

## Maricopa County Attorney's Office Prosecution Policies and Procedures

CHAPTER DIVERSION PROGRAMS	EFFECTIVE DATE 11/21/2022	PROCEDURE # 17. 10
SECTION OPIOID USE - FELONY DIVERSION PROGRAM (Pilot Program)		
DISTRIBUTION CRIMINAL TRIAL ATTORNEYS	REVISION DATE	REVISION #

The Opioid Use-Felony Diversion Program (OU-FDP) will be administered by a community-based behavioral health provider selected by MCAO and offered to defendants who endangered a child in their care through exposure to fentanyl. The purpose of the diversion program is to provide an alternative to prosecution which allows a defendant to address their opioid use disorder, substance use disorder or alcohol use disorder while ensuring any children living with the defendant are safe. Defendants referred to the OU-FDP will be evaluated for the following: in-patient services, out-patient behavioral therapy, medication assisted treatment, randomized drug testing, in-home family counseling and parenting education. The length of treatment will be tied to the defendant's progress and attainment of the goals in the comprehensive individual service plan developed and monitored by the provider. A successful or unsuccessful discharge will be clinically determined by the provider. This is a pilot diversion program limited to referrals from Family Violence Bureaus.

### A. OFFENDER ELIGIBILITY CRITERIA

Offenders may be eligible for the Opioid Use- Felony Diversion Program if they meet all the following criteria:

1. The offender cannot have any prior convictions for any of the following: 1) a serious offense as defined in A.R.S. § 13-706; 2) an offense under title 13, chapter 14; or 3) an offense that is defined as dangerous or dangerous crime against children in A.R.S. § 13-105.
2. The offender has no historical prior felony convictions unless the offender's only prior felony conviction is an Aggravated DUI or personal possession committed more than five years before the current offense, excluding any time spent incarcerated.
3. The offender has no convictions under Chapter 35.1 (Sexual Exploitation of Children) or A.R.S. § 13-3212 (Child Sex Trafficking)
4. The offender does not have any other pending felony cases unless all open cases are pre-arraignment, each case is eligible for diversion under this policy, and the combined restitution from all the cases does not exceed \$2,000. In that event, diversion may be offered in all open cases if otherwise appropriate.
5. The offender was not on felony probation or on pre-conviction release for a felony offense when the offense was committed
6. The offender has not completed any felony diversion program within the last five (5) years.

7. The offender's Recidivism Risk Score (Proxy Score) is four (4) or lower.
8. The offender has no holds or detainers that would prevent the completion of the program.

**B. CASE ELIGIBILITY CRITERIA**

1. To be eligible, all cases must meet the following criteria:
  - a. The case must present a reasonable likelihood of conviction;
  - b. The case must be filed; there is no pre-file diversion for this program; and
  - c. Total restitution owed cannot exceed \$2,000.
2. The following specific types of cases are eligible for this program:
  - a. Any case that requires mandatory probation under A.R.S. § 13-901.01 if convicted at trial; or
  - b. A class 2 or 3 drug sales related offense that involves a drug amount below the threshold quantity of drugs; or
  - c. A case involving a class 4, 5 or 6 felony or the acquisition of drugs by fraud.
  - d. A class 3, 4, 5 or 6 child abuse involving no fracture or permanent injury and not classified as a Dangerous Crime Against Children.

3. Exceptions and Special Circumstances:

The following cases or charges are not eligible even if they meet the criteria above:

- a. DUI offenses are not eligible pursuant to A.R.S. § 28-1387(I);
- b. Robbery;
- c. Arson;
- d. Any offense under A.R.S. § 13-3212 (Child Sex Trafficking) or an offense in title 13, chapters 14 (Sexual Offenses), or 35.1 (Sexual Exploitation of Children);
- e. Cases involving the use of a firearm or the infliction of significant physical injury;

- f. Domestic violence cases, except that if the charge involves child abuse that is the result of the offender negligently leaving a child in a car (frequently referred to as “hot car cases”) or due to exposure to opioid abuse, this program may be offered if the case does not involve serious physical injury;
- g. Cases where some charges are eligible, and others are not. However, if the only ineligible charge is a misdemeanor DUI filed with eligible felony charges, the DCA may resolve the DUI charge by plea, or by a separate prosecution in a municipal or justice court.

#### C. ADDITIONAL CONSIDERATIONS

In deciding whether this program is appropriate in a given case, the DCA should consider the following factors:

1. The offender’s overall criminal history including the number and nature of previous arrests; previous charges that were not filed and the reason for those decisions; prior felony charges that were dismissed; and any prior convictions.
2. The offender’s FTA history or other matters that would raise doubts as to the offender’s likelihood of successfully completing the treatment program.
3. Whether the offender has previously completed any criminal diversion program and, if so, how long ago the program was completed, and the nature of the treatment provided in that program.
4. Whether the offender has been the subject of any other DCS referrals.

#### D. VICTIM CASES

When considering whether diversion is appropriate in a case involving a victim, the DCA must ensure that the victim has the opportunity to be fully informed about the goals and requirements of the program. The victim’s input should be fully considered before deciding whether the program is an appropriate resolution for in a particular case. In all cases involving restitution, payment of restitution in full must be required for the successful completion of the program.

#### E. TIMING OF DIVERSION OFFER

If diversion is an appropriate alternative to prosecution, it should be offered as early in the prosecution as possible. Therefore, diversion offers should ideally be made before arraignment.

F. TERMINATION, COMPLETION, AND RE-ENTRY

1. Termination and Reinstating the Prosecution

In accordance with the guidelines established by the MCAO, the diversion program provider will monitor the offender's performance. If the diversion provider terminates an offender from the program, the provider will notify the MCAO and include the reasons for the termination. Generally, a motion to reinstate the prosecution should be filed. However, before filing a motion to reinstate the prosecution, the prosecutor must review the termination report and, if it appears that the termination is due solely to an offender's non-payment of program costs and fees (other than restitution), the case should be referred to the Director of the Diversion Strategies Group. The Director will review the termination report and consult with the provider to review the offender's financial assessment application, financial responsibility determination, and any other available information regarding the offender's financial circumstances. The Director will then discuss the case with the assigned DCA and the DCA will determine whether the prosecution should be reinstated.

2. Successful Completion

The program provider will notify the MCAO when an offender successfully completes the program. Upon receipt of notification of successful completion, including the payment of restitution in full, MCAO will file a motion to dismiss the case(s) with prejudice.

3. Re-Entry

Generally, offenders who fail to successfully complete the program will not be offered another opportunity to resolve the criminal matter through diversion. Unsuccessful completion followed by a successful prosecution will not automatically bar an offender from participation in the future on a new case if otherwise appropriate based on the criteria listed above.

G. PROCEDURE AND DEVIATIONS

The DCA must have Division Chief approval prior to offering this diversion program.

The requirements of this policy may be deviated from in an appropriate case with Division Chief approval. The fact of and reason for any deviation should be specifically detailed in the case notes.