

COMPREHENSIVE SENTENCING TASK FORCE

Diversion Working Group

RECOMMENDATION PRESENTED TO THE CCJJ
November 9, 2012

FY13-CS #4 Expand the availability of adult pretrial diversion options within Colorado's criminal justice system.

Recommendation FY13-CS#4:

The Comprehensive Sentencing Task Force recommends enhancing the availability of pretrial diversion options throughout the state, as well as developing appropriate funding alternatives, by:

1. Replacing the existing deferred prosecution statute (C.R.S. 18-1.3-101) with the three statutory sections proposed below.
2. Amending the Victim's Rights Act to ensure victims are able to provide input to the pretrial diversion decision.

Discussion:

Diversion is a voluntary alternative to criminal adjudication that allows a person accused of a crime to fulfill a prescribed set of conditions or complete a formal program designed to address, treat, or remedy issues related to or raised by the allegation. Upon successful completion of the conditions or program, the charges against the defendant are dismissed or not filed.¹ Goals of diversion include, but are not limited to:

- preventing defendants from committing additional criminal acts;
- restoring victims of crime;
- assisting district attorneys' offices, courts, detention facilities, and the state public defender by reducing the number of cases within the criminal justice system; and
- limiting defendants' penetration into the criminal justice system.²

¹ There is no universally accepted definition of diversion. The definition here is drawn from the National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Diversion/Intervention*, standard 1.1 (2008) [hereinafter NAPSA standards], as well as a draft of the ABA Diversion Standards (publication pending).

² Different organizations assign different goals to diversion. The four goals listed here, however, are widely accepted. They are consistent with the stated goals of programs currently operating in Colorado's first and seventeenth judicial districts, as well as the National District Attorneys Association, *National Prosecution Standards* 55 (3d ed.) [hereinafter NDAA standards], and NAPSA standard 1.2.

In Colorado, “deferred prosecution” and “deferred sentencing” are both currently permitted by statute. The deferred sentencing option requires a defendant to enter a guilty plea and the punishment, or sentence, is then suspended for a period of time.³ Provided the defendant successfully completes certain requirements of the deferred sentencing, the charge is subsequently dismissed. Deferred sentencing is a well-accepted and frequently employed option, and thus is not the focus here.

Deferred prosecution, as it exists under current law, is a form of pretrial diversion where prosecution of the offense is deferred for a period of time and then dismissed if the defendant satisfactorily completes supervision.⁴ This option is rarely used in Colorado.⁵ Although it is difficult to pinpoint precisely why deferred prosecution is seldom employed, commonly expressed reasons include:

- district attorneys do not have the resources to screen defendants for deferment, implement a deferment agreement, and then monitor defendants for compliance;
- the ability to follow through with prosecution is impeded by fading memories, scattering witnesses, and other practical impediments to gathering evidence when prosecutorial action on an offense is delayed; and
- there is little motivation for prosecutors to make it available because deferred prosecution inures solely to the benefit of defendants.

This recommendation is an effort to address those concerns. It would replace the presently existing deferred prosecution statute, and strives to facilitate diversion of appropriate defendants in a way that is:

- more readily available to criminal justice practitioners statewide;
- more beneficial to prosecutors; and
- more consistent with the long-term rehabilitation and recidivism reduction of individual defendants.

The recommended statutory changes are intended to operate simply and flexibly. District attorneys can agree to divert a defendant at any point before plea or trial, including before charges are filed. They can preserve their ability to reinstate prosecution by requiring a signed “statement of facts” upon which the allegation is based. The terms of a diversion agreement can restore victims and require defendants to address criminogenic needs.

³ See § 18-1.3-102, C.R.S. 2011.

⁴ See § 18-1.3-101, C.R.S. 2011.

⁵ Statistics provided by the Colorado Judicial Branch, Division of Planning and Analysis, indicate that in FY 2011, approximately 0.5% of misdemeanor cases (216 of 42,590) and 1.7% of felony cases (484 of 28,536) received a court-involved deferred prosecution.

Compliance with the agreement can be monitored and enforced by any approved entity, including, but not limited to, diversion programs run by district attorneys' offices, law enforcement agencies, and pretrial service organizations. Alternatively, a diversion agreement may be filed with a court, thus allowing the defendant to be ordered to the supervision of the Probation Department. If the agreement is successfully completed, the defendant is returned to the same legal status as if the offense had never occurred.

Pretrial diversion is intended to increase the available options for resolution after a crime has occurred. Prosecutors will have the discretion to pursue diversion, deferred sentencing, a traditional plea, or a jury trial. As explained below, that decision will be based upon the nature of the offense, the characteristics of the offender, and the interests of the public.

To further encourage the expansion and use of diversion programs, CCJJ recommends that cost-savings associated with FY13-CS#1 (regarding the reclassification of various theft offenses) be used for that purpose consistent with this recommendation.

This recommendation seeks to improve public safety by allowing people accused of a crime to take responsibility for their mistakes while limiting the collateral consequences that accompany a criminal record.

Proposed Statutory Change #1:

18-1.3-101. Pretrial Diversion Authorized.

(1) The intent of this section is to facilitate and encourage pretrial diversion when diversion is consistent with preventing defendants from committing additional criminal acts, restoring victims of crime, and reducing the number of cases in the criminal justice system. Diversion strives to ensure defendant accountability while allowing defendants to avoid the stigma and collateral consequences associated with criminal charges and convictions.⁶

(2) Except as otherwise provided in section 18-6-801(4), in any case, either before or after charges are filed, with the consent of the defendant and the prosecution, prosecution of the offense may be diverted for a period not to exceed two years. The period of diversion may be extended for an additional time up to one year if the failure to pay restitution is the sole condition of supervision which has not been fulfilled, because of inability to pay, and the defendant has shown a future ability to pay. During that time the defendant may be placed under the supervision of the probation department or a diversion program approved by the district attorney.⁷

(3) Each district attorney shall adopt policies and guidelines delineating eligibility criteria for pretrial diversion,⁸ and may agree to diversion in any case in which there exists sufficient admissible evidence to support a conviction.⁹ In determining whether an individual is appropriate for diversion, the district attorney shall consider:

- (a) the nature of the crime charged and the circumstances surrounding it;**
- (b) any special characteristics or circumstances of the defendant;**
- (c) whether diversion is consistent with the defendant's rehabilitation and reintegration; and**
- (d) whether the public interest will be best served by diverting the individual from prosecution.¹⁰**

(4) Before consenting to diversion, the district attorney may require any defendant requesting diversion to provide information regarding prior criminal charges, education and work experience, family, residence in the community, and other information relating to the

⁶ This language is consistent with the Model Penal Code § 6.02A(3) (Discussion Draft No. 4, 2012).

⁷ This language clarifies that supervision can be facilitated by the Probation Department via a court filing, or can be delegated to any entity approved by the district attorney.

⁸ This language is drawn from NAPSA standards 1.3 and 3.3, and the commentary to section 3 of part IV of the NDAA standards. It is consistent with the *ABA Standards for Criminal Justice, Prosecution Function and Defense Function*, standard 3-3.8 (3d ed. 1993) [hereinafter ABA standards].

⁹ Consistent with ABA standard 3-3.9(a) and NAPSA standard 1.4, diversion is not intended as a disposition option for cases that could not otherwise be prosecuted.

¹⁰ These criteria are a generalized version of those found in NDAA standard 4-3.5.

diversion program.¹¹ The defendant shall not be denied the opportunity to consult with counsel before consenting to diversion.¹² Counsel may be appointed as provided under article 1 of title 21.

(5) A diversion program's receipt of diversion related funding provided under section 18-19-103(5)(d)(I) shall be contingent upon the referring district attorney's office having adopted pretrial diversion policies and guidelines pursuant to section 18-1.3-101(2).

(6) Diversion programs may include, but are not limited to, programs operated by law enforcement upon agreement with a district attorney, district attorney internally operated programs, programs operated by other approved agencies, restorative justice programs, or supervision under the probation department. References to "deferred prosecution" in Colorado statutes and court rules shall apply to pretrial diversion as authorized by this section.

Explanation:

This statute is designed to facilitate increased availability of the diversion option. It encourages district attorneys' offices to consider diversion as an option in appropriate cases, and provides basic criteria for evaluating whether individual defendants are appropriate for diversion. It does not require that diversion be offered to any individual defendant; it merely provides guidelines designed to increase the legitimacy of diversion as a disposition option.

The statute is also designed to address resource-related concerns regarding supervision of diverted defendants. Successful diversion depends upon: (1) defendants receiving the education or treatment necessary to address the criminogenic factors contributing to the behavior resulting in the offense, and (2) repairing any harm done to victims through payment of restitution or other restorative mechanisms. Individual jurisdictions can accomplish this through locally operated diversion programs independent of the state judiciary. Where that is not possible, however, the Probation Department is already well suited for facilitating these goals, and has currently existing statewide facilities. Creating an efficient mechanism by which individual defendants can be placed under the supervision of the Probation Department is thus consistent with the goals of diversion. It bears emphasizing that the cohort likely to be appropriate for diversion is similar to the cohort who, if their case was either pleaded or tried, would be sentenced to probation. It is thus unlikely this statute will substantially affect the Probation Department's caseload.

The Task Force will strive to make the attached Diversion Agreement form widely available to criminal justice practitioners, either through education or by inclusion in the Rules of Criminal Procedure. Prosecutors will be able to easily dispense with appropriate cases by

¹¹ This language is modeled on S.C. Code Ann. § 17-22-70 (2011). It is consistent with NDAA standard 4-3.4.

¹² Consistent with NAPSA standard 2.2, ABA standard 3-3.10, and Colorado's Crim. P. 11(f)(1).

including the terms of a diversion agreement on the form, and then allowing the selected entity to monitor compliance.

The ability to be represented by counsel during any diversion conference with the district attorney is critical to ensuring the maintenance of basic constitutional rights. Especially where a defendant completes a statement of facts pursuant to proposed section 18-1.3-101.1(4), entering a diversion agreement can amount to confession of the offense. Although consultation with an attorney is not necessary, proceeding without counsel should not be a condition of entry into a diversion agreement.

This statute allows district attorneys' offices to continue to operate pre-existing diversion programs or establish new diversion programs. It is not intended to detract in any way from diversion programs currently in operation. The statute is intended simply to facilitate and legitimize the option of placing defendants under supervision by an appropriate entity while bypassing a formal guilty plea and the associated long-term impediments to rehabilitation.

Proposed Statutory Change #2:

18-1.3-101.1. Diversion Agreements.

(1) All pretrial diversions shall be governed by the terms of a diversion agreement signed by the defendant, the defendant's attorney if the defendant is represented by an attorney, and the district attorney.

(2) The diversion agreement shall include a written waiver of the right to a speedy trial for the period of the diversion.¹³ All diversion agreements shall include as a condition that the defendant not commit any criminal offense during the period for which the agreement is to remain in effect. Diversion agreements may also include provisions, agreed to by the defendant, concerning payment of restitution and court costs, payment of a supervision fee not to exceed that provided for in section 18-1.3-204(2)(a)(V),¹⁴ or participation in restorative justice practices as defined in section 18-1-901(3)(o.5). The conditions of diversion shall be limited to those specific to the individual defendant or necessary for proper supervision of the individual defendant.¹⁵

(3) The diversion agreement may require an assessment of the defendant's criminogenic needs, to be performed after the period of diversion has begun by either the probation department or a diversion program approved by the district attorney. Based on the results of that assessment, the probation department or approved diversion program may direct the defendant to participate in programs offering medical, educational, vocational, corrective, preventive, or other rehabilitative services. Defendants with the ability to pay may be required to pay for such programs or services.

(4) The diversion agreement may include a statement, authored by the defendant and agreed to by the defendant's attorney if the defendant is represented by an attorney, and the district attorney, of the facts upon which the charge is based and a provision that if the defendant fails to fulfill the terms of the diversion agreement and criminal proceedings are resumed, the statement will be admissible as impeachment evidence against the defendant in those proceedings.¹⁶

(5) No defendant shall be required to enter any plea to a criminal charge as a condition of pretrial diversion.¹⁷ No statements made by the defendant or counsel in any diversion conference or in any other discussion of a proposed diversion agreement, other than a

¹³ This requirement is consistent with the currently existing deferred prosecution statute. § 18-1.3-101(3), C.R.S. 2011.

¹⁴ Specifies a maximum supervision fee of fifty dollars per month.

¹⁵ Consistent with NAPSA standards 4.2 and 5.3.

¹⁶ This provision is loosely modeled on Kan. Stat. Ann. § 22-2909C (2011).

¹⁷ Consistent with the currently existing deferred prosecution statute, section 18-1.3-101(1), C.R.S. 2011, as well as NAPSA standard 4.3.

statement provided for in section 18-1.3-101.1(4), shall be admissible as evidence in criminal proceedings on the crimes charged or facts alleged in the complaint.¹⁸

(6) If the district attorney agrees to offer diversion in lieu of further criminal proceedings and the defendant agrees to all of the terms of the proposed agreement, the diversion agreement may be either filed with the court or held by the parties. A court filing shall be required only if the probation department is involved in the diversion agreement. If the agreement is filed, the court shall stay further proceedings.

(7) A diversion agreement shall provide that if the defendant fulfills the obligations described therein, the court shall order any criminal charges filed against the defendant dismissed with prejudice.¹⁹

Explanation:

This statute is designed to make diversion a more attractive option to prosecutors. By allowing a statement of facts related to the offense, the statute permits prosecutors to require a limited confession as a condition of diversion. This addresses concerns associated with the passage of time impeding the ability to prosecute if the defendant does not successfully complete the terms of the diversion agreement.

Because the statute diverts defendants from prosecution before a guilty plea is entered, it furthers the goal of facilitating long-term rehabilitation. Many impediments to employment, housing, and education take effect upon entry of a guilty plea. National and local policy makers have recognized that the inability to find stable employment and housing is strongly related to recidivism. By avoiding those collateral consequences of a conviction, diversion can decrease recidivism and increase public safety while saving costs to the courts and district attorneys' offices.

The terms of the diversion agreement between the defendant and the prosecutor are critical to victim restoration, recidivism reduction, and the long-term rehabilitation of the defendant. The statute discourages numerous "standard conditions" of supervision unrelated to the offense at issue. It provides that diversion agreements should require individual defendants to stay out of trouble, restore any victims of their offense, and address the criminogenic factors that contributed to their offense.

As with proposed section 18-1.3-101, this statute allows great flexibility in the structure of diversion programs. Compliance with the agreement can be monitored by a diversion program operated by a district attorney's office, an entity selected by a district attorney, or the Probation Department.

¹⁸ This requirement is consistent with Colorado's Crim. P. 11(f)(6).

¹⁹ Consistent with the currently existing deferred prosecution statute. § 18-1.3-101(2), C.R.S. 2011.

Proposed Statutory Change #3:

18-1.3-101.2. Diversion Outcomes.

(1) During the period of diversion, the supervising program or agency designated in the diversion agreement shall provide the level of supervision necessary to facilitate rehabilitation and ensure the defendant is completing the terms of the diversion agreement.

(2) Upon the defendant's satisfactory completion of and discharge from supervision, any charge against the defendant shall be dismissed with prejudice.²⁰ The effect of the dismissal is to restore the defendant, in the contemplation of the law, to the status he or she occupied before the arrest, citation, or summons.²¹ A successfully completed diversion shall not be considered a conviction for any purpose. No person as to whom an order of dismissal pursuant to this article has been entered may be held to be guilty under Colorado law of perjury or otherwise giving a false statement by reason of his or her failure to recite or acknowledge the arrest, citation, or summons in response to any inquiry made for any purpose.²²

(3) At any point after a diversion agreement is entered a defendant may petition the court to seal all arrest and other criminal records pertaining to the offense, using the procedure described in section 24-72-308. Unless otherwise prohibited under section 24-72-308(3)(a), the court shall issue a sealing order if requested by the defendant following successful completion of a diversion agreement.

(4) If the conditions of the diversion agreement are violated, the defendant and the court shall be provided written notice of the violation. Revocation of a diversion agreement shall be initiated by the filing of a criminal complaint, information, or indictment, or if charges have already been filed by giving the court notice of intent to proceed with the prosecution. The defendant may, within fourteen days of the first court appearance following such a filing, request a hearing at which to contest whether a violation occurred. The burden in such a hearing shall be upon the district attorney by a preponderance of the evidence to show that a violation has in fact occurred, and the procedural safeguards required in a revocation of probation hearing shall apply.²³ The court may, when it appears that the alleged violation of the diversion agreement consists of an offense with which the defendant is charged in a criminal proceeding then pending, continue the diversion revocation hearing until the termination of the criminal proceeding.²⁴ If the court finds a violation has occurred, or no hearing is requested, the prosecution may continue. If the court finds the district attorney has not proven a violation, the court shall dismiss the criminal case without prejudice and

²⁰ Consistent with the currently existing deferred prosecution statute. § 18-1.3-101(2), C.R.S. 2011.

²¹ Modeled on S.C. Code Ann. § 17-22-150(a) (2011).

²² Modeled on S.C. Code Ann. § 17-22-150(a) (2011).

²³ Consistent with the currently existing deferred sentencing statute. § 18-1.3-102(2), C.R.S. 2011.

²⁴ Consistent with the currently existing probation revocation hearing statute. § 16-11-206(3), C.R.S. 2011.

return the defendant to the supervision of the diversion program to complete the terms of the agreement.

(5) If a defendant is prosecuted following violation of a diversion agreement, a factual statement entered pursuant to 18-1.3-101.1(4) shall be admissible as impeachment evidence. No other information concerning diversion, including participation in a diversion program, the terms of a diversion agreement, or statements made to treatment providers during a diversion program, shall be admitted into evidence at trial for any purpose.

Explanation:

This statute is designed to make diversion beneficial to both prosecutors and individual defendants. If the defendant does not abide by the terms of the agreement, the prosecutor can proceed with the case and admit as impeachment evidence against the defendant the statement of facts provided for in proposed section 18-1.3-101.1(4). This allows prosecutors and supervision providers sufficient leverage to ensure defendants will take seriously the terms of their diversion agreement.

If a violation of the diversion agreement occurs, no hearing is necessary prior to the district attorney's reinstatement of prosecution. In accordance with the requirements of due process, however, the defendant is to be provided notice of the alleged violation and the opportunity to contest whether a violation occurred.

The statute encourages candid participation in diversion by protecting all diversion related information—other than a statement of facts agreed to by the defendant—from admissibility in a criminal trial. Additionally, the statute leaves in place the currently existing privilege for communications with counselors, social workers, and therapists, which applies to all proceedings. See § 13-90-107(1)(g), C.R.S. 2011. That privilege recognizes defendants must be able to provide honest information to treatment providers in order to address their criminogenic needs. If a diversion agreement is revoked and a conviction is obtained, however, the statute contemplates that information such as the fact of a prior diversion, as well as the defendant's performance during diversion, may be presented to the court to assist in making decisions as to bond, sentencing, probation conditions, and credit for effort already expended.

The statute facilitates the long-term rehabilitation of defendants and takes measures to reduce recidivism. If the defendant successfully completes the terms of the diversion agreement, he or she is to be treated by the law as if the offense had never occurred and he or she may seal any record of the offense. This allows defendants to continue to pursue employment, housing, and education options without the collateral consequences associated with a conviction or deferred sentence. By removing these barriers, the diversion option enhances public safety by reducing the likelihood that an individual defendant will engage in future criminal behavior.

Proposed Statutory Change #4:

Amendments to the existing Guidelines for Assuring the Rights of Victims of and Witnesses to Crimes.

Include the italicized in section 24-4.1-302, Definitions:

(2) "Critical stages" means the following stages of the criminal justice process:

(a) The filing of charges against a person accused of a crime;

(a.5) The decision not to file charges against a person accused of a crime;

(a.6) The decision to enter a diversion agreement pursuant to section 18-1.3-101;

Include the italicized in section 24-4.1-302.5, Rights Afforded to Victims:

(1) In order to preserve and protect a victim's rights to justice and due process, each victim of a crime shall have the following rights:

(a) The right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process;

(b) The right to be informed of and present for all critical stages of the criminal justice process as specified in section 24-4.1-302(2); except that the victim shall have the right to be informed of, without being present for, the critical stages described in section 24-4.1-302(2)(a), (2)(a.5), (2)(a.6), (2)(e.5), (2)(k.3), (2)(n), (2)(p), and (2)(q);

Explanation:

Restoring victims of crime is one of the primary goals of pretrial diversion. As such, it is critical that victims have input regarding the diversion process.

This statutory amendment ensures that victims of crime are informed of the decision to enter a diversion agreement as to any crime to which the Guidelines for Assuring the Rights of Victims of and Witnesses to Crimes are applicable. It reinforces the currently-existing right under section 24-4.1-302.5(1)(e) to: "consult with the prosecution after any crime against the victim has been charged, prior to any disposition of the case, or prior to any trial of the case, and the right to be informed of the final disposition of the case."

Proposed Statutory Change #5:

Amendments to the existing sealing of arrest and criminal records statute.

Include the italicized in section 24-72-308(1)(a)(I):

(1)(a)(I) Except as otherwise provided in subparagraphs (II) and (III) of this paragraph (a), any person in interest may petition the district court of the district in which any arrest and criminal records information pertaining to said person in interest is located for the sealing of all of said records, except basic identification information, if the records are a record of official actions involving a criminal offense for which said person in interest was not charged or entered a diversion agreement pursuant to section 18-1.3-101, in any case which was completely dismissed, or in any case in which said person in interest was acquitted.

Include the italicized in section 24-72-308(1)(c):

(c) Except as provided in section 18-1.3-101.2(3), after the hearing described in subparagraph (II) of paragraph (b) of this subsection (1) is conducted and if the court finds that the harm to the privacy of the petitioner or dangers of unwarranted adverse consequences to the petitioner outweigh the public interest in retaining the records, the court may order such records, except basic identification information, to be sealed. Any order entered pursuant to this paragraph (c) shall be directed to every custodian who may have custody of any part of the arrest and criminal records information which is the subject of the order. Whenever a court enters an order sealing criminal records pursuant to this paragraph (c), the petitioner shall provide the Colorado bureau of investigation and every custodian of such records with a copy of such order. The petitioner shall provide a private custodian with a copy of the order and send the private custodian an electronic notification of the order. Each private custodian that receives a copy of the order from the petitioner shall remove the records that are subject to an order from its database. Thereafter, the petitioner may request and the court may grant an order sealing the civil case in which the records were sealed.

Explanation:

This statutory amendment clarifies that courts may seal records pertaining to a diverted offense at any point after a diversion agreement is entered, and must grant a request to seal following successful completion of a diversion agreement.

Attachment 1:

Diversion Agreement Form

The attached form is intended to serve as an example diversion agreement where the parties have decided the agreement should be filed with a court. A court filing is unnecessary unless the Probation Department is selected as the entity to ensure compliance with the agreement.

STATEMENT OF FACT

As a condition of diversion insert name of accused submits this Statement of Fact (“Statement”) related to the offense of insert name of offense or offenses.

The parties understand and agree that this Statement will be admissible against the Accused for purposes of impeachment if the terms of the Agreement are violated. By completing this Statement, the Accused waives his or her right to silence and right to be free from self-incrimination only as those rights relate to the content of this Statement.

This statement has been reviewed and agreed upon by the defendant, the defendant’s attorney if the defendant is represented by an attorney, and the district attorney.

_____	_____
Signature of Defendant	Date

_____	_____
Signature of Defendant’s Attorney	Date

_____	_____
Signature of District Attorney	Date

