaining expungement may not be accessible to program participants. Professional stakeholders suggested delineating a process to share information and provide assistance to program completers. This process often required the prosecutor's office to commit resources to help participants with this process after program completion. Professional stakeholders suggested drafting robust and accessible materials to help participants engage in this process at home to reduce burden in the prosecutor's office.

## Evaluation and Sustainability

It is important that mechanisms for tracking program data and measuring program outcomes are carefully considered during the implementation process. New programs will benefit from conducting evaluations during the program design phase. Stakeholders suggesting partnering with a researcher from a local university to assist with evaluation and data collection.



While the ability to collect data will vary by capacity and available resources of the jurisdiction, some common data elements of deferred prosecution programs that should be measured include: participant demographics, current charges and criminal history; services needed, referred to, and received; agreement requirements (e.g., restitution, community service); program completion; case disposition; and future criminal legal system involvement.

These quantitative data will be useful to assessing program acceptability, effectiveness, and sustainability. Additionally, qualitative focus groups and individual interviews with key stakeholders and program participants (those who complete the program as well as those who fail to complete) will help new programs identify barriers and help participants plan for success.

This will allow new programs to make evidence-informed midcourse corrections during the implementation phase of a deferred prosecution program. The ability to measure, in real time, whether or not a program is meeting desired outcomes is invaluable to a new program seeking to improve, not only individual outcomes for defendants, but also desired changes within the prosecutor's office and improved public safety. Common mid-course adjustments include tailoring inclusion/exclusion criteria, adjusting program length and intensity, and refining or expanding service offerings.

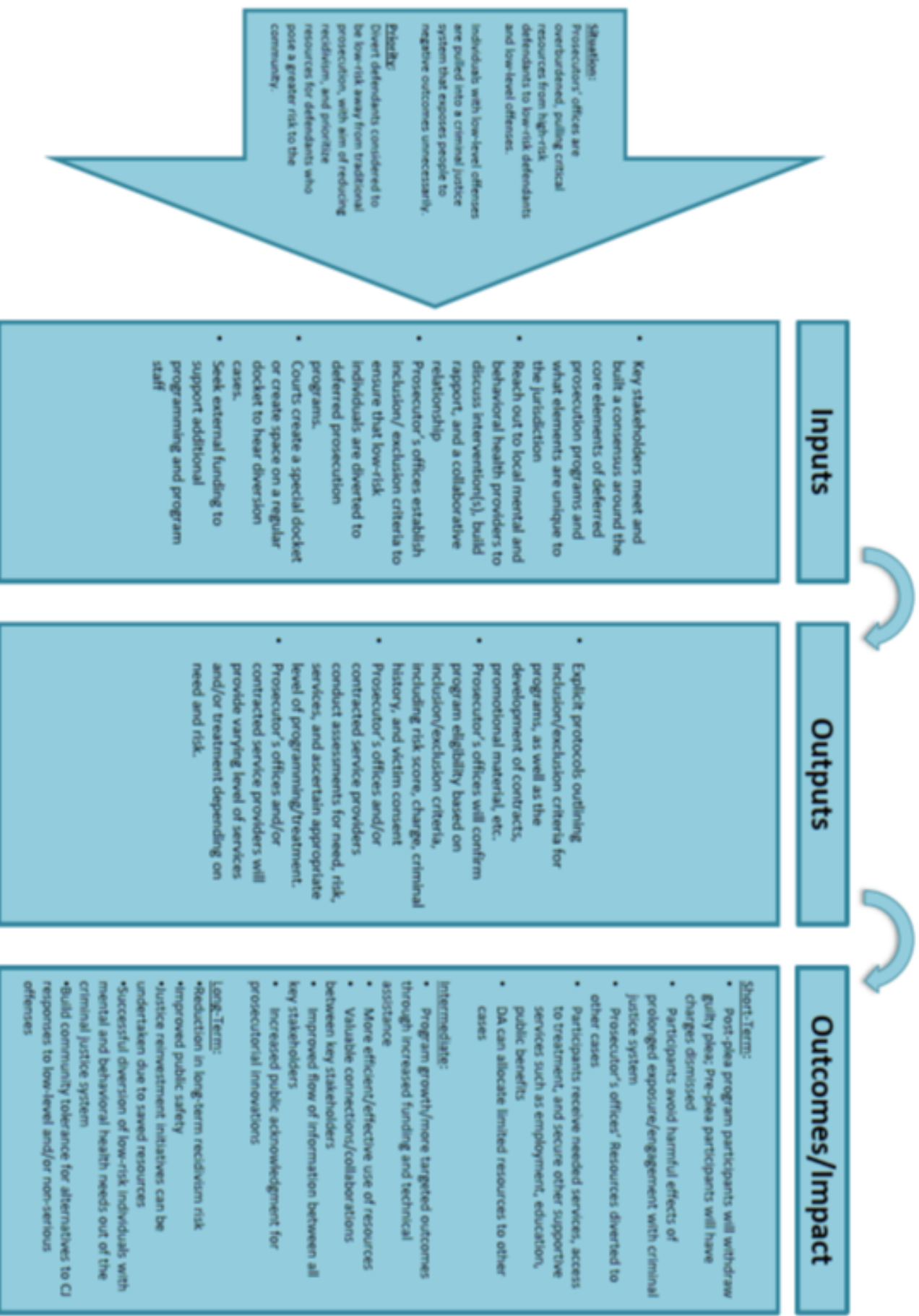
Additionally, building evaluation into implementation provides an opportunity for regular assessment and program improvement. Data and analyses may help other new program avoid common pitfalls and maximize success.

## Sustainability

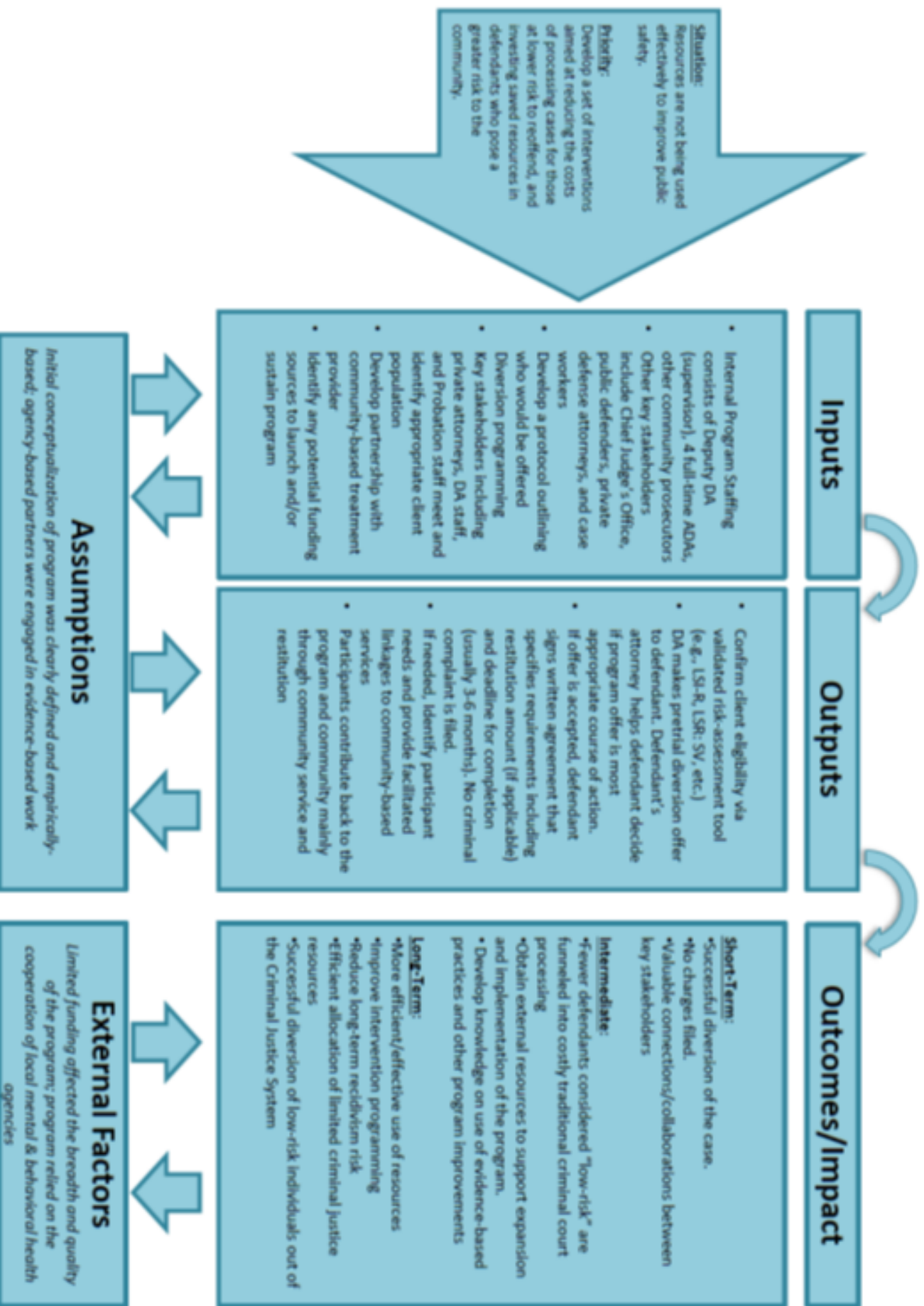
As the goal of deferred prosecution programs is to continue to divert the target population from the prosecutor's office caseload, sustainability of the program is imperative. The Center for Public Health Systems Science at the Washington University in St. Louis developed a sustainability framework and assessment tool to help build sustainability starting in the implementation phase. The tool guides users to measure sustainability along eight key areas. These areas include:

- Environmental support: Having a supportive internal and external climate
- Funding stability: Establishing a consistent financial base
- Partnerships: Cultivating connections between your program and key stakeholders
- Organizational capacity: Having the internal support and resources needed to effectively manage your program
- Program evaluation: Assessing your program to inform planning and document results
- Program adaptation: Taking adaptive actions to ensure ongoing effectiveness
- Communications: Having strategic communication with stakeholders and the public
- Strategic planning: Using processes to guide program direction, goals, and strategies

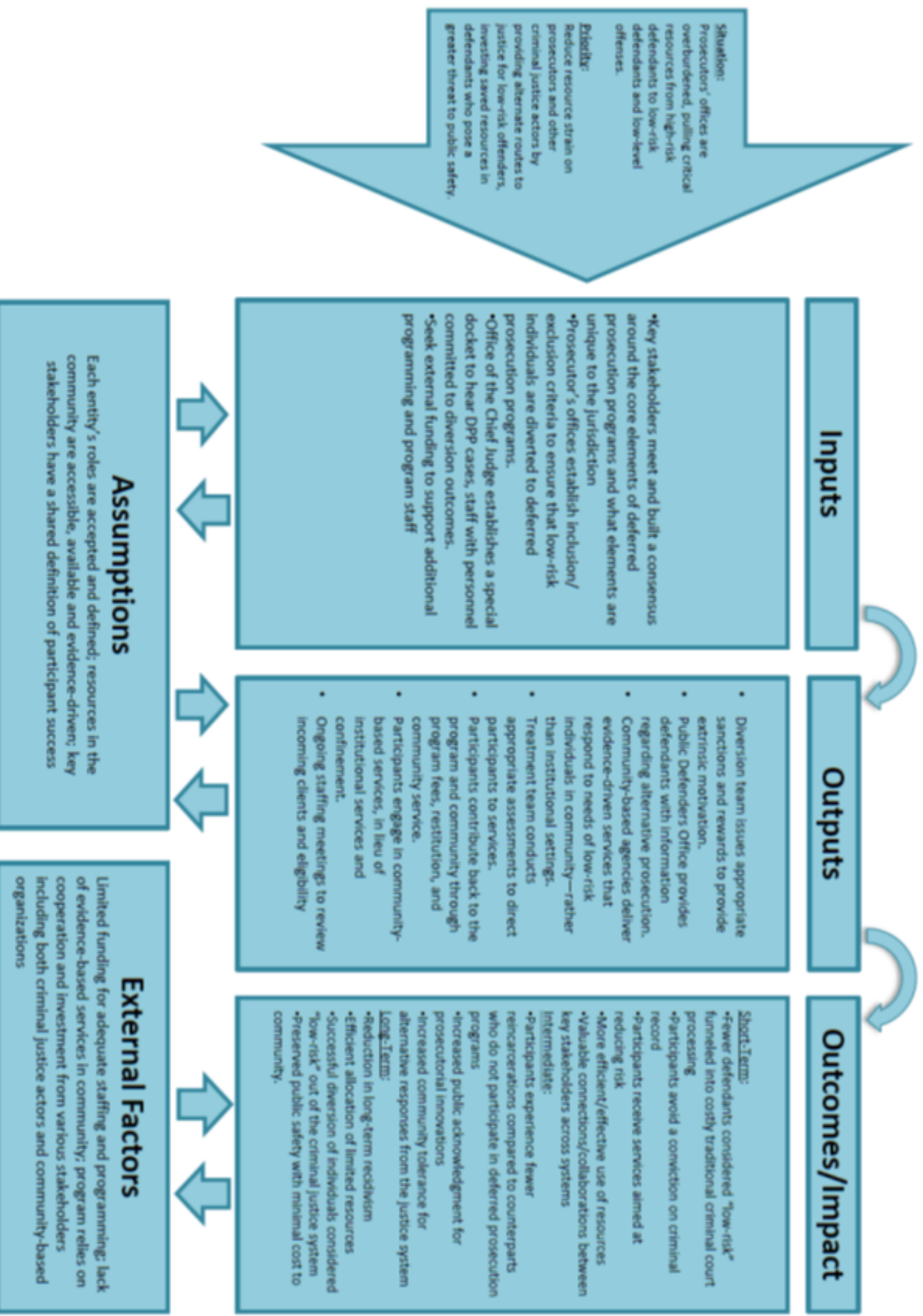
## Core Elements of Deferred Prosecution Programs



## Pre-Charge, Pre-Plea Programming

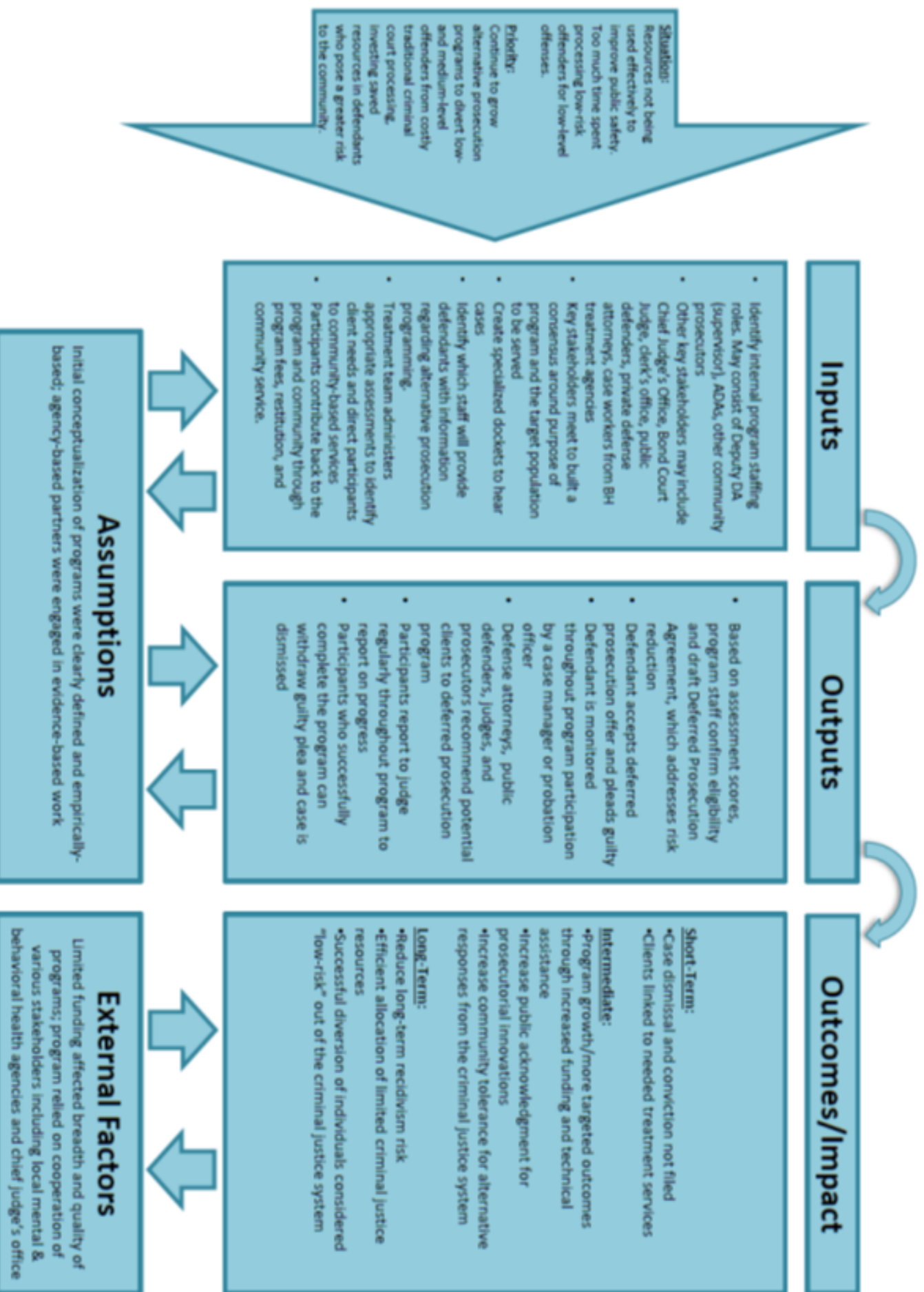


## Post-Charge, Pre-Plea Programming





## Post-Charge, Post-Plea Programming



# Conclusion

Deferred prosecution programs provide a unique opportunity for prosecutor's offices to divert individuals from the traditional criminal legal process in effort to improve individual outcomes, maximize resources within their own offices, and promote overall public safety and well-being. This guide offers common building blocks for implementing and sustaining a deferred prosecution program. The program elements, practices, and resources detailed in this guide allow prosecutor's offices to design and implement deferred prosecution programs that meet local needs while adhering to the best available evidence on what leads to successful program implementation, program effectiveness, and sustainability.

## Resources

### **Level of Service Inventory - Revised**

A validated risk assessment tool widely used to facilitate screening and the identification of treatment needs.

<https://storefront.mhs.com/collections/lsi-r-sv>

### **Ohio Risk Assessment System**

A validated risk assessment tool designed for use with pre-trial defendants.

[http://www.ocjs.ohio.gov/ORAS\\_FinalReport.pdf](http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf)

### **The Risk-Needs-Responsivity Simulation Tool**

The Risk-Needs-Responsivity Simulation Tool, developed by the Center for Advancing Correctional Excellence! at George Mason University, provides a tool for identifying evidence-based practices within a community, capacity to provide those services to justice-involved populations, and match offenders to services and programs based on assess risk and need.

<https://tools.gmuace.org/>

### **Washington University at St. Louis Program Sustainability Assessment Tool**

Tool designed to measure program capacity for sustainability.

<https://cphss.wustl.edu/items/program-sustainability-assessment-tool-project/>

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