

THE ANCHORAGE, ALASKA MUNICIPAL PRETRIAL DIVERSION PROGRAM: AN INITIAL ASSESSMENT

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ABSTRACT

Pretrial diversion programs have the potential to prevent future criminal behavior through intervention and community based services. This may be particularly true for specific populations of offenders such as those with mental illness, substance abuse disorder, and those with co-occurring disorders. Pretrial diversion programs take low-level offenders out of the jail population, both reducing system overpopulation and costs of incarceration. The programs also provide speedy case processing for minor crimes resulting in savings to the court system and personnel. Pretrial diversion can help an offender avoid a criminal conviction and potentially avoid future criminal violations. Results indicate that most Anchorage pretrial defendants comply with and complete the pretrial conditions in a very short time period, an additional savings in case processing time. This research details the initial assessment of the Anchorage Municipal Prosecutor Pretrial Diversion program. This assessment examines system savings in time and money, as well as policy implications for the justice system that may assist other jurisdictions as they consider implementing a pretrial diversion program.

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INTRODUCTION

Alaska is in severe financial distress, and figuring out how to effectively and efficiently administer the justice system with less funding presents a myriad of difficult decisions. Shrinking oil production on Alaska's North Slope, combined with plummeting oil prices, have made for "a state budget crater of crisis proportions."¹ This practicum highlights the results of a recent assessment of the Municipality of Anchorage's pretrial diversion program as an example of a small but hopeful cost-savings option for Alaskan communities. Financial crises oust us from comfort zones, force careful examination and prioritization, and necessitate adaptation. One change worth careful consideration is increased use of pretrial diversion alternatives. This practicum details the results of a recent effort to assess Anchorage's pretrial diversion program and its potential for resource savings. Anchorage's program is modest, in that it only addresses a handful of non-violent violations and does not take on the laudable goals of treatment of offenders or the restoration of specific victims. Yet as our findings indicate, the program is a wise fiscal strategy that spares valuable justice system resources and helps citizens avoid the collateral consequences of a conviction on one's record.

Funding Alaska's justice system is a costly endeavor. Expenditures for the major justice agencies such as the Department of Corrections, Department of Public Safety, Department of Law, Alaska Court System, Public Defender Agency, and Office of Public Advocacy make up about 9% of Alaska's total state agency spending.² As state revenues were plentiful from 2000–2010, Alaska's justice system expenditures grew in lock step with growth in the total state operating budget.³ Part of the growing justice expenses resulted from more certain prosecution and increasingly punitive sentencing policies. This caused inmate populations to rise. The combined jail and prison population has grown 27% over the past decade, fueling increased corrections spending by 60% in twenty years.⁴ It is not just correctional costs that have risen. Between fiscal year

1. Kirk Johnson, *Alaska's Schools Face Cuts at Every Level Over Oil Collapse*, N.Y. TIMES (Mar. 14, 2016), http://www.nytimes.com/2016/03/15/us/oil-collapse-drains-alaskas-wide-ranging-education-system.html?_r=0.

2. Justice Ctr., Univ. of Alaska Anchorage, *Justice System Operating Expenditures*, 26(1) ALASKA JUST. F. 2, 2 (2009).

3. See *id.* The total operating budget in FY 2000 was \$3,513,383,100 and in FY 2010 was \$6,138,365,300. *Id.*

4. *Public Safety in Alaska*, PEW CHARITABLE TRUSTS (July 15, 2015), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/07/public-safety-in-alaska> (last updated July 12, 2016).

(FY) 2000 and FY 2010, Alaska’s Department of Law and Public Defender Agency operating budgets more than doubled as well.⁵

In 2014, the Alaska Legislature created a thirteen-member Alaska Criminal Justice Commission (ACJC) tasked with evaluating system practices and making recommendations to improve criminal laws and practices with an eye toward public safety, offender rehabilitation, victim restitution, and overall cost reduction.⁶ Because of the budget situation, cost reduction has occupied center stage in all relevant discussions. Once the ACJC assembled, it fashioned workgroups to review specific stages in the criminal process, and continues to engage in deep exploration and discussion about policies and practices in Alaska and their impacts on the above goals. Early in 2015, the ACJC saw the need and advisability of joining with PEW Charitable Trust’s Public Safety Performance Project. The State partnered with researchers from PEW and entered a justice reinvestment initiative wherein the State has agreed to follow the research findings by taking funds from less effective policies and programs and reinvesting those funds into more promising endeavors.⁷ In December 2015, the ACJC provided a comprehensive set of policy recommendations to the Alaska Legislature.⁸ Major reforms that were proposed include using evidence-based pretrial practices, prioritizing prison and jail space for serious and violent offenders, strengthening community supervision programs, ensuring oversight and accountability, and expanding crime victims’ rights.⁹ Senate Bill 91 followed on the heels of the ACJC’s recommendations.¹⁰ This Bill seeks sweeping changes and incorporates many, but not all, of the ACJC’s recommendations. Governor Walker signed the Bill into law on July 11, 2016.¹¹

Alaska is not alone in its challenge to provide a workable justice system amidst shrinking budgets. Growing corrections populations, larger court dockets, and more former prisoners returning to their communities have forced numerous jurisdictions to become “laboratories

5. See Justice Ctr., Univ. of Alaska Anchorage, *supra* note 2.

6. ALASKA CRIM. JUSTICE COMM’N, <http://www.ajc.state.ak.us/alaska-criminal-justice-commission> (last visited Feb. 17, 2017).

7. See ALASKA CRIM. JUSTICE COMM’N, JUSTICE REINVESTMENT REPORT 1, 14 (Dec. 2015), http://www.ajc.state.ak.us/sites/default/files/imported/acjc/recommendations/ak_justice_reinvestment_intiative_report_to_acjc_12-9.pdf.

8. See *id.*

9. *Id.* at 14.

10. See *29th Legislature (2015–2016): Full Text of SB 91*, ALASKA STATE LEGISLATURE, http://www.legis.state.ak.us/basis/get_fulltext.asp?session=29&bill=SB91 (last visited Jan. 26, 2017).

11. Press Release, Office of the Governor, Governor Walker Signs Historic Criminal Justice Reform Bill (July 11, 2016), <http://gov.alaska.gov/newsroom/2016/07/governor-walker-signs-historic-criminal-justice-reform-bill/>.

for innovative programs and collaborative problem-solving approaches.”¹² Growing research shows these alternative approaches can reduce crime, promote better victim services, and increase public trust and faith in the justice system.¹³ And many of these approaches rely on the well-established concept of pretrial diversion.¹⁴ Pretrial diversion programs divert certain defendants away from traditional criminal justice proceedings into other case resolution alternatives such as community treatment programs. Most pretrial diversion programs are designed to address factors contributing to criminal behavior, provide a source of restitution to specific victims or the community, reduce costly prosecution and drains on court resources, and free defendants from the collateral effects of having convictions on their records.¹⁵

In this practicum, we focus on pretrial diversion by providing some general characteristics of pretrial diversion programs in the United States, recounting the history and extremely limited use of pretrial diversion in Alaska, and then presenting the findings from a recent assessment of the Municipality of Anchorage’s pretrial diversion program. We conclude by highlighting the success of the program, discussing some limitations regarding the evaluation, and sharing some considerations for future development of pretrial diversion programs in Alaska.

I. HISTORY OF PRETRIAL DIVERSION

Pretrial diversion programs vary in name and structure but share several common characteristics. These programs often seek to modify behavior and include drug and alcohol treatment, psychological counseling, behavioral management sessions, vocational training, community service, and required restitution payments. Programs typically use established eligibility criteria based upon the offender’s characteristics and his or her perceived treatment needs (gleaned from assessment tools), as well as the type of crime committed. Diversion can occur at various stages in the life of a case, but as its name denotes, diversion occurs prior to conviction. Finally, prosecution is held in abeyance, and successfully completing the terms of the diversionary

12. NAT’L ASS’N OF PRETRIAL SERVS. AGENCIES, PROMISING PRACTICES IN PRETRIAL DIVERSION 4 (2010) [hereinafter NAPSA], <https://netforumpro.com/public/temp/ClientImages/NAPSA/20b9d126-60bd-421a-bcbf-1d12da015947.pdf>; see also ALASKA CRIM. JUSTICE COMM’N, *supra* note 7, at 5.

13. NAPSA, *supra* note 12, at 4.

14. *Id.*

15. See *id.* See also CATHERINE CAMILLETI, PRETRIAL DIVERSION PROGRAMS: RESEARCH SUMMARY 1-2 (Oct. 25, 2010), <https://www.bja.gov/Publications/PretrialDiversionResearchSummary.pdf>.

program usually results in dismissal of the charges.¹⁶ Pretrial diversion is an attractive alternative because it provides powerful incentives to defendants, focuses on conditions driving criminal behavior, and diverts people out of an over-taxed case processing system.

A. Pretrial Diversion in the United States

According to the National Conference of State Legislatures (NCSL) as of May 13, 2015, forty-four states statutorily provide some form of pretrial diversion alternatives.¹⁷ Thirty-seven states have programs created to address the needs of specific defendant populations, such as substance abuse or mental illness.¹⁸ These programs often utilize treatment or therapeutic court processes and programs that divert defendants away from court into community-based programs.¹⁹ Twenty-six states have statutory authorization for general population diversion.²⁰ These programs address the general needs of all defendants and typically have some eligibility criteria, such as diverting only first-time offenders and misdemeanor offenses.²¹

Pretrial diversion programs grew, particularly in the 1970s, and by March 1977, about 248 intervention/diversion type projects operated in thirty-seven states.²² States began passing laws to explicitly allow pretrial diversion programs, and several professional pretrial associations were organized, such as the National Association of Pretrial Services Agencies (NAPSA) and the Pretrial Justice Institute (PJI).²³ As NAPSA created pretrial diversion standards, hundreds of programs sprung up across the country. It was during this decade that the National Advisory

16. Amber Widgery, *Pretrial Diversion*, NAT'L CONF. ST. LEGISLATURES (May 13, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion>. Programs can offer diversion into other alternatives pre-plea or post-plea. NAPSA, *supra* note 12, at 5–6. The National Association of Pretrial Services prefers the use of voluntary pre-plea programs to post-plea options. *See id.* at 5. In post-plea programs, pleas and convictions must be vacated rather than simply having the charges dismissed. *Id.* at 5–6.

17. Widgery, *supra* note 16.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. JOHN CLARK, PRETRIAL JUSTICE INST., THE ROLE OF TRADITIONAL PRETRIAL DIVERSION IN THE AGE OF SPECIALTY TREATMENT COURTS: EXPANDING THE RANGE OF PROBLEM-SOLVING OPTIONS AT THE PRETRIAL STAGE 5 (2007); Chris Cobb, *Pretrial Intervention Project Begins in Anchorage*, 2(6) ALASKA JUST. F. 2, 2–3 (1978), https://www.uaa.alaska.edu/academics/college-of-health/departments/justice-center/alaska-justice-forum/02/06jul1978/b_pretrial.cshtml.

23. CLARK, *supra* note 22, at 5.

Commission on Criminal Justice Standards and Goals recommended pretrial diversion programs for all jurisdictions.²⁴

B. Pretrial Diversion in Alaska

Alaska is one of only six states without a statute on pretrial diversion.²⁵ While statutory authorization is not required to exercise the discretionary function of law enforcement and prosecution, clear codification helps cement a climate of alternative case processing, breaks through vacillating administrative ideologies about proper forms of punishment and accountability, and can establish uniformity across local jurisdictions. Despite a lack of statutory direction, Alaska has some experience with pretrial diversion at both the state and community level.

i. The Statewide Pretrial Intervention Program

The Alaska Department of Law first experimented with pretrial diversion in 1978 when it started the Pretrial Intervention Program in Anchorage.²⁶ This pilot project targeted first-time property offenders with no history of violence and who were not dependent upon drugs or alcohol.²⁷ The program focused on direct restitution to specific victims, community service, and compliance with a performance contract that offenders and other relevant parties developed.²⁸ Both State of Alaska and Anchorage municipal prosecutors made referrals to this program. A favorable evaluation of the first year led the Alaska Legislature to fund a statewide pretrial intervention program in FY 1981, which extended by 1983 to the communities of Barrow, Bethel, Fairbanks, Juneau, Kenai, Nome, Valdez, Ketchikan, Kodiak, Sitka, Dillingham, and Palmer.²⁹

As the statewide pretrial diversion program expanded, it sought to provide (1) viable alternatives to formal processing within defined guidelines, (2) rehabilitative services to defendants charged with non-serious offenses, and (3) restitution either to the victim directly with

24. *Id.*

25. Widgery, *supra* note 16. Technically, Alaska has a statutory diversion program for juvenile offenders called Youth Court, which allows dismissal of charges for applicable cases. *See* ALASKA STAT. § 47.12.400 (2016) (allowing diversion of juveniles alleged to have committed misdemeanors to local Youth Courts).

26. *See* N.E. SCHAFER, ALASKA JUSTICE STATISTICAL ANALYSIS UNIT, JUSTICE CENTER, UNIVERSITY OF ALASKA ANCHORAGE, EVALUATION OF THE ALASKA PRETRIAL INTERVENTION PROGRAM 12 (1988), <http://www.ajc.state.ak.us/acjc/pretrial%20diversion/interprogram1988.pdf>.

27. Cobb, *supra* note 22.

28. *Id.*

29. SCHAFER, *supra* note 26, at 13.

monetary reimbursement or to society generally through community service. To avoid net-widening, the program guidelines prevented non-prosecutable cases from program referral, and the program had extensive evaluation capabilities built in from the beginning.³⁰ And while intake guidelines permitted referral of felons and those with prior records, the program was primarily intended for those charged with non-serious first offenses.³¹

Nancy Schafer, a University of Alaska Anchorage justice researcher, conducted a grant-funded evaluation of program outcomes from 1983 to 1986. Schafer's findings revealed a promising program and a unique opportunity to study diversion as it operates in different localities under uniform guidelines. Unlike site-specific programs that often vary in policy and practice, Alaska's statewide program allowed both comparisons among different program sites operating under the same policies, as well as assessment of how prosecutors and program staff adapted the policies to meet local concerns. Such assessment is important to Alaska, which has communities that are distinctly different in size, accessibility, race, and ethnicity. For example, the statistics showed that Fairbanks made the greatest use of pretrial diversion, but used it predominately for underage drinking cases.³²

Schafer's evaluation showed that the most common offense categories referred for pretrial diversion were theft, including theft in the second degree, theft in the third degree, and shoplifting offenses, drug offenses in the third and fourth degrees, burglary/trespass, assault, and

30. *Id.* at 12. This so-called "net-widening" effect describes the situation when changes in justice system processes and procedures result in a more individuals controlled by the criminal justice system instead of less. Matthew C. Leone, *Net-Widening*, in *ENCYCLOPEDIA OF CRIME & PUNISHMENT* 1087-88 (ed. David Levinson), <http://sk.sagepub.com/reference/crimepunishment/n286.xml> (last visited Mar. 20, 2017). Some fear that diversion programs result in sanctions imposed on those (especially youth) who otherwise would never have experienced any formal or informal sanctions. Instead of reducing those under official supervision, a worry is that diversion alternatives increase those under supervision and subject to increased punishment for violations of the conditions of diversion. Christopher Bright, *Lesson 5: Implementation Issues – Net-widening or Diversion?*, *CTR. FOR JUSTICE & RECONCILIATION*, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-5-implementation-issues/diversion-or-net-widening/> (last visited Mar. 20, 2017).

31. *Id.* at 26. However, it is clear that not just "easy" cases were "cherry-picked," because 36.8% of the participants were charged with felonies and 36.3% were not first-time offenders. *See id.*

32. *Id.* at 31.

underage drinking.³³ These accounted for 75% of all program referrals, with the majority being crimes against property or public order.³⁴

Some criminologists and justice officials worry that instead of a reduction of individuals entering the justice system, diversionary programs discriminate against minorities and lead to net-widening.³⁵ Schafer's evaluation showed that the statewide program did neither. Referral decisions did not appear to be racially motivated or discriminatory. If anything, minorities like Alaska Natives were given the pretrial diversion option in excess of their percentage of the total population. Also, except for minor consuming alcohol cases, the program did not result in net-widening, as prosecutors ensured referrals were limited to "prosecutable" cases.³⁶ Program guidelines allowed for referral of felony cases and defendants with prior records, but the program was primarily intended for non-serious first offenses. Schafer's results showed 36.8% of those in the program were charged as felons, suggesting the program did in fact serve as an alternative to more severe sanctions, rather than a new option for those who would otherwise have avoided sanction.³⁷ Furthermore, 36.3% of participants had prior criminal histories.³⁸ These numbers show that diversion was functioning as an alternative to more severe sanctions and minimized penetration into the criminal justice system³⁹—the goals of pretrial diversion.

Substance abuse treatment was required in about half of the referrals because most of the participants were under the influence of alcohol or drugs at the time of their offense.⁴⁰ About 65% of program participants successfully completed their performance contracts, and the remainder was a mixture of partial completion or no participation.⁴¹

Impact on future criminality (also known as recidivism) is important. Approximately one-third of the participants were rearrested

33. *Id.* at 27–28.

34. *Id.* at 28–29.

35. CTR. ON JUVENILE & CRIMINAL JUSTICE, WIDENING THE NET IN JUVENILE JUSTICE AND THE DANGERS OF PREVENTION AND EARLY INTERVENTION 1 (2001), <http://www.cjg.org/uploads/cjg/documents/widening.pdf>; OJJDP, Diversion Programs an Overview, *Juvenile Justice Bulletin* (Sept. 1999), <https://www.ncjrs.gov/html/ojjdp/9909-3/div.html> (last visited Apr. 7, 2017); Traci Schlesinger, Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts, *Race and Justice* 3(3), 210, 223–27 (2013), <http://journals.sagepub.com/doi/pdf/10.1177/2153368713483320> (last visited Apr. 7, 2017).

36. *See id.* at 29.

37. *Id.* at 26.

38. *Id.*

39. *Id.* at 27.

40. *Id.* at 33.

41. *Id.*

for any offense between two years and four and one-half years after they were admitted into the program, mirroring the recidivism rates in other states' pretrial diversion programs.⁴² This 33% rate was, and would continue to be, much lower than the criminal recidivism rate for all adult offenders in Alaska, which is about 65%.⁴³ Schafer also found that age was the strongest predictor of rearrest.⁴⁴ Offenders under age twenty-five were twice as likely to be rearrested as those over age thirty-five.⁴⁵ Also, females in the program were rearrested at a rate about 10% less than males, and those without a high school diploma or its equivalent recidivated at a rate of about 40% compared to the 30% with a high school diploma.⁴⁶ Race also seemed to be associated with rearrest: Alaska Natives and blacks were rearrested more often than whites, but Shafer believed this may have been more of a rural versus urban distinction than an indicator of discrimination.⁴⁷ In Shafer's sample, nearly 52% of the Alaska Natives lived in rural areas, whereas only about 21% of the whites lived in rural areas.⁴⁸

Despite the fact that the program was meeting its objectives, the statewide pretrial diversion program was "phased out" by the Department of Law in 1986 during Alaska's last major oil recession.⁴⁹ This is ironic because of the financial benefits of diversion programs.⁵⁰ Ultimately, 1,964 cases entered the pretrial intervention program before it was discontinued. Resource savings do not appear to have been a program goal, because it did not surface as a data point in evaluation tools. For example, Schaffer's 1988 evaluation did not measure the extent

42. *Id.* at 35.

43. The recidivism in Alaska peaked in 2007 at 66%. Some believe the rate grew as the Murkowski administration sought to eliminate reformatory programs offered by the Alaska Department of Corrections. The 2015 Alaska Recidivism Reduction Plan notes that recidivism dropped to 63.19% in FY 2011 as these programs started to return. THE ALASKA JUDICIAL COUNCIL, 2015 RECIDIVISM REDUCTION PLAN: COST-EFFECTIVE SOLUTIONS TO SLOW PRISON POPULATION GROWTH AND REDUCE RECIDIVISM, at ii, <http://www.correct.state.ak.us/commish/docs/hb266.pdf>.

44. SCHAFFER, *supra* note 26, at 37.

45. *Id.*

46. *Id.*

47. *Id.* at 39-40.

48. *Id.* at 40.

49. *See id.* at 14 (noting the Pretrial Intervention Program was ended in 1986 because of a statewide economic depression).

50. Kwixuan Maloof, The Recorder: Expand Diversion to Save Money and Lives, *San Francisco Public Defender* (Feb. 26, 2010); Mark S. Waller et al., Testing the Cost Savings of Judicial Diversion, *Center for Court Innovation & NPC Research*, 45-49 (Mar. 2013), <http://www.pretrial.org/download/diversion/Testing%20the%20Cost%20Savings%20of%20Judicial%20Diversion%20-%20Center%20for%20Court%20Innovation%20et%20al%202013.pdf> of% (last visited Apr. 7, 2017).

to which cost savings to the State of Alaska were realized. We can only speculate on the degree, if any, that this statewide program saved judicial and prosecutorial resources.

ii. *The Municipality of Anchorage Pretrial Diversion Program*

Anchorage reinstated pretrial diversion alternatives in the mid-1990s when it codified a pretrial diversion program in the Anchorage Municipal Code (AMC Section 08.05.060).⁵¹ It is a modest effort that refers fewer types of cases and offenders into the program than the earlier statewide program. Primarily, Anchorage seeks to divert first-time offenders in a specific range of minor offenses from traditional case processing. The Municipal Code states that pretrial diversion is available for any criminal or traffic offense *except* for those specifically identified. Diversion is not currently available for crimes against persons, weapon crimes, crimes harmful to minors, gambling, prostitution, and offenses related to driving under the influence.⁵²

Defendants are offered pretrial diversion independent of whether they are in custody or not.⁵³ The Municipality operates three kinds of diversion: pre-charge, pretrial, and deferred sentencing.⁵⁴ Under Anchorage Municipal Code Section 08.05.060, pretrial diversion agreements typically require the defendant to pay a fine or do community work service (CWS).⁵⁵ Pretrial diversion participants are usually expected to complete their conditions within one month.⁵⁶ Community work service is not usually an option offered for thefts over \$100 since one hour of CWS equates to \$6.25, and completion of the requisite number of hours would be hard to achieve within a month.⁵⁷ The Municipality obtains fines from all three diversion programs.⁵⁸

51. Anchorage Mun. Code § 08.05.060 (2016).

52. *Id.*

53. ALASKA CRIMINAL JUSTICE COMM'N, SENTENCING AND ALTERNATIVES WORKGROUP PROPOSALS TO THE COMMISSION FOR RECOMMENDATIONS REGARDING: PRETRIAL DIVERSION AND DEFERRED PROSECUTION 18 (Apr. 25, 2015), <http://www.ajc.state.ak.us/acjc/proposals/ptd-dis4-15.pdf>.

54. *Id.* at 19.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

II. EVALUATION OF THE ANCHORAGE PRETRIAL DIVERSION PROGRAM

Pretrial diversion programs have operated successfully at the federal, state, and local levels for years, so it is not surprising that early into the Alaska Criminal Justice Commission (ACJC) review process, the Sentencing Alternatives Workgroup began exploring the use of pretrial diversion programs as a cost-effective alternative to typical case processing for certain crimes.⁵⁹ The Workgroup was intrigued by Anchorage's program and invited Municipal prosecutor Seneca Theno to explain the program and discuss its impact. Some data was presented, mostly in the form of estimated numbers of program participants and total yearly amounts of collected fines, but hard numbers were unavailable as there was no ongoing organized data collection occurring and the program had never been evaluated.⁶⁰

The authors of this paper were invited to help provide specific data on the program, and worked with municipal prosecutors during the summer of 2015 to collect and assess initial information about the program. We embarked on a phased approach wherein phase one would track general information for three months to provide a "snapshot" of the program. Phase one's snapshot provides information on the total number of people offered pretrial diversion, those who accepted and rejected the offer, those who successfully completed their pretrial diversion obligations, demographic information about these groups, and the amount of time expended on each case collected to help predict resource savings. Phase two will take the findings of phase one and seek grant funding to provide a deeper review and follow program participants over time to determine the effects, if any, of successful participation.

Data collection for phase one employed a convenience sampling methodology. That is, all offenders who were eligible for and were offered pretrial diversion during the data collection period were included in the sample. Program effectiveness for phase one considered whether: (1) the program is administered as designed (offers are made and carried out as set forth in the municipal code); (2) participants are successfully completing the program requirements and are diverted from the system; (3) bias or discrimination exists regarding who has access to the program; and (4) the program is a cost savings measure for the municipal and state government. Measures of cost-savings equated with financial success

59. ALASKA CRIMINAL JUSTICE COMM'N WORKGROUP ON SENTENCING ALTERNATIVES, STAFF NOTES OF SNOWDEN CONFERENCE CENTER MEETING 1-2 (Dec. 18, 2014), <http://www.ajc.state.ak.us/sites/default/files/meeting-summaries/workgroup/sentencing-alternatives/12-18-14.pdf>.

60. *See id.*

consisted of revenue generated through fines collected by the program and the estimated timesaving for prosecutors and the court. These latter estimates were gleaned by comparing time spent on cases in the pretrial diversion program to estimates of time spent on comparable cases that do not go through the program. Time estimates from past prosecutorial experience were required since only two of the ninety-one closed cases in which offers of pretrial diversion were made declined participation.

The municipal prosecutor's office collected data on all defendants offered pretrial diversion from June to August 2015. It was estimated that the municipal prosecutor's office offered pretrial diversion to an average of five defendants per day, for an estimated twenty-five offers per week. Based on the twelve weeks of data collection, we estimated that data on 300 defendants would be collected. Data collection points included case characteristics (e.g., sanction, completion, outcome), dates for each point in the process of pretrial diversion, and participant demographics. As of August 31, 2015, the end of the data collection period, the actual sample size was 148 cases. Of these 148 cases, the outcome results include data on the ninety-one closed cases in the sample.

A. Acceptance Rate and Offense Categories of Defendants Offered Pretrial Diversion

Of the defendants offered pretrial diversion, 98%, or eighty-nine of the ninety-one closed cases, accepted the offer. Thus, it appears that pretrial diversion is very attractive to those charged with minor offenses. The four most common offenses, accounting for 93% of those defendants that accepted pretrial diversion, were driving without insurance (53%), theft over fifty dollars (24%), theft under fifty dollars (12%), and misconduct involving a controlled substance in the sixth degree (4%).

Tables 1-3 outline the number of defendants with closed and open cases of pretrial diversion, the number of defendants that accepted pretrial diversion, and the categories of charges associated with the defendants whose pretrial diversion case was closed at the end of the data collection period.

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STATUS PTD STATUS	REASON	TOTAL
Closed		91
	PTD Successful	82
	No BW or continuances	61
	PTD Complete But	
	BW involved after acceptance of PTD	5
	BW involved after acceptance of PTD offer and additional continuances granted	4
	BW involved before acceptance of PTD offer	4
	BW involved before acceptance of PTD offer and after accepting PTD	1
	Continuances (1), no BW	5
	Rejected initially by defendant but allowed into PTD later	2
	PTD Unsuccessful	
Allowed into PTD, but ultimately pled out to underlying charge	5	
Rejected by Defendant		
By way of BW at OCA or other reason, and not allowed to participate later	2	
Dismissed for various reasons		
Before PTD offer or acceptance	2	

Table 1a: Open Pretrial Diversion Case Counts. Legend: BW: Bench Warrant, OCA: Out of Custody Arraignment, PTD: Pretrial Diversion.

STATUS	PTD REASON STATUS	TOTAL
Open		57
	Accepted into PTD and now awaiting completion	13
	Rejected by Defendant By way of BW at OCA or other reason, and not allowed to participate later Prosecution ongoing	6
	BW Bench Warrants and NEVER IN PTD. PTD would have been offered but defendants failed to show up for OCAs (For JW purposes, these cases are listed as PTD rejected, but they may be given PTD at next OCA if they show up to it)	38
	Bench Warrants and accepted into PTD, but then got subsequent BW (For JW purposes, these cases are listed as PTD accepted and PTD rejected at BW)	2
		17
TOTAL OPEN AND CLOSED		148

Table 1b: Open Pretrial Diversion Case Counts. Legend: BW: Bench Warrant, JW: Justice Ware Software used by Anchorage Municipal Precursors Office, OCA: Out of Custody Arraignment, PTD: Pretrial Diversion.

Tables 1a and 1b outline the status of all 148 cases. Further analyses on the measures of success were done on the ninety-one cases that were completed and closed by the end of the data collection period on August 31, 2015. Table 1b additionally shows the status of the open cases at the end of the data collection period. The tables detail the range of significant events or reasons for the status of closed and open cases, such as a bench warrant being issued at some point during the defendant's time in the pretrial diversion program. These reasons are listed as described by the prosecutor collecting the data for the evaluation.

Analysis was done to concisely show the number defendants that were offered pretrial diversion and the number of defendants that accepted the offer. As already mentioned, in the ninety-one closed cases that data were collected on, a significant percentage of defendants, 98% (n=89), accepted the offer. While the number of defendants who accepted

pretrial diversion offers is not itself a measure of program success, it does indirectly suggest that the option is appealing. Still, multiple reasons may explain the high acceptance rate, and fully discerning these reasons would likely require participant interviews or surveys. One possibility is that defendants view the diversionary obligations as small and insignificant compared to what they perceive may be required if they are found guilty of their charged offense in court. Alternatively, the incentive of having the case dismissed and avoiding a conviction on their record may be the primary motivating factor.

Offense Category/Charge		
Offense Category	<i>f</i>	%
DWOI	48	52.7
Theft Under \$50	11	12.1
Theft Over \$50	22	24.2
MICS 6	4	4.4
CDM	1	1.1
HAR	2	2.2
D/wSDO	1	1.1
DPU21	1	1.1
Trespass	1	1.1
Total	91	100.0

Table 2: Offense Category and Charge

Table 2 describes the offenses and charges of the sample of closed cases facing defendants who were offered pretrial diversion. Defendants who were offered pretrial diversion were charged with relatively minor offenses. This parallels the parameters of eligibility requirements of the pretrial diversion program for minor non-violent offenses. The vast majority of defendants, 93%, were charged with one of four modal crimes in ascending order: (1) driving without insurance (DWOI); (2) theft under fifty dollars; (3) theft over fifty dollars; and (4) misconduct involving a controlled substance in the sixth degree (i.e., Anchorage Municipal Code Section 9.28.303(A)) (MICS 6). The prosecutor’s office stated that in most cases the controlled substance indicated in this charge is marijuana. The remaining charges include: contributing to the delinquency of a minor (CDM), under Anchorage Municipal Code Section 8.50.050(A)(1); hit and

run leaving the scene of a crash (HAR), under Anchorage Municipal Code Section 9.10.020(C); driving a motor vehicle with a screen device operating (D/wSDO); purchase or delivery to persons under the age of twenty-one or access of persons under the age of twenty-one to licensed premises (DPU21), under Anchorage Municipal Code Section 8.53.416.060; and trespass.

B. Demographic Variations among Defendants Offered Pretrial Diversion

Demographic variables were collected and analyzed on the ninety-one defenders who accepted the offer of pretrial diversion and whose cases were closed by the end of the data collection period. There was no variation between the number of males (56%) and number of females (44%) that pretrial diversion was offered, and no variation between males (56%) and females (44%) that accepted the offer of pretrial diversion. In the two cases where defendants did not accept the pretrial diversion offer, one defendant was male and one was female.

Pretrial diversion was offered and accepted by defendants who tended to be relatively young, with 85% between the ages of eighteen to forty years old. Defendants twenty-one to forty years old were the most common age group to whom pretrial diversion was offered and accepted, comprising 48% of offers and 49% of acceptances, followed by defendants aged eighteen to twenty years old with 37% of offers and 38% of acceptances.

The racial composition of defendants offered pretrial diversion and those who accepted the offer was most commonly Caucasian (57% of offers and 56% of acceptances respectively). No differences existed between how many defendants were offered and subsequently accepted the offer of pretrial diversion for the next largest racial groups: American Indians/Alaska Natives (14%), African American (9%), and Asian/Pacific Islander (8%). The defendants' race was either unknown or not indicated in 10% of the data.

The majority of defendants in the pretrial diversion program did not have any prior convictions (90% of those offered pretrial diversion and 91% of those that accepted pretrial diversion, respectively). Defendants had a prior conviction in only 9% of offers and 8% of acceptances. This supports the program prescripts of defendant eligibility: the Anchorage Municipal Pretrial Diversion program has a target population of low-level first time offenders. The high degree of defendants without a prior criminal conviction demonstrates efficacy in the program being implemented and applied as it was designed. The data also demonstrate the eligibility restrictions' flexibility because defendants with a criminal

conviction made up 9% of those who were offered pretrial diversion and 8% of those who accepted such offers. This shows that pretrial diversion attorneys used discretion in evaluating whether a defendant was still a good candidate for pretrial diversion despite a criminal conviction. It is plausible that the criminal convictions of those defendants who were offered and accepted pretrial diversion were for minor offenses, thus qualifying them as good candidates in spite of prior convictions.

Variable	Mean/Percentage	Anchorage Population Estimate
Age	22.0	32.6
Gender		
Male	56.0	50.8
Female	44.0	49.2
Race		
Caucasian	57.1	66.0
African American	8.8	5.6
American Indian/Alaska Native	14.3	7.9
Asian/Pacific Islander	7.7	10.1

Table 3: Pretrial Defendants Compared to Population Estimates: Age used was median. Source: Municipal Pretrial Diversion Evaluation, American Community Survey 2010-2014 Estimates.

When the group of defendants that accepted pretrial diversion was compared to the population estimates for the Municipality of Anchorage, some demographic differences emerged. Those in pretrial diversion had a median age of twenty-two, compared to a median age of thirty-seven in the general population. The pretrial defendants were more likely to be males than females (56% compared to 44%) than the Anchorage population (51% compared to 49%). For racial composition of the pretrial defendants compared to the Anchorage population, Caucasians were underrepresented (57% compared to 66%), as were Asian/Pacific Islanders (8% compared to 10%). By contrast, American Indian/Alaska Natives were overrepresented in the pretrial diversion group by a factor of 45% (14% compared to 8%) and African Americans were overrepresented by a factor of 36% (9% compared to 6%). In other words, there were fewer Caucasian and Asian/Pacific Islanders in the pretrial diversion program as compared to the Anchorage population, and there

were more American Indian/Alaska Native and African American offenders in the pretrial diversion program than in the Anchorage population.

C. Conditions of Pretrial Diversion

Conditions of PTD		
	<i>f</i>	%
Fine	81	89.0
CWS	8	8.8
N/A (due to defendant failing to show to OCA)	2	2.2
Total	91	100.0

Table 4: Conditions of Pretrial Diversion

Table 4 outlines the frequency and percentage of the conditions of pretrial diversion for those who were offered and accepted the offer of pretrial diversion during the data collection period. As stated previously, fines comprised nearly 90% of the conditions imposed, with community work service assigned to a much smaller percentage of cases, 9%. The Municipal Prosecutor reported that all but one of the fines was set at \$250, and community work service was set at forty hours. The data and completion rates demonstrate that most participants in the pretrial diversion program preferred a small monetary fine to time spent doing community service.

Descriptive analysis was completed on the pretrial sanctions for those defendants who completed the conditions of pretrial diversion during the data collection period. By far the most common completed condition was payment of a fine (93%) compared to those who completed a condition of community work service (7%). Outside of the discussion of the amount of time saved by municipal attorneys and the judiciary via the use of pretrial diversion, this demonstrates a successful measure of the Anchorage Municipal Pretrial Diversion program in revenue generation. If the most common fine amount was \$250 and seventy-six defendants completed the financial condition of pretrial diversion, a rough estimate of \$19,000 was generated in a three-month period. Additionally, it can be estimated that, during the data collection period, the Anchorage Municipal Pretrial Diversion program generated 240 hours of community service.

D. Length of Time for Pretrial Diversion Processes

Participants were typically given about a month to complete their diversion obligations. The pretrial diversion process was relatively short, averaging twenty-four days from pretrial acceptance by the defendant to the date of satisfaction of the conditions. Additionally, most defendants satisfied their conditions earlier than required with an average of nine days before the completion due date. The longest part of the process was an average of thirty-one days between the date of offense and screening for pretrial diversion.

Table 5 shows the average amount of time that elapsed for the pretrial defendants at each procedural stage in the pretrial diversion process. Time spent by both defendants and attorneys for each point in the pretrial diversion process illustrates the variation in time estimates.

Time Point in PTD Processes				
	Date PTD Accepted to Date PTD Completed	Date of Offense to Screening Date	Screening Date to Date PTD Offered	Date PTD Offered to Date PTD Accepted
N	63	82	82	82
Mean	24.4762	31.6220	9.0000	6.6829
Std. Deviation	21.11402	57.25698	40.80547	36.25148
Range	147.00	395.00	388.00	301.00
Time Point in PTD Processes, Continued				
	Date PTD Accepted to Due Date for PTD Agreement Completion	Due Date for PTD Agreement Completion to Outcome Date	Outcome Date to Date PTD Completed	Date PTD Completed to Date Case Closed
N	81	79	62	62
Mean	35.5802	9.7700	0.4194	3.2903
Std. Deviation	19.12777	12.16694	3.30200	5.60265
Range	142.00	41.00	26.00	35.00

Table 5: Procedural Time Lengths for Pretrial Diversion Processes

As stated above, Table 5 shows the relative swiftness of case processing as a measure of success for the Anchorage Municipal Pretrial

Diversion program. The mean time (measured in days) spent during the different process points of the program are highlighted. As shown, offers of and conditions of the pretrial program are closed rather than open-ended, with an average of twenty-four days spent from the date pretrial diversion was accepted until the date that the conditions were satisfied. The time between the date of the offense and the time that a municipal attorney screens the case for pretrial eligibility was on average thirty-one days, and only nine days from the time the case was screened until the day that the offer of pretrial diversion was made. On average, defendants took six days to accept an offer of pretrial diversion. Once accepted, defendants were offered about thirty-five days to complete the conditions of pretrial diversion, most often by either paying a fine or completing community service. Most notably, many defendants took much less time than offered to complete the conditions of pretrial diversion: just nine days. While the twenty-four day average from PTD acceptance to PTD completion accounts for the days between court hearings, the nine-day average in completing conditions of PTD is a more precise measure of the number of days, on average, that defendants completed the conditions of PTD between hearings. This demonstrates the swiftness or success of pretrial diversion in attaining compliance. Once the conditions for pretrial diversion were satisfied, it took an average of three days for the municipal prosecutor's office to close the case. Taken as a whole, this mechanism of case diversion is a much quicker process for the defendants, prosecution, defense attorneys, and the court system than traditional case processing.

E. Number of Court Hearings and Estimated Time Spent

The Anchorage Municipal Pretrial Diversion Program appears to be very efficient for prosecuting attorneys based on the number of court hearings attended and the amount of time devoted to each case. Eighty-three percent of the cases were closed within two court hearings and almost nine out of ten, 89%, of the cases required less than one hour of case processing time by the prosecuting attorney.

Tables 6 and 7 describe the number of court hearings for the eighty-two defendants that successfully completed the conditions of pretrial diversion during the data collection period. Additionally, estimates of time spent are detailed for each court hearing, and estimates of total time spent for the entire case by the prosecutor is listed.

Number of Court Hearings		
	<i>f</i>	%
0	1	1.2
1	24	29.3
2	44	53.7
3	9	11.0
4	2	2.4
5	1	1.2
8	1	1.2
Total	82	100.0

Table 6: Number of Court Hearings

Table 6 extends the findings of efficiency in case processing as reported in the previous table from the perspective of the municipal attorneys handling pretrial diversion cases. The majority of pretrial cases (83%) required only one or two court hearings to be processed. Additionally, the time of the municipal prosecutors was efficiently used with an average of less than one hour (51.3 minutes) spent for each of the two court hearings.

Estimated Time Spent on Case (In Hours)		
	<i>f</i>	%
0.50	3	3.7
0.75	58	70.7
1.00	12	14.6
1.25	5	6.1
1.50	2	2.4
1.75	1	1.2
2.15	1	1.2
Total	82	100.0

Table 7: Estimated Time Spent on Case

Table 7 demonstrates another measurement of time efficiency for municipal prosecutors with the use of pretrial diversion. Nearly nine out of ten (89%) cases used one hour or less of municipal prosecutors' time for case processing. Without pretrial diversion, it could reasonably be

estimated that municipal prosecutors would spend more than one hour on each case in traditional adjudicatory processing.⁶¹

III. CONCLUSIONS AND IMPLICATIONS

The initial assessment of the Anchorage pretrial diversion program consisted of a three-month program “snapshot” to determine how often the option was utilized and offer data about the cases and the participants. During the three-month period, 148 people charged with municipal law violations in Anchorage were offered a pretrial diversion alternative wherein if they paid a \$250 fine or served forty hours of community work service within a month their charges would be dismissed. At the close of the three-month period, ninety-one of these cases had either been dismissed or resulted in convictions. These cases became the sample for this assessment. Program effectiveness focused on the following:

(1) Whether the program is administered as designed (as set forth in the Municipal Code);

(2) Whether participants are successfully completing the program requirements and diverted from the system;

(3) Whether bias or discrimination is present in who has access to the program; and

(4) Whether the program is a cost savings measure for the municipal and state governments.

The Anchorage pretrial diversion program is being operated as designed and set forth in the Anchorage Municipal Code.⁶² Municipal prosecutors review cases for program eligibility prior to arraignment. All of the cases in the sample were offers extended to those who had committed non-violent misdemeanors that were not otherwise barred from the program by the Municipal Code.⁶³ Ninety percent of the participants had no prior criminal history. These two findings align with the program’s stated mission, a diversionary alternative to low level, first time misdemeanors. Yet at the same time, some discretionary flexibility is intended and is apparent in what we observed. For instance, by design not everyone who commits a low-level misdemeanor automatically gets an offer to participate. No one is guaranteed participation as the decision

61. *Id.* at 57; Interview with Seneca Theno, Municipal Prosecutor, Municipality of Anchorage (Nov. 13, 2015) (on file with authors) [hereinafter *Theno Interview*].

62. Anchorage Mun. Code § 08.05.060 (2016).

63. Prosecutors may offer diversion in theft cases up to \$500 and other misdemeanors that do not involve crimes against persons, crimes against minors, weapons violations, driving under the influence, gambling, and prostitution. *Id.*

remains within prosecutors' discretion.⁶⁴ About 10% of the participants were not first time offenders, demonstrating that some discretionary decision-making took place in screening decisions. Pretrial obligations also matched program design. A fine or community work service was required in each case, aligning with the fine and community work service schedule set forth in the Anchorage Municipal Code.⁶⁵ Fines were much more common than community work service. Further research should explore whether this frequency demonstrates a preference by the prosecution or the Municipality to assign a fine instead of community work service, or instead whether it reflects the participants' preferences.

The program appears appealing, as evidenced by the vast majority of people who were offered and accepted participation. Of the ninety-one closed cases where an offer was made, eighty-nine defendants accepted the offer and eighty-two of those individuals successfully paid their fine or completed their community work service within the time limit. On average, these participants even completed their obligation nine days before their given deadline.

The initial outcome assessment demonstrated positive results by accruing savings, both in money and time, and diverting defendants out of the criminal adjudication process. Eighty-three percent of the cases were closed within two court hearings and almost nine out of ten (89%) of the cases used less than one hour of case processing time by the prosecuting attorney. Because offers are accepted at the arraignment stage, there is no need to appoint government paid defense counsel, which results in further savings. Many of these cases would qualify for a public defender if actively prosecuted beyond arraignment.

Because the number of those who were offered but who subsequently failed to complete was so small in our sample, we questioned municipal prosecutors for some estimates about comparable cases that are actively prosecuted by the office either because the defendant was not offered pretrial diversion or because the defendant declined the offer.⁶⁶ By way of example, those charged with driving without insurance (DWOI) who wish to challenge their charges get a defense attorney appointed. If they are not offered or do not accept pretrial diversion at arraignment, then the case is placed in pretrial conference status with a pretrial conference hearing every week until either trial or a plea is entered at a later change of plea hearing. On

64. *Frequently Asked Questions – Pretrial Diversion*, MUN. OF ANCHORAGE, <http://www.muni.org/Departments/legal/criminal/Pages/PreTrialDiversion.aspx> (last visited Feb. 22, 2017); *see also* Anchorage Mun. Code § 08.05.060 (describing the discretionary nature of the program).

65. *See* Anchorage Mun. Code § 08.05.060.

66. Theno Interview, *supra* note 61.

average there would be three pretrial conference hearings and two change of plea hearings for each of these cases because continuances are often requested and granted during hearings. For each pretrial conference hearing, the prosecution spends anywhere from five to fifteen minutes pulling the file and preparing for the hearing and three to four hours attending weekly hearings. Each pretrial conference hearing for a particular defendant is short, ranging from forty-five seconds to five minutes, but because all the pretrial conferences are scheduled together, and there is no set order, the time spent in aggregate at the hearing(s) that day may be three to four hours. Changing plea hearings are comparable, because hearings are lumped together on the court calendar and can take one to two hours in total, even though only five to seven minutes is spent on any one case. Prosecutors and public defenders attend these docketed pretrial conference and change of plea hearings with multiple cases to be addressed, but one can quickly extrapolate the mounting time and energy spent on any one DWOI case by the prosecution, defense counsel, and the court in having to churn these files and address them at such hearings. Many more resources are used than when compared to those successfully diverted through pretrial diversion.

Additionally, fines and community work service are generated at the front end of the process instead of the back end. According to municipal prosecutors, the typical sanction for a DWOI case that is not resolved through pretrial diversion is a \$500 fine with \$250 suspended, thirty days jail with all thirty days suspended, two years of probation, and a \$50 surcharge. In other words, the typical penalty is a \$250 fine and probation. This raises the question: why not just try to collect this at the front end before expending extra time and energy? When asked how often these defendants sentenced for DWOI actually pay their fine, the response was that the Municipality does a “pretty good job” at fine collection because they have a very effective collections effort.⁶⁷ But again, such efforts require time, money, and energy.

Ultimately, the pretrial diversion program saves time for justice system agencies involved with minor criminal defendants – time that can be more efficiently directed towards involvement and processing of more serious criminal defendants. The agencies that directly benefit from timesaving include the Municipal Prosecutors Office, the State of Alaska Public Defenders Office, and the Anchorage District and Superior Courts.

Additionally, the defendants benefit from timesaving of diversion rather than the process involved with traditional adjudication. Quite often, criminal cases impose an arduous time requirement for defendants (e.g., court hearings, continuances) that is commonly viewed as more

67. *Id.*

burdensome than the adjudication process itself. Defendants often have to take time off from work to appear at court, may have to find childcare and transportation, and are often unaware of court locations and proceedings. This makes the process of court adjudication seem more burdensome than a sentencing.⁶⁸ This may make pretrial diversion more attractive to defendants, and may explain why it was so readily accepted when offered in Anchorage.

The program appears to be facially nondiscriminatory. The number of males and females who received offers is closely aligned with their given proportions in Anchorage. No minority groups appear to be left out, although Pacific Islanders were slightly underrepresented. In fact, Alaska Natives and African Americans were overrepresented in our sample.

These positive outcomes are particularly important considering that this is the first outcome assessment done of the Anchorage Pretrial Diversion Program and demonstrates the need for a more comprehensive evaluation. Determining the effectiveness of pretrial diversion as a resource saving alternative is important due to Alaska's fiscal constraints.

Limitations of Research

This first phase, the initial outcome assessment of the Anchorage Pretrial Diversion Program, is not without limitations. Due to the sampling methodology, the sample should not be construed as representative of all defendants who are offered or accept the offer of pretrial diversion. Also, because the sample size is small, caution should be used in interpreting the findings. This initial phase aimed to ascertain baseline estimates on the number of defendants in the program, their characteristics (e.g., types of offenses, demographics, and program completion), and program characteristics (e.g., types of conditions, completion rates, and duration to completion). The design of the next phase of the evaluation can address the limitations of small sample size and non-representativeness associated with this phase. The use of random sampling in the methodology, with control and comparison groups, would lead to a representative and generalizable sample by which stronger inferences could be made from the data. A more robust methodology would lead to more confidence in any policy implications. Additionally, using both quantitative and qualitative research methods would increase confidence in the research, lending more credence to any policy recommendations. Interviews with defendants centered on their

68. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 154-98 (1992).

perceptions of the benefits and challenges of the program would produce richer qualitative data about the Anchorage Pretrial Diversion Program. While this first phase shows promising results in terms of the efficacy of the Anchorage Pretrial Diversion Program, stronger research design in the subsequent phases will do well to validate these preliminary findings.