

Memorandum

To: APAAC Council Members

From: Elizabeth Ortiz

Re: Proposed Revision to Deferred Prosecution Guidelines

Date: August 2, 2011

Pursuant to A.R.S. section 11-362, APAAC is responsible for establishing the deferred prosecution guidelines used by the county attorney offices. It has been a number of years since the current guidelines have been reviewed and revised. Therefore, APAAC staff undertook a comprehensive review, and prepared revised guidelines that reflect the current statutes and also modified certain procedural aspects of the program.

APAAC staff is requesting that the Council review the proposed changes, and provide feedback to and/or approve the proposed guidelines at the September 30, 2011, Council meeting. In addition, APAAC staff seeks direction from the Council regarding whether the responsibility under A.R.S. section 11-362(B) to maintain statistical records and submit an annual program evaluation to the president of the senate and the speaker of the house of representatives should be delegated to APAAC.

Attached please find for review: (1) the relevant Arizona statutes; (2) the current deferred prosecution guidelines; and (3) the proposed revision to the guidelines.

The following is a summary of the recommended changes to the guidelines:

- General objective number five of the current guidelines notes that the program is geared toward diversion of non-violent and “selected situational defendants”. The latter group was modified to limit such defendants to those “unlikely to reoffend” to keep the selection in line with the previous four program objectives and to prevent arbitrary referrals.
- The list of crimes involving knowing or intentional infliction of serious bodily injury or death and use or exhibition of a deadly weapon or dangerous instrument was updated.
- In order to comply with victims’ rights, the county attorney must notify the victim that the defendant will be referred to diversion, a victim/defendant meeting is only permitted upon the victim’s agreement, and program participants must now pay restitution in full before being successfully terminated from the program.
- Candidate evaluation now includes a determination of the availability of the resources needed to address the defendant’s personal, social and welfare needs in order to maximize the program’s effectiveness.

- The process by which a defendant is unsuccessfully terminated from the program is simplified, giving each county more flexibility to determine what process is due to a non-compliant defendant. Previously, the guidelines required the county attorney to give a defendant a termination hearing before a court officer before prosecution is resumed. Neither the applicable statute nor court rule mandates this hearing. Rule 38.2(a) suggests that the prosecutor has sole discretion to determine whether the defendant has fulfilled the conditions of the program. Accordingly, the section was revised to require termination under four basic scenarios (program rejection, defendant's withdrawal from or failure to timely complete the program, and recidivism). Termination for failure to comply with a program condition or obligation is within the county attorney's discretion after the defendant has been given notice of the alleged violation and the opportunity to respond.
- The section regarding annual requests for funding has been removed.

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

DEFERRED PROSECUTION GUIDELINES

INTRODUCTION

The concept of formalizing the prosecutor's discretion to seek non-adversary alternatives to the disposition of criminal cases had been first promulgated nationally by the President's Commission on Law Enforcement and the Administration of Justice in their 1967 report. Thereafter, the National District Attorney's Association, American Bar Association, American Correctional Association, National Council on Crime and Delinquency, National Advisory Commission on Criminal Standards and Goals and the Arizona Legislature have endorsed the concept. Presently, there are growing numbers of politicians, academicians, practitioners, and lay residents advocating an expansion of diversion.

There are numerous reasons why diversion programs were instituted. The following reasons are those most salient as far as the Criminal Justice System is concerned: the criminal court dockets have been extremely overloaded; the jails and prisons have been overcrowded and inadequate; the rehabilitation programs in most correctional agencies have been unsuccessful in attaining their goals; the prosecutors', public defenders', and probation officers' caseloads have substantially grown and the financial cost to the taxpayers to operate the Criminal Justice System has increased to an exorbitant amount.

GENERAL

Pursuant to A.R.S. § 11-362(A) the following guidelines for the conduct of deferred prosecution programs within the State of Arizona are hereby promulgated. The guidelines are intended to provide minimum standards for the conduct of the programs. Nothing contained

herein should be interpreted so as to prevent any individual county attorney from adding provisions which make the program in his county more restrictive.

The overall objectives and goals of the Deferred Prosecution Program are:

1. to remove from the traditional system of adversary trial those accused of criminal acts who do not contest their guilt and who are likely to benefit from an effective community-based program of habilitation;
2. to remove non-adversary cases from the traditional Criminal Justice system so that the courts may give more prompt and efficient attention to cases which must be tried and to defendants whose presence in the community pose a serious threat;
3. to eliminate a criminal conviction upon defendants who are able to demonstrate the desire and willingness to participate in the habilitation program, thus better equipping them to compete for satisfactory employment, cope with personal problems, and other benefits important to their full habilitation;
4. to curtail the substantial time delay between apprehension and treatment for certain situational defendants, as is often not the situation with cases processed through the court system; and
5. to diminish the high costs of prosecuting a defendant through the traditional criminal justice process by channeling the non-violent, and selected situational defendants via the diversion process.

PROGRAM CRITERIA FOR ACCEPTANCE

Defendants targeted for felony diversion are those persons charged with a felony offense whose suspected offense does not present a "continuing pattern of anti-legal behavior."

While the Program is basically a habilitation endeavor, the primary and overriding concern of the Program is public safety. Individuals charged with having committed the following offenses are automatically excluded from acceptance into the Deferred Prosecution Program.

CRIMES INVOLVING KNOWING OR INTENTIONAL INFLICTION SERIOUS BODILY INJURY

§ 13-1103(A) (2) (4) Manslaughter [(1) is recklessly and (3) is intentionally aiding a suicide]

13-1104	Second degree murder
13-1204	Aggravated assault
13-1205	Unlawfully administering drugs.
13-1206	Dangerous or deadly assault by prisoner
13-1304	Kidnapping
13-1406	Sexual assault
13-1410	Molestation of child
13-1411	Crime against nature [Under 15]
13-1412	Lewd and lascivious [Under 15]
13-1902	Robbery
13-1903	Aggravated robbery

13-1904	Armed robbery
13-2502	Third degree escape
13-2503	Second degree escape
13-2504	First degree escape
13-2903	Riot
13-3603	Abortion
13-3704	Adding poison, etc. to food, etc.
28-622.01	Felony flight if serious injury involved

CRIMES INVOLVING USE OF EXHIBITION DEADLY WEAPON /
DANGEROUS INSTRUMENT

13-1102	Negligent homicide
13-1103	Manslaughter
13-1104	Second degree murder
13-1105	First degree murder
13-1201	Endangerment
13-1206	Dangerous or deadly assault by prisoner
13-1304	Kidnap
13-1406	Sexual assault
13-1508	First degree burglary
13-1702	Reckless burning [Occupied Structure]
13-1704	Arson of an occupied structure
13-1904	Armed robbery

13-2504	First degree escape
13-3102(A)(3-7)	Misconduct involving weapons
13-3104	Depositing explosives
13-3708	Introducing weapon into juvenile correctional institute

In addition to the foregoing automatic exclusions, no person who has been previously convicted of a felony shall be admitted to the program; nor shall any person who has previously been admitted to the program, whether completed successfully or unsuccessfully, be again admitted to such program. All programs shall be operated in conformance with Rule 38 of the Arizona Rules of Criminal Procedure as promulgated by the Arizona Supreme Court.

SUGGESTED PROGRAM CONTENT

The structure and scope of each county's program will be governed by the financial and community resources available.

Every effort should be made to provide the following components in each program:

1. Supervision: A client should be seen by his/her counselor on a weekly basis for the first three months of his/her program. In addition, each client should be re-assessed on a quarterly basis to determine the type of supervision necessary. During these visits, a counsel should provide assistance and support.
2. Referral to Manpower Services: Any client in need of training, job upgrading or more education should be referred to a Community Manpower Program.
3. Restitution: Part of any client's program should be the payment of restitution equal to the victim's loss.

4. Victim-Defendant Meeting: Whenever possible, a meeting should be set for the victim to meet the defendant and deal directly with issues surrounding the offense.

5. Community Service Work: All participants should be expected to perform a minimum of forty (40) hours of voluntary community service work.

6. Utilization of Existing Community Resources: The diversion staff should develop contacts with related social service agencies and make appropriate referrals to mental health, welfare, financial, alcohol or employment agencies.

Screening Guidelines

- A. All recommendations for deferred prosecution shall originate in the County Attorney's Office;
- B. Referrals will be made only when the County Attorney believes that the facts of the case are sufficient to secure a conviction;
- C. A complete record check, including ACIC and NCIC, will be made on all candidates;
- D. The program staff will evaluate each candidate to determine:
 - 1. The defendant's culpability in the charged offense;
 - 2. The extent of involvement in anti-legal behavior;
 - 3. Risk of re-arrest;
 - 4. The personal, social, and welfare needs of the defendant;
 - 5. Whether or not the defendant is likely to benefit from a community based habilitation program; and
 - 6. Proposed treatment plan.

Courtesy Supervision

- A. If the offender is a resident of another county with a deferred prosecution program, courtesy supervision may be arranged by mutual agreement.
- B. The originating county will maintain jurisdiction over the defendant.
- C. Full disclosure through a bi-lateral release of confidential information will be made between the cooperating counties.
- D. The originating county will establish a treatment plan as well as the conditions and obligations of participation before a defendant is transferred to another county for courtesy supervision.
- E. Changes in treatment plans will be made through consultation between the cooperating programs.
- F. The supervising county will make appropriate referrals to community agencies to meet the conditions and obligations of participation.
- G. The supervising county will monitor the defendant's progress and will report quarterly to the originating county.

Suspension of Prosecution

Pursuant to Rule 38, the defendant, with consent of counsel, shall complete a Consent to Participate in Diversion and a Waiver of Speedy Trial when he is referred to the deferred prosecution program. These forms and a Motion for Suspension of Prosecution will be submitted by the County Attorney to the Superior Court which will suspend prosecution for a

period of two (2) years.

Termination Procedures

- A. Successful Termination: When the defendant completes the terms and obligations of the deferred prosecution program, the County Attorney will file a Motion to Dismiss with Prejudice.
- B. Unsuccessful Termination:
 - 1. If the defendant is not accepted into the Program, or withdraws after the Suspension of Prosecution, the County Attorney will file a Motion to Vacate Suspended Prosecution in Superior Court and notify the defendant and his attorney of this action. Prosecution will resume at the point of suspension within ninety (90) days from the date of the Order to Vacate Suspended Prosecution.
 - 2. Re-arrest or non-compliance with the conditions and obligations of the deferred prosecution program shall compel a termination hearing to determine whether or not the defendant has violated the voluntary conditions of the program and therefore should be returned to the court system to face the original charge.
 - a. The defendant and his attorney will

be notified of the alleged violation and of the scheduled date of the termination hearing.

- b. The County Attorney will designate a Hearing Officer to conduct the proceedings and to recommend either continuation in the program, modifications of the program, or unsuccessful termination.
- c. If the defendant is unsuccessfully terminated, the County Attorney will file a Motion to Vacate Suspended Prosecution in Superior Court and notify the defendant and his attorney of his action. Prosecution will resume at the point of suspension in either Justice Court or Superior Court and trial will begin within ninety (90) days from the date of the Order to Vacate Suspended Prosecution.

Reporting

"The County Attorney of any County that has established a program shall establish and maintain statistical records pertaining to the program and shall annually submit an evaluation of the program to the President of the Senate and Speaker of the House of Representatives."

Evaluations forwarded to the Arizona Prosecuting Attorneys' Advisory Council will include:

- A. Basic demographic data on all defendants referred to the program;
- B. Records of acceptances and rejections;
- C. Data on successful and unsuccessful completions;
- D. Compilation of offenses;
- E. Policies and Procedures; and
- F. An assessment of the impact of the deferred prosecution program on the criminal justice system and on the offenders.

Annual Requests for Funding

"On or before October 7, each county board of supervisors shall, by resolution, notify the state treasurer of its establishment of a program defined in § 11-361 and the amount of county funds budgeted for such a program. The state treasurer shall, upon receipt of such resolution, certify the list of counties which have voted to establish a program and shall use each county's budgeted amount to determine such county's matching fund grant pursuant to § 11-364, subsection B. The treasurer shall allocate the state funds in such amounts as provided in § 11-364, (sic) to the participating counties on or before October 31."

Deferred Prosecution Statutes

11-361. Definition of program

For the purposes of this article, unless the context otherwise requires, "program" means a special supervision program in which the county attorney of a participating county may divert or defer, before a guilty plea or a trial, the prosecution of a person who is accused of committing a crime, except that the county attorney may not divert or defer the prosecution of a person who:

1. Has been previously convicted of a felony.
2. Is accused of committing a felony involving a dangerous offense as defined in section 13-105.
3. Has previously completed a program established pursuant to this article.

11-362. Deferred prosecution program; administration; guidelines; records

A. The program, as defined in section 11-361, shall be administered by the county attorney of each participating county according to guidelines established by the Arizona prosecuting attorneys' advisory council.

B. The county attorney of any county that has established a program shall establish and maintain statistical records pertaining to the program and shall annually submit an evaluation of the program to the president of the senate and the speaker of the house of representatives.

11-365. Diversion and deferred prosecution of offenders

The county attorney has sole discretion to decide whether to divert or defer prosecution of an offender. This section does not preclude the ability of another prosecuting agency to divert or defer the prosecution of an offender as otherwise provided by law.

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
DEFERRED PROSECUTION GUIDELINES

DRAFT

August 2, 2011

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CRIMES INVOLVING KNOWING OR INTENTIONAL INFLICTION OF SERIOUS PHYSICAL INJURY OR DEATH

A.R.S. § 13-1103(A) (2)-(5)	Manslaughter
13-1104	Second degree murder
13-1105	First degree murder
13-1204(A)(1),(3),(7)	Aggravated assault
13-1206	Dangerous or deadly assault by prisoner
13-1304(A)(3)	Kidnapping
13-1406	Sexual assault
13-1410	Molestation of child
13-2308(A)(2)	Participating in or assisting a criminal syndicate
13-2321(A)(2)	Participating in or assisting a criminal street gang
13-2504	First degree escape
13-2903	Riot
13-3623(A)(1)	Child or vulnerable adult abuse
28-622.01	Felony flight if serious injury involved

CRIMES INVOLVING USE OR EXHIBITION OF A DEADLY WEAPON OR DANGEROUS INSTRUMENT

A.R.S. § 13-1102	Negligent homicide
13-1103	Manslaughter
13-1104	Second degree murder
13-1105	First degree murder
13-1201	Endangerment
13-1204	Aggravated Assault
13-1206	Dangerous or deadly assault by prisoner
13-1209	Drive-by shooting

13-1211	Discharging a firearm at a structure
13-1304	Kidnapping
13-1508	First degree burglary
13-1702	Reckless burning
13-1704	Arson of an occupied structure
13-1904	Armed robbery
13-2308.01	Terrorism
13-2504	First degree escape
13-2505	Promoting prison contraband (class 2 felony)
13-2514	Promoting secure care facility contraband (class 2 felony)
13-3102	Misconduct involving weapons
13-3104	Depositing explosives
13-3107	Unlawful discharge of firearms
13-3117(A)(2)	Use of a remote stun gun
13-3119	Misconduct involving weapons in an airport
28-622.01	Felony flight if serious injury involved
28-661(B)	Accidents involving death or personal injuries
28-672	Causing serious physical injury or death by a moving violation
28-675	Causing death by use of a vehicle
28-676	Causing serious physical injury by use of a vehicle

In addition to the foregoing automatic exclusions, no person who has been previously convicted of a felony shall be admitted to the program; nor shall any person who has previously been admitted to the program, whether completed successfully or unsuccessfully, be again admitted to such program. All programs shall be operated in conformance with Rule 38 of the Arizona Rules of Criminal Procedure as promulgated by the Arizona Supreme Court.

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2. Referral to Manpower Services: Any client in need of training, job up-grading or education should be referred to an appropriate community manpower program.
3. Restitution: Part of any client's program should be the payment of restitution equal to the victim's loss. A client must pay restitution in full before successful termination from the deferred prosecution program.
4. Victim-Defendant Meeting: Whenever possible, and only if the victim agrees, a meeting should be set for the victim to meet the defendant and deal directly with issues

surrounding the offense.

5. Community Service Work: All participants should be expected to perform a minimum of forty (40) hours of voluntary community service work.

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- C. A complete record check, including ACIC and NCIC, will be made on all candidates;
- D. Prior to commencement of the program, program staff must evaluate each candidate to determine:
 - 1. The defendant's culpability in the charged offense;
 - 2. The extent of involvement in illegal behavior;
 - 3. The risk of re-arrest;
 - 4. The personal, social, and welfare needs of the defendant;
 - 5. Whether or not the defendant is likely to benefit from a community based habilitation program;
 - 6. The availability of the resources needed to address the defendant's personal, social and welfare needs, and
 - 7. A proposed treatment plan.

Courtesy Supervision

- A. If the offender is a resident of another county with a deferred prosecution program, courtesy supervision may be arranged by mutual agreement.
- B. The originating county will maintain jurisdiction over the defendant.
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and obligations of participation before a defendant is transferred to another county for courtesy supervision.

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Termination Procedures

- A. **Successful Termination:** When the defendant completes the terms and obligations of the deferred prosecution program, including restitution (if any), the County Attorney will file a Motion to Dismiss with Prejudice.
- B. **Unsuccessful Termination:**
 - 1. The County Attorney shall unsuccessfully terminate the defendant from the deferred prosecution program if the defendant:
 - a. Is not accepted into the program;
 - b. Withdraws after the suspension of prosecution;
 - c. Is arrested for a new offense while in the program, or;
 - d. Fails to substantially complete the terms and conditions of the program within twenty-one (21) months of the court order suspending prosecution.
 - 2. If the defendant's program supervisor reports to the County Attorney that the defendant has not complied with the conditions and obligations of the deferred prosecution program, the defendant shall be notified of the violation(s) and given the opportunity to respond before the County Attorney unsuccessfully terminates the defendant from the program. If the defendant fails to respond within 14 days or the County Attorney is not satisfied that the defendant has fulfilled the conditions of the program, the County Attorney may unsuccessfully terminate the defendant from the program.

If the defendant is unsuccessfully terminated, the County Attorney will file a Motion to Vacate Suspended Prosecution in Superior Court and notify the defendant and his attorney of his action. Prosecution will resume at the point of suspension in either Justice Court or Superior Court and trial will begin within ninety (90) days from the date of the Order to Vacate Suspended Prosecution.

Reporting

"The County Attorney of any County that has established a program shall establish and maintain statistical records pertaining to the program and shall annually submit an evaluation of the program to the President of the Senate and Speaker of the House of Representatives." A.R.S. § 11-362.

Evaluations forwarded to the Arizona Prosecuting Attorneys' Advisory Council will include:

- A. Basic demographic data on all defendants referred to the program;
- B. Records of acceptances and rejections;
- C. Data on successful and unsuccessful completions;
- D. Compilation of offenses;
- E. Policies and Procedures; and
- F. An assessment of the impact of the deferred prosecution program on the criminal justice system and on the offenders.