



Race and Prosecutorial Diversion

What we know and what can be done

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We thank our partner state and district attorney’s offices from Cook County (Chicago), Clay, Duval, and Nassau Counties (Jacksonville), Milwaukee County (Milwaukee), and Hillsborough County (Tampa) for their assistance, and for redefining the standards of prosecutorial transparency and accountability.

This work would not be possible without the generous support of the **John D. and Catherine T. MacArthur Foundation**. Laurie Garduque, the Foundation’s criminal justice director, and Aisha Edwards, senior program officer, have been instrumental in shaping the project. We are thrilled to be part of the Safety & Justice Challenge, an ambitious national initiative aiming to reduce unnecessary incarceration and racial and ethnic disparities in the justice system.

Introduction

Diversion is increasingly used by prosecutors in the United States. As an alternative to formal prosecution, diversion programs provide opportunities to avoid conviction, address substance use and mental health needs, and maintain employment and community ties. However, the diversion process can be a source of racial and ethnic disparities. Who gets diverted and who completes diversion successfully has a lot to do with income. Irrespective of skin color, poor individuals are disadvantaged for a variety of reasons, ranging from the quality of legal advice to hefty fees. While we acknowledge that diversion differences can stem from socioeconomic factors, this report focuses specifically on how race and ethnicity influence diversion decisions.

To document racial and ethnic disparities in diversion, we use data from four prosecutorial offices in Cook County (Chicago), Clay, Duval, and Nassau Counties (Jacksonville), Milwaukee County (Milwaukee), and Hillsborough County (Tampa). The data was collected and analyzed as part of the Prosecutorial Performance Indicators project. Specifically, PPI 7.5: Diversion Differences by Defendant Race/Ethnicity examines the difference in rates for prosecutor-initiated diversion across racial and ethnic groups, on a monthly basis.

What is Diversion?

Diversion is a program run by prosecutors, courts, law enforcement, faith-based, educational, or health agencies in which a person charged with a crime — generally a first-time, nonviolent offense — participates in programs to address the causes underlying the behavior that led to an arrest. Upon completion of a diversion program, charges are generally dismissed. Most diversion programs require payment of fees by the participant. Other requirements of diversion programs may include educational courses aimed at preventing future offenses, restitution to victims, and completion of community service hours.

Pathways to disparity

There are multiple stages in the diversion process where racial/ethnic disparities can be introduced. First, legislative eligibility criteria can disadvantage some groups compared to others. Research shows differential arrest practices in poor communities of color relative to more affluent White neighborhoods. If people of color are more likely to accumulate prior records or be charged with a felony, which often renders them ineligible for diversion programming, they are more disadvantaged before the prosecutor even lays a hand on the case file. In diversion programs where victim approval is required, victims may be less likely to approve diversion in cases where the defendant is a person of color.

Second, people of color can be disadvantaged by office-wide eligibility criteria or by individual prosecutors’ discretionary decisions. Head prosecutors set criteria for their offices as to which cases can be diverted, in addition to what is set forth by statute. Individual prosecutors decide who gets referred to diversion based on their assessments of dangerousness and success in diversion. These assessments are fed by legally relevant, but not race-neutral, factors such as employment, housing status, and neighborhood of residence.

Third, people of color may be less likely to accept diversion offers extended to them. Their reluctance may stem from anticipated costs, travel, and other challenges associated with program participation. A lack of trust in the criminal justice system may also discourage diversion acceptance. Further, it remains unclear how often defense counsel discourage their clients from accepting diversion offers if they are unsure whether the clients will be able to complete the program.

Fourth, once in a diversion program, people of color may be less likely to successfully complete it. Resource constraints may more negatively affect their ability to pay associated fees, including general programming, drug tests, and court costs. Language barriers and lack of cultural awareness from service providers may also make participation more challenging for people of color.

Data & Definitions

The data used in this report represent cases resolved in the four prosecutor’s offices between 2017 and 2019. Given that 2020 diversion usage was heavily affected by the COVID-19 pandemic, we exclude this year from the report. The data were collected primarily from the offices’ case management systems. In Chicago, the prosecutor’s case management system does not collect information on misdemeanor cases. As such, data from Chicago includes only felonies.

Diversion in four partner offices

Chicago: There are eight types of court-based alternative prosecution programs available. Five are pre-plea diversion programs overseen by prosecutors and three are post-plea programs overseen by the court. The office provides both felony and misdemeanor programming, including restorative justice programs and multiple treatment court options (e.g., drug, mental health, and veterans’ courts).

Jacksonville: Most diversion programming is offered by prosecutors before cases are filed. The office has general felony and misdemeanor pretrial intervention programs, as well as several offense-specific programs (e.g., a restitution program for economic crimes) and treatment court options.

Milwaukee: Diversion programs are offered by prosecutors both pre-filing (diversion) and post-filing (deferred prosecution). The office provides felony and misdemeanor diversion programming, including offense-specific programs (e.g., first-time gun offender program) and treatment court options.

Tampa: Law enforcement operate their own set of diversion programs, so prosecutor-driven programs are offered only after cases are filed. The office has general felony and misdemeanor pretrial intervention programs, as well as several offense-specific programs (e.g., a driver’s license restoration program for license-related traffic offenses) and treatment court options.

Race and ethnicity

In all four jurisdictions, the office’s case management system lists defendant race and ethnicity as recorded by law enforcement.

Chicago: Defendants are identified as Asian, Black, Hispanic, Native American, or White.

Jacksonville: Defendants are identified as Black, White, or Other (Asian or Native American). Ethnicity is not recorded. To capture Hispanic ethnicity, defendants were designated as Hispanic if their surname matched the U.S. Census Bureau’s Hispanic Surname List, meaning that at least 75% of individuals in the United States with that surname self-identify as Hispanic.

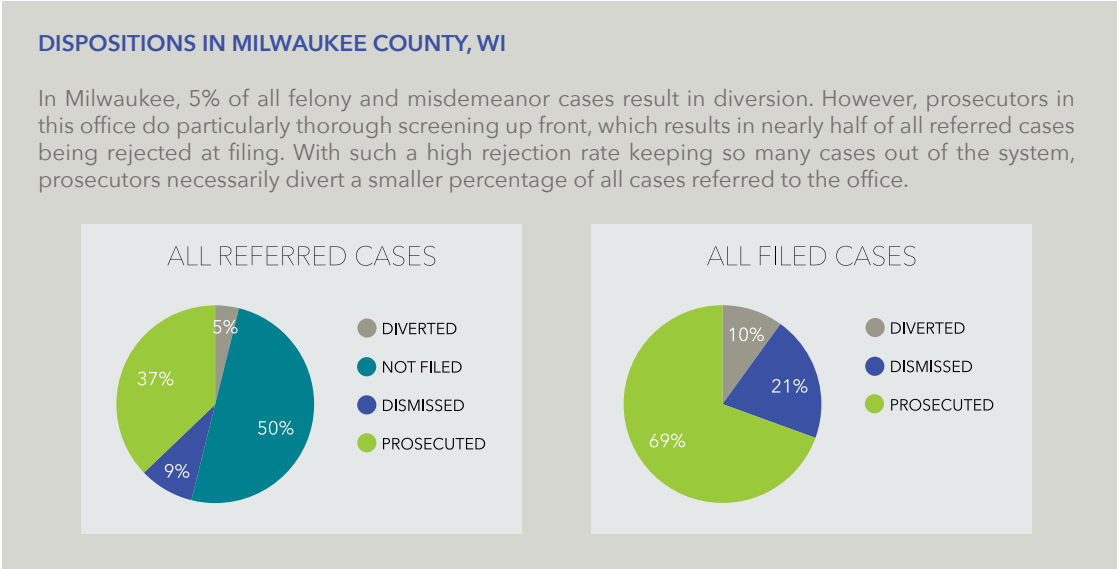
Milwaukee: Defendants are identified as Asian, Black, Hispanic, Native American, or White. However, assessments indicated that Hispanic ethnicity was underreported in the data. To better capture ethnicity, defendants were designated as Hispanic if their surname matched the U.S. Census Bureau’s Hispanic Surname List, meaning that at least 75% of individuals in the United States with that surname self-identify as Hispanic.

Tampa: Defendants are identified as Asian, Black, Hispanic, Native American, or White. However, assessments indicated that Hispanic ethnicity was underreported in the data. To better capture ethnicity, defendants were designated as Hispanic if their surname matched the U.S. Census Bureau’s Hispanic Surname List, meaning that at least 75% of individuals in the United States with that surname self-identify as Hispanic.

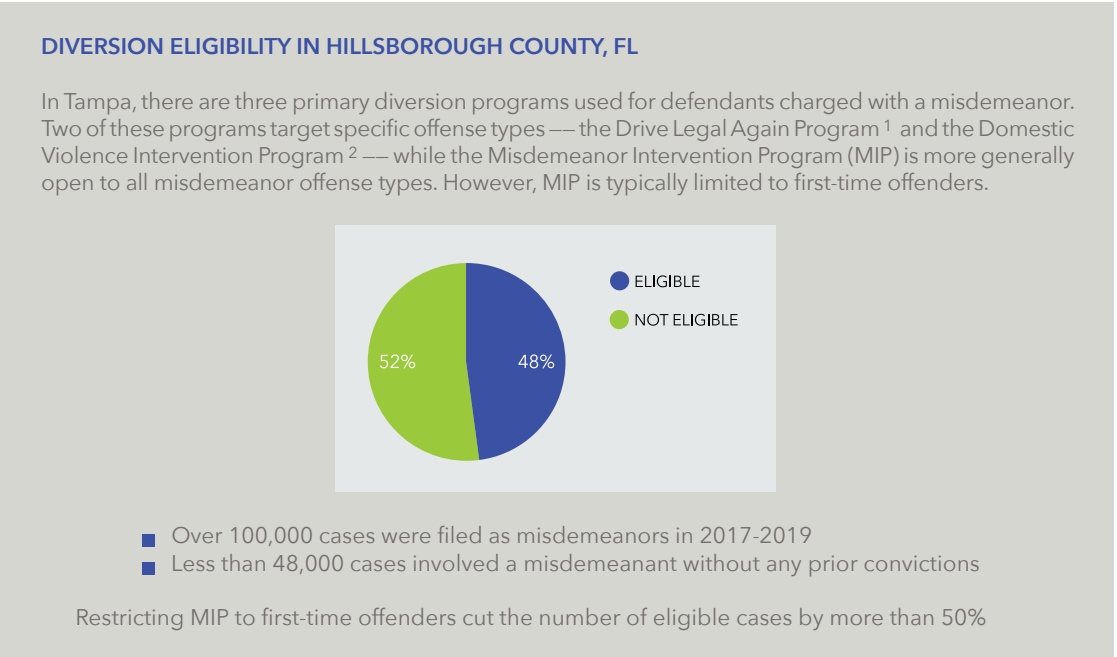
What We Found

Diversion use

To understand racial disparities in diversion, we first need to understand how often diversion is used relative to other options for disposing of cases. If prosecutors reject substantially more cases involving Black defendants, for example, this will influence racial differences in who gets diverted. In our partner sites, between 6% and 10% of all cases referred for prosecution are diverted.



Who gets diverted is also determined by who is eligible for diversion programming. Generally, while state legislation and diversion program administrators regulate eligibility criteria, each prosecutor's office is still left with wide discretion to determine which types of cases and defendants get diverted.



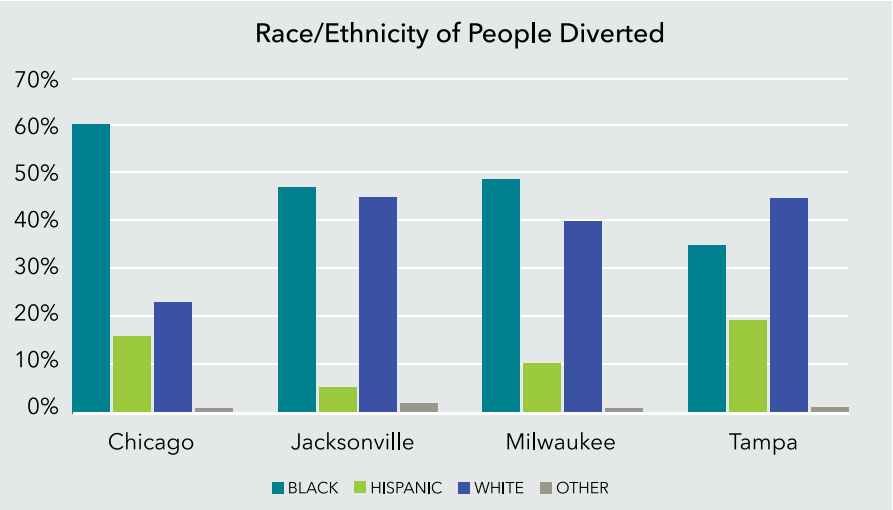
¹ The Drive Legal Again Program specifically targets driving while license suspended and non-valid driver's license cases.
² The Domestic Violence Intervention Program specifically targets domestic battery offenses.

Racial differences in diversion

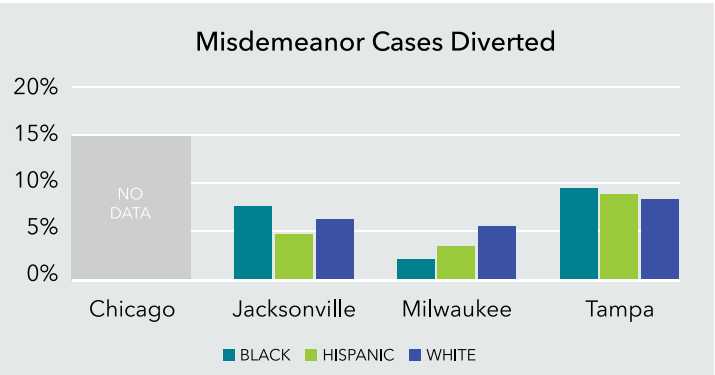
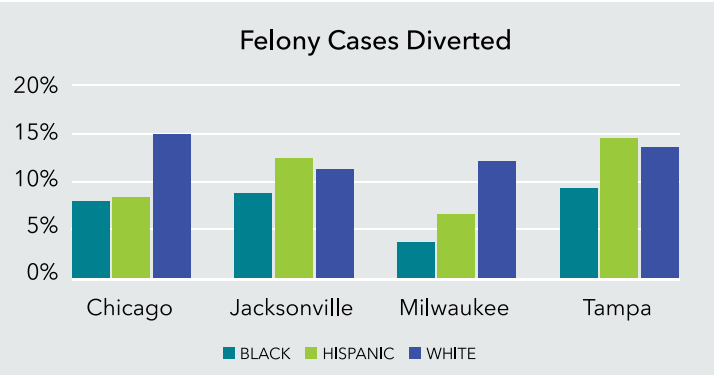
Across our four partner jurisdictions, between 47% and 77% of people diverted are non-White. In Chicago, Milwaukee, and Jacksonville, Black defendants represent the largest racial/ethnic group of people diverted.

On the surface, the graph to the right suggests that Black defendants are more likely to benefit from diversion in three of the four jurisdictions. But these numbers do not indicate which groups are more likely to get diverted.

In Chicago, Black defendants represent a much greater percentage (68%) of all cases brought to the prosecutor's office by law enforcement. As a result, they also make up a greater percentage of people diverted by prosecutors.

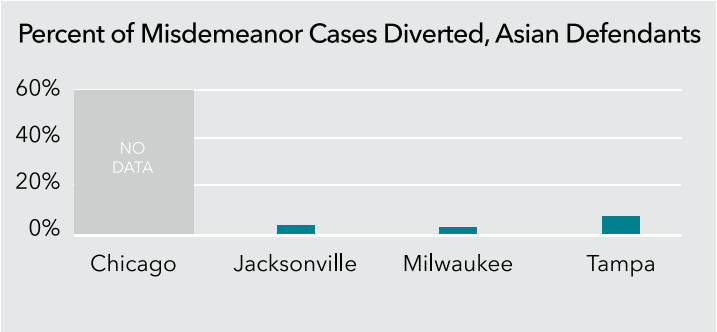
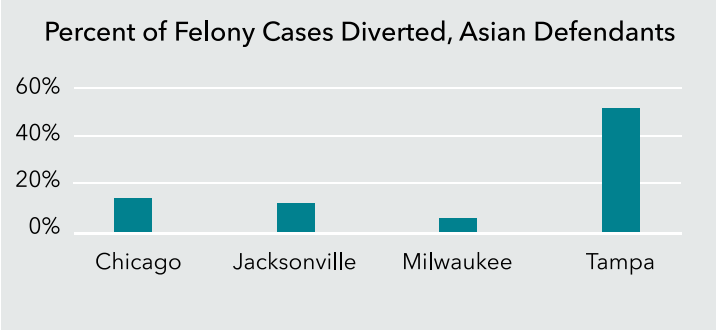


When we look at the percent of cases that are diverted for each racial and ethnic group, we can see that among felonies, Black defendants have the lowest diversion rate in every jurisdiction. In contrast, among misdemeanors, Black defendants have the highest diversion rates in Jacksonville and Tampa, and the lowest in Milwaukee.



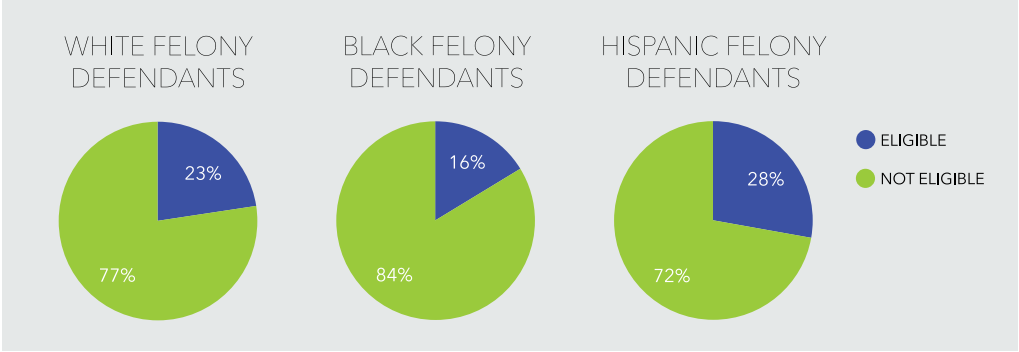
ASIAN DEFENDANTS AND DIVERSION

Only very small percentages of defendants in these four jurisdictions are identified as Asian. They represent 0.6% of defendants in Cook County, 1.9% in Jacksonville, 1.6% in Milwaukee, and 0.7% in Tampa. The small number of Asian defendants makes it difficult to draw conclusions about diversion rates among this group. For example, in Tampa, the bar representing Asian felony defendants who were diverted is high, but there were only 44 Asian felony defendants referred over a 3-year period.



One potential explanation for racial disparities in diversion placement is differences in eligibility—non-White and particularly Black defendants may be less likely to meet the eligibility criteria for particular diversion programs.

To illustrate, one of the diversion programs in Jacksonville is called Felony Pretrial Intervention (FPTI). Supervised by the Florida Department of Corrections, FPTI is designed for defendants who have been charged with a third-degree felony and have previously been convicted of no more than one nonviolent misdemeanor. In Jacksonville, FPTI is typically limited to defendants whose current charge is nonviolent as well. Our estimates show that altogether, these criteria are more likely to exclude Black defendants than White or Hispanic defendants from being eligible for FPTI.³



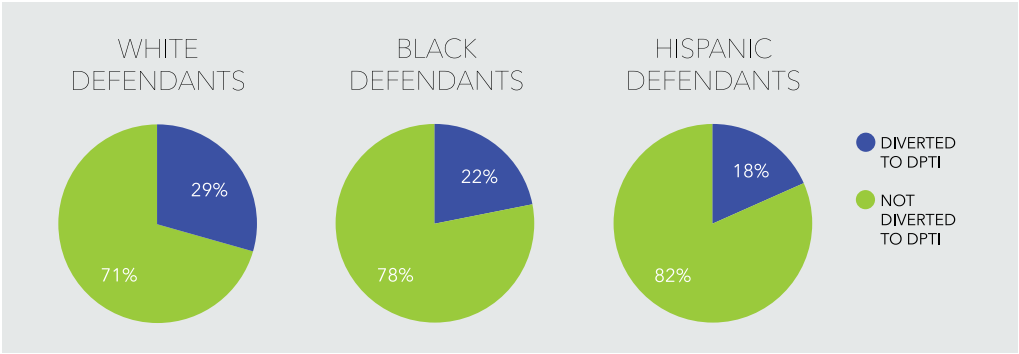
³ Prosecutors may use their discretion to refer defendants to FPTI who are not formally eligible. 32.9% of cases diverted to FPTI do not meet at least one of the eligibility criteria (e.g., 12.3% of FPTI cases were referred to the Jacksonville office as second-degree felonies).

Prosecutorial discretion is another potential source of racial differences in diversion — prosecutors may be more likely to offer diversion to eligible White defendants than to eligible Black defendants. Perceptions of how defendants of different racial or ethnic groups respond to treatment may influence how prosecutors allocate limited diversion resources.

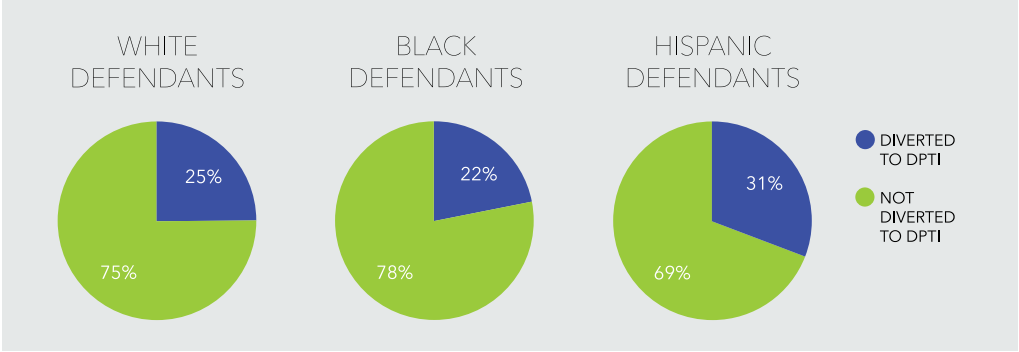
Racial differences in diversion may also be due to differences in which defendants accept the diversion offers given to them by a prosecutor. If White defendants are more likely to accept a prosecutor’s diversion offer, perhaps because they are more able to pay the associated fees, then White defendants will get diverted more often.

It is difficult to distinguish these two possible sources of racial disparity using data from prosecutorial case management systems. However, by comparing diversion rates across racial/ethnic groups in specific subsets of cases that are eligible for diversion, we can get a sense of whether these sources together contribute to racial differences in diversion.

In Tampa, there is a drug pretrial intervention program (DPTI) that is designed primarily for third-degree felony drug defendants with minor or no prior record. When we look at first-time defendants charged with possession of cocaine (all of whom should be eligible for DPTI), we find that a greater percentage of White defendants end up going to DPTI than Black and especially Hispanic defendants.



We see a similar but smaller difference between White and Black defendants when we look at first-time defendants charged with felony possession of cannabis, though Hispanic defendants are now the group most likely to be diverted to DPTI among those eligible.



Racial differences in diversion over time, not accounting for legal and nonlegal factors

Prosecutorial Performance Indicator 7.5 compares the percent of Black and Hispanic defendants diverted to the percent of White defendants diverted. This information is tracked on a monthly basis, allowing the office to see whether racial and ethnic differences exist and to examine the impact of changes in practices or policies on such differences over time.

METHOD NOTE

The graphs starting on page 9 present differences between Black and White defendants and between Hispanic and White defendants in case diversions, broken down by felonies and misdemeanors. In each graph, bars above the zero axis represent a greater percentage of Black or Hispanic defendants getting diverted compared to White defendants. Bars below the zero axis represent a smaller percentage for people of color. Each bar represents one month of data, from January 2017 to December 2019. When reading this section, keep in mind that diversion rates differ substantially across offices.

Diversion Differences by Defendant Race/Ethnicity

| | |
|-------------------|--|
| How it's measured | Percent of filed cases that were diverted, broken down by (a) Asian, (b) Black, (c) Hispanic, and (d) White defendants |
| Data elements | 1. Case filing decision 2. Defendant race/ethnicity 3. Case disposition type 4. Date of case disposition |
| Frequency | Monthly |
| Desired direction | Decrease in racial/ethnic differences |
| Rationale | Diversion programs have become a common alternative to traditional prosecution. Prosecutors should ensure that diversion programs are equally accessible and not excessively burdensome for minority defendants. |

Summary of Trends

Chicago

Racial and ethnic differences in felony diversion are large, with lower diversion rates for Black and Hispanic defendants. Over the three-year period, less than 8% of Black and Hispanic defendants are diverted, compared to 15% of White defendants. However, these differences have shrunk markedly over time, due to increasing diversion rates for Black and Hispanic defendants. In 2019, just over 10% of Black and Hispanic defendants are diverted compared to 15% of White defendants. No data on misdemeanor case outcomes are collected by the Cook County State's Attorney's Office.

Jacksonville

Racial and ethnic differences in diversion are relatively small. Still, Black defendants have lower diversion rates than White defendants among felony cases (across the 36 months, 9% of Black and 11% of White defendants are diverted). Black defendants have increasingly higher diversion rates among misdemeanors. The opposite trend has emerged for Hispanic defendants (although the number of Hispanic defendants is relatively small). Hispanic defendants receive diversion more often than White defendants in felony cases but less often in misdemeanor cases.

Milwaukee

Racial and ethnic differences in diversion rates are very similar to those in Cook County, with Black and Hispanic defendants having lower diversion rates relative to White defendants. Differences are larger for felony cases than for misdemeanor cases, but both are shrinking over time. This is due largely to decreasing diversion rates for White defendants. For example, diversion rates for White felony defendants decline from 16% in 2017 to 7% in 2019; in contrast, during the same period, diversion rates for Black felony defendants decline from 4% to 3% and for Hispanic felony defendants from 6% to 4%.

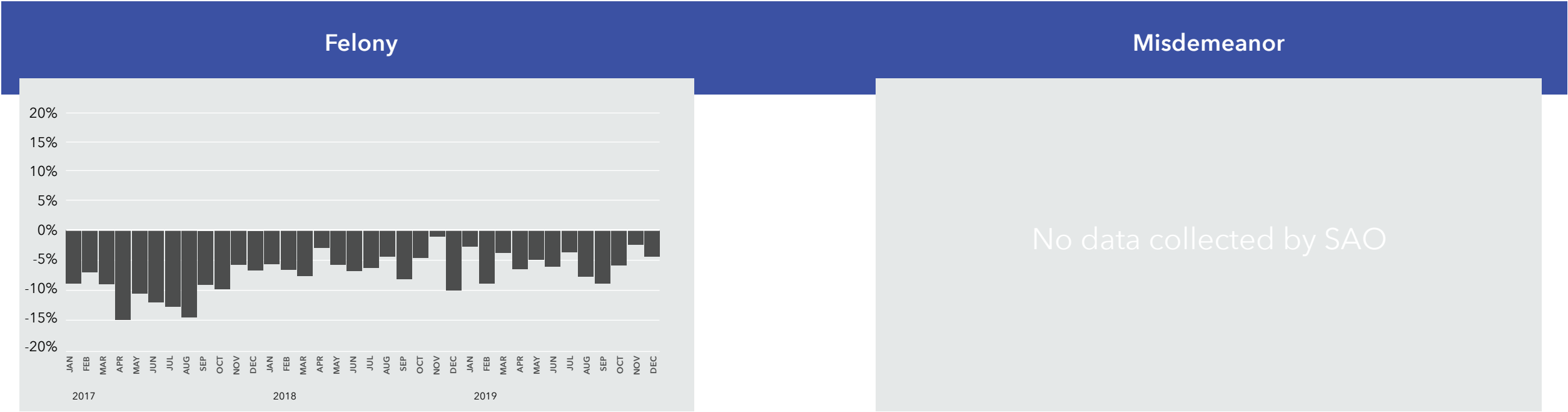
Tampa

Racial and ethnic differences in diversion rates resemble those in Jacksonville. On average over the three-year period, Black felony defendants are diverted at a rate four percentage points lower than White felony defendants (10% of Black and 14% of White defendants diverted), though this difference has shrunk slightly since 2017. Over the three years, Hispanic defendants experience slightly higher diversion rates than White defendants, for both felony and misdemeanor cases. Across all groups, overall differences are minimal among misdemeanor cases.

Next: site-specific trends

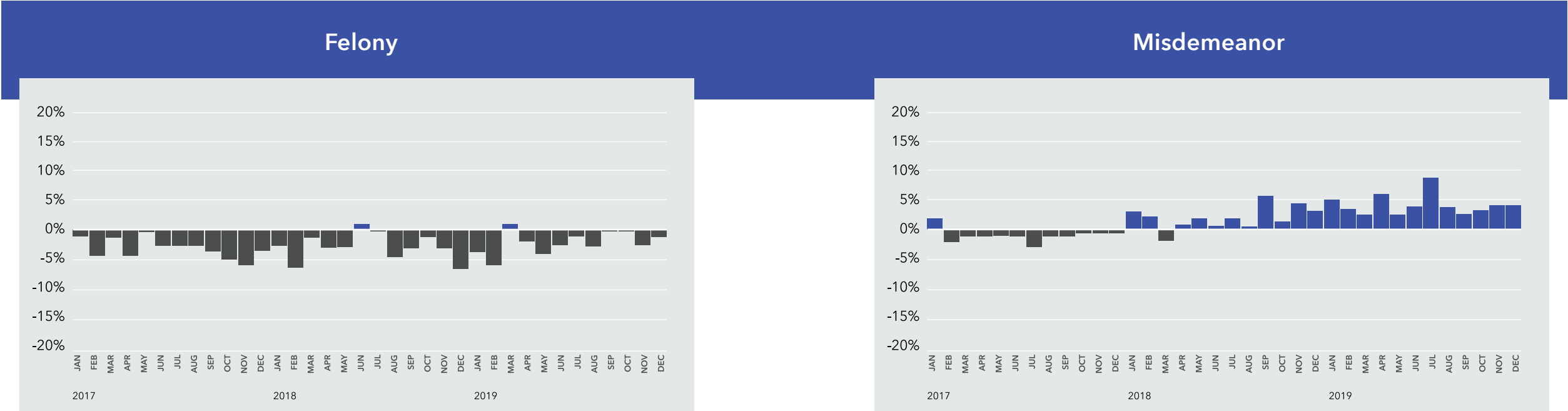
Black as compared to White defendants

CHICAGO

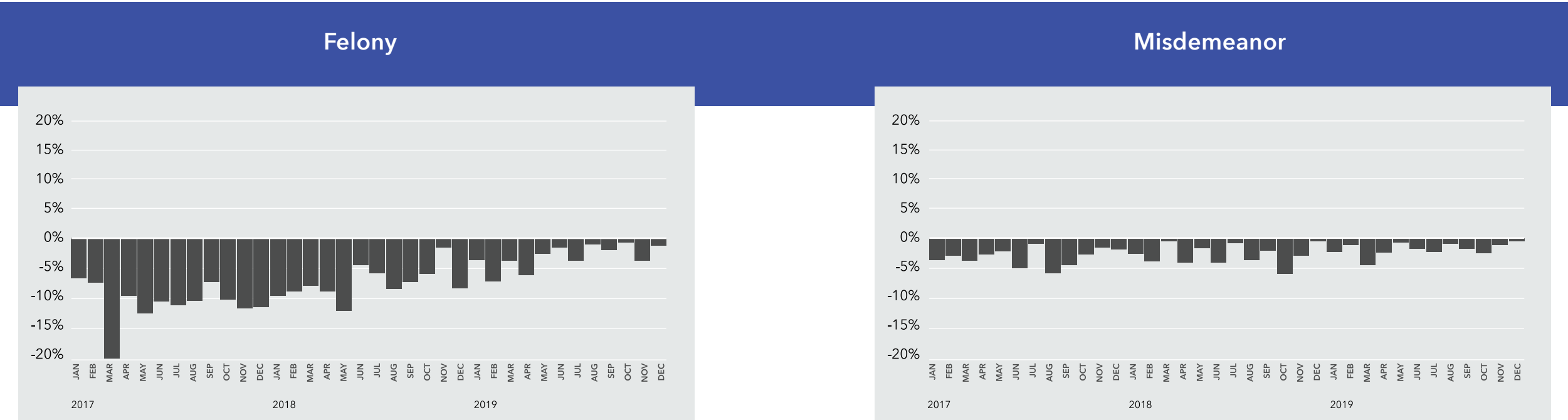


Black as compared to White defendants

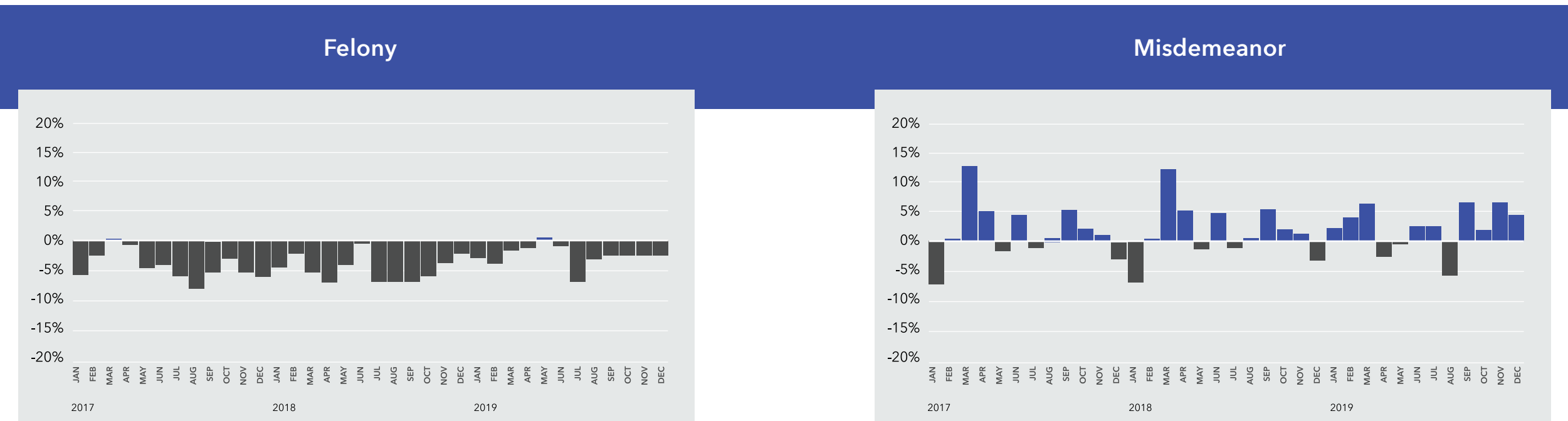
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Black as compared to White defendants
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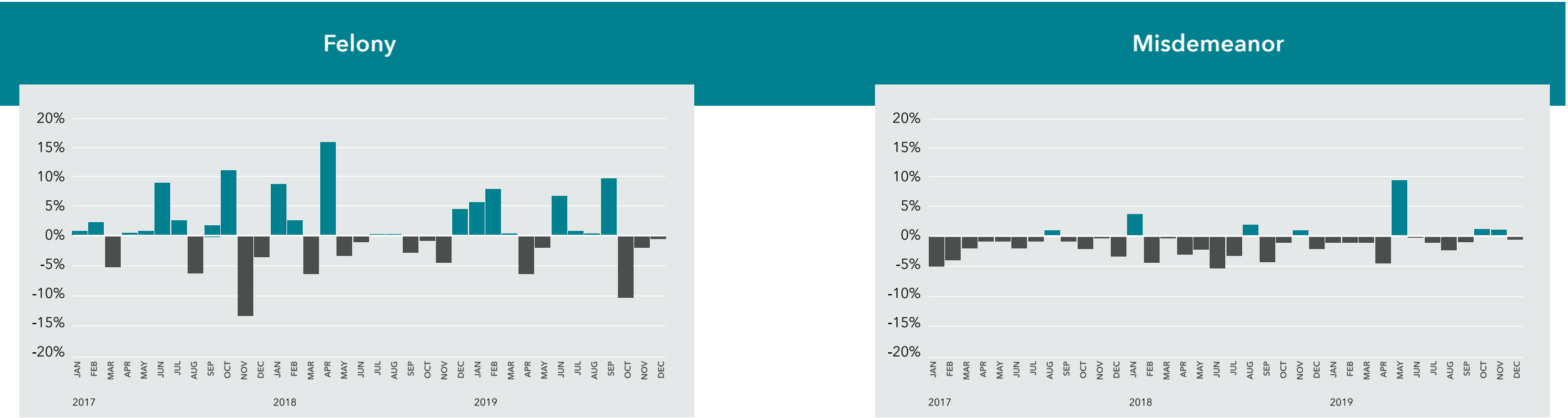
Black as compared to White defendants
TAMPA



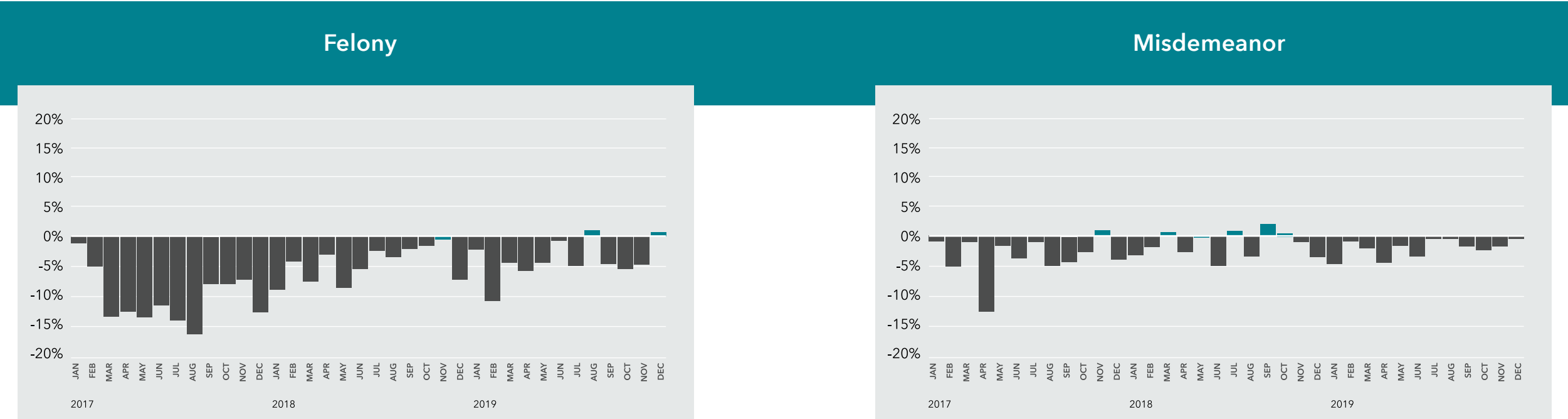
Hispanic as compared to White defendants
CHICAGO



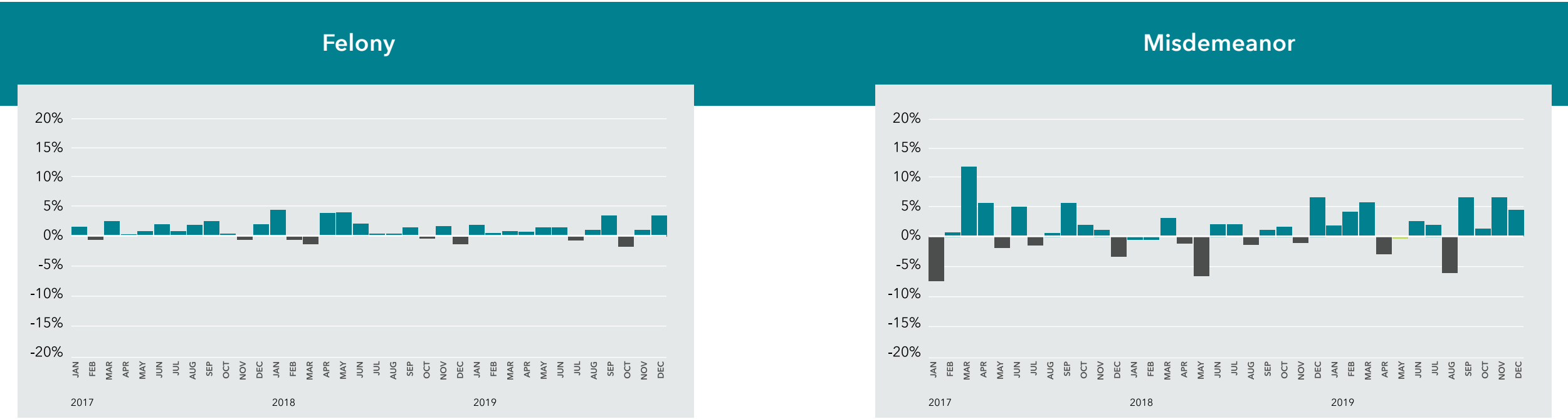
Hispanic as compared to White defendants
JACKSONVILLE



Hispanic as compared to White defendants
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Hispanic as compared to White defendants
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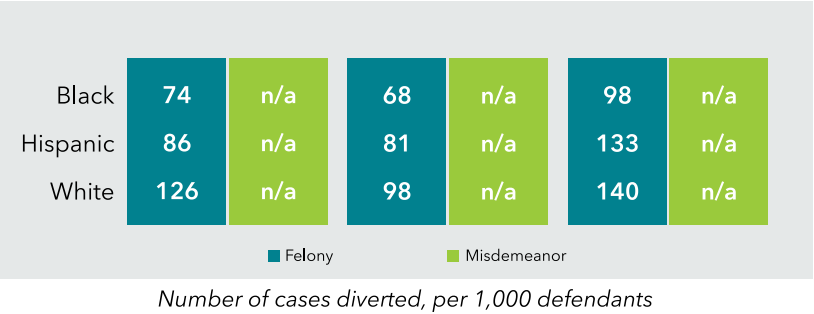
Racial differences in diversion over time, accounting for legal and nonlegal factors

METHOD NOTE

PPIs can also be used to estimate the probability of diversion for different racial and ethnic groups while taking into account various factors. This section presents predicted probabilities of receiving diversion for Black, Hispanic, and White defendants, after accounting for offense type and severity, number of counts charged, criminal history, probable cause arrest, defense counsel type, and defendant age and gender. In Chicago, only felony data are available. In Chicago and Tampa, probabilities are calculated using all cases filed, while in Jacksonville and Milwaukee, probabilities are calculated using all cases referred by law enforcement. As such, comparisons across years are more meaningful than comparisons across jurisdictions.

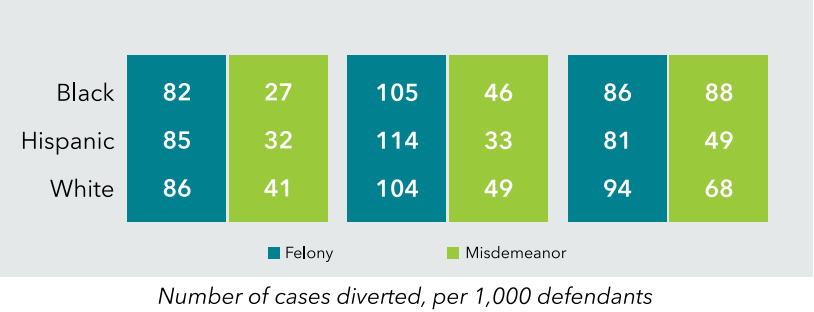
Chicago

There are clear racial differences in diversion patterns among felony cases over time. After accounting for various legal and demographic factors, Black and Hispanic defendants are consistently less likely to receive diversion compared to White defendants, with Black defendants the least likely to receive diversion. Although diversion rates for Black and Hispanic defendants increase through 2019, by 2019, roughly 98 Black defendants are diverted for every 1,000 cases initiated, compared to 133 Hispanic defendants and 140 White defendants.



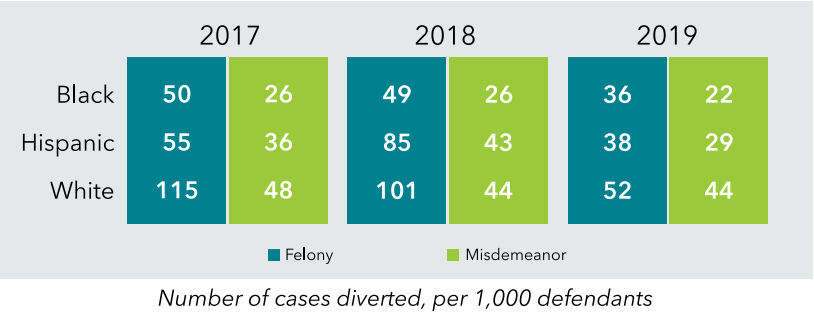
Jacksonville

There are no apparent racialized patterns in diversion among felony cases over time. However, consistent with PPI data from the previous section, after accounting for various legal and demographic factors, Black defendants grow increasingly more likely to receive diversion in misdemeanor cases compared to White and Hispanic defendants. By 2019, for every 1,000 Black defendants who have a misdemeanor case referred for prosecution, 88 receive diversion (comparable probabilities for Hispanic and White defendants are 49 and 68, respectively).



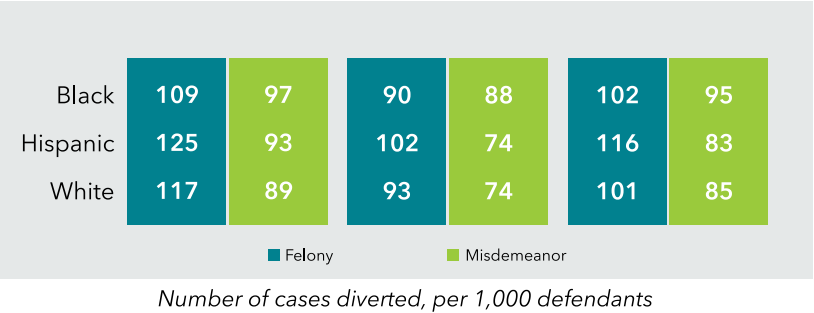
Milwaukee

Among both felony and misdemeanor cases, White defendants are consistently more likely to be diverted than Black and Hispanic defendants after controlling for various legal and demographic factors. However, as case rejection rates increased from 2017 (43%) to 2019 (47%) among felony cases, felony diversion rates decreased, especially for White defendants. In 2017, 115 White felony defendants per 1,000 were diverted, but by 2019, this number had dropped to 52. Misdemeanor diversion rates and disparities have stayed consistent over time.



Tampa

Among felony cases, differences in the probability of receiving diversion between Black and White defendants have gotten smaller over time. Hispanic defendants are consistently the most likely group to be diverted. By 2019, for every 1,000 felony cases filed for Hispanic defendants, 116 receive diversion (comparable probabilities for Black and White defendants are 102 and 101, respectively) even after accounting for various legal and nonlegal factors. Among misdemeanors, Black defendants are the most likely group to be diverted each year.



How Can We Ensure Equitable Diversion Decisions

Recommendation 1: Collect data

All prosecutorial offices should collect data on diversion for both felony and misdemeanor cases. At a minimum, capture 1) whether each defendant is eligible for a diversion program, 2) whether the defendant was offered diversion and how it was communicated, 3) whether the diversion offer was accepted or rejected by the defendant, and 4) whether the defendant completed the diversion program. Keep track of when these events occur, and also consider systematically capturing the reasons why defendants decline diversion offers or are unable to complete diversion programs. By collecting data to create PPIs, the four partner sites have been able to identify disparities in diversion rates across racial and ethnic groups and have begun addressing them.

Recommendation 2: Conduct research

More research is needed to understand how diversion programs are used in prosecutorial offices. Document how offices decide which diversion program to adopt, set eligibility criteria, and match defendants to the right programs. Evaluate what factors contribute to successful completion in diversion programs, and which programs are most successful for specific populations (e.g., women, religious minorities, LGBTQ individuals). Incorporate the voices of individuals who accepted or declined diversion offers, as well as survivors of crime. Given that most prosecutorial offices do not have the capacity to do this research, consider hiring a research associate or partnering with a local researcher.

Recommendation 3: Reconsider prior record

Prior records disqualify defendants from many diversion programs, but individuals of different racial and ethnic groups do not accumulate prior records the same way. Heavy policing in minority neighborhoods triggers more arrests and convictions, which disadvantage Black and Brown people in any subsequent cases they may have. Instead of over-relying on prior record, consider the racial impact that criminal history has on diversion and other prosecutorial decisions. Do not allow old and non-violent convictions, or prior arrests that did not result in conviction, to disqualify defendants from diversion.

Recommendation 4: Consider the racial impact of diversion programs

When adopting new diversion programs, be thoughtful about their anticipated racial impact. Adopt diversion programs that help reduce racial disparities by disproportionately benefiting low-income, underserved communities. For example, using PPI 7.5, Jacksonville has been able to track the marked shift in racial disparities in misdemeanor diversion rates over time. This is primarily due to the adoption of a large diversion program — KEYS 2 Drive — addressing those whose driver’s license has been suspended due to unpaid fines or fees. Over 70% of referrals to KEYS 2 Drive involve Black defendants.

Recommendation 5: Decline rather than divert

Reducing the size of the criminal justice footprint requires bold decisions. If a case is dismissible for evidentiary or other reasons, don’t divert it. Reject or dismiss it. Diversion is preferable to prosecution in most cases, but it does not guarantee successful completion and may ultimately lead to conviction. Use diversion for defendants who could benefit from diversion programming and avoid a criminal record. As data from Milwaukee show, net widening can be prevented by rejecting or dismissing more cases and using diversion less often. With reduced enrollment in diversion programs, fewer people are affected by racial disparities in diversion completion.

The above recommendations are complementary; as such, offices should consider adopting them jointly. They are not exhaustive, however, and each jurisdiction should come up with additional strategies, informed by research, to improve diversion decisions and outcomes. We know, for example, that many programs have entry fees which pose a significant burden for defendants’ families. Reducing or eliminating such fees would improve the chances of diversion completion,

especially for low-income people. In certain cases, individuals may also face marked challenges when accessing physical locations of diversion programs. Using new technologies—such as online meeting platforms or apps — can help overcome this challenge. Our goal is to continue providing empirical evidence to inform policies and practices toward more equitable and effective decision making about prosecutorial diversion.

This report is part of the [Prosecutorial Performance Indicators](#) (PPIs), which is a research and technical assistance project launched in 2017 by researchers from Florida International University and Loyola University Chicago. The project supports local prosecutors to build data and analytical capacity, examine and address racial and ethnic disparities, and produce public-facing dashboards. PPIs are an office management, performance measurement, community engagement, and transparency and accountability tool. With a menu of 55 indicators, PPIs measure performance toward three goals: Capacity & Efficiency, Community Safety and Well-being, and Fairness and Justice.

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About Florida International University

Florida International University is Miami's only public research university. Designated a top-tier research institution, FIU emphasizes research as a major component in its university mission. FIU is among the top 10 largest universities in the nation. Of its 54,000 students, 67% are Hispanic, and 12% are Black. This project is housed in the Department of Criminology and Criminal Justice, and the Center for the Administration of Justice, which are part of the Steven J. Green School of International and Public Affairs.

About Loyola University Chicago

Loyola University Chicago is one of the nation's largest Jesuit, Catholic Universities. Loyola's mission is to expand knowledge in the service of humanity through learning, justice, and faith. This includes a profound commitment to the poor, to issues of social responsibility and justice, and to service that promotes truth and care for others. This project is housed in the Department of Criminal Justice and Criminology, and the Center for Criminal Justice Research, Policy, and Practice.