

STATE ATTORNEY, NINTH JUDICIAL CIRCUIT
DRUG DIVERSION POLICY

I. Introduction

There is ample evidence that the manner in which our country has prosecuted and punished drug offenses over the past thirty years has failed to reduce levels of drug use, dramatically inflated the number of our residents who are incarcerated or under judicial supervision and exacerbated the racial disparities in our criminal justice system. It has undermined public safety by diverting resources away from the investigation and prosecution of more serious offenses and by criminalizing and stigmatizing individuals suffering from drug addiction.

Justice and community safety are both achieved when prosecutors increase the number of low-level cases that are diverted through policies that minimize court involvement and unnecessary incarceration, reduce racial disparities, reduce recidivism, keep people free of criminal records and able to work, and direct those in need of treatment to available resources.¹ For those charged with more serious controlled substance offenses, this Office will ensure that punishments are proportionate to personal culpability and the individual's role in drug distribution activity, limit incarcerative sentences to large-scale distributors or those who threaten the physical safety of our residents, and connect lower-level participants to evidence-based interventions proven to reduce reoffending.

This policy addresses the manner in which I will expand drug diversion programs and severely limit the impact of drug offenses on mass incarceration, while promoting public safety, decreasing Assistant State Attorney caseloads, and reducing overall costs. The policy includes two parts. The first describes a newly developed diversion program. The second discusses charging and plea guidelines for drug offenses not eligible for diversion.

¹ See National Institute of Corrections, *A Framework for Evidence-Based Decision Making in State and Local Criminal Justice Systems*, 4th ed. (June 2017) at 17-18, <https://nicic.gov/framework-evidence-based-decision-making-state-and-local-criminal-justice-systems>

II. State Attorney Drug Diversion

Research shows that while criminal activity is deterred by arrest, whether prosecution or punishment follows has little to no additional impact.² This is largely because the arrest itself carries a number of negative informal consequences as well as the social and economic costs triggered by arrest, even without conviction, that, for most individuals, are the primary forces preventing criminal activity.³ As a result, studies have shown that even substantial decreases in penalties have not led to higher crime rates.⁴ Once an individual has been apprehended, imposing more severe sanctions actually *increases* the likelihood a person will reoffend.⁵ Therefore, research on how criminal justice policy affects recidivism supports a policy in which criminal justice contact or arrest and any subsequent sanction should be reasonable, within the limits of public safety.⁶

A presumption of diversion of drug possession offenses is particularly appropriate because drug use in society is “driven mostly by broader social economic and cultural factors, as well as by the internal dynamics of epidemics” and tends not to respond to criminal punishment.⁷ This Office recognizes that diversion helps reduce the collateral consequences associated with entering the criminal justice system, while also lowering recidivism rates and saving prosecutorial resources. These resources may then be concentrated on more serious crime. Evidence shows that individuals charged with a range of offenses, individuals who have never been arrested, and people with criminal records all benefit from diversion and, where necessary,

² Daniel S. Nagin, *Deterrence in the Twenty-First Century*, in Michael Tonry, ed., *CRIME AND JUSTICE IN AMERICA, 1975-2025*, v. 42 (2013) at 201-202.

³ *Id.* at 210.

⁴ See, e.g., Pew Charitable Trusts, *The Effects of Changing State Theft Penalties* (Feb. 2016), https://www.pewtrusts.org/~media/assets/2016/02/the_effects_of_changing_state_theft_penalties.pdf. (States that substantially increased their felony theft thresholds did not see any increase in rates of property crime in the years following the legislative changes).

⁵ David Huizinga and Kimberly L. Henry, *The Effect of Arrest and Justice System Sanctions on Subsequent Behavior: Findings from Longitudinal and Other Studies*, in Akiva M. Liberman, ed., *The Long View on Crime: A Synthesis of Longitudinal Research* (2008) at 244.

⁶ *Id.* at 250. Neither is there any empirical support for the contention that declining to prosecute low-level offenses will embolden the public to commit more serious crimes. Deterrence research shows these supposed “spill-over” effects are extremely unlikely to occur. Raymond Paternoster, *How Much Do We Really Know about Criminal Deterrence?*, 100 *J. Crim. L. & Criminology* 765, 809 (2010), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=7363&context=jclc>.

⁷ Peter Reuter, *Why has US Drug Policy Changed so Little over 30 years?*, in Michael Tonry, ed., *CRIME AND JUSTICE IN AMERICA, 1975-2025*, v. 42 (2013) at 98; see also Alex Stevens, *Modernising Drug Law Enforcement Report—Applying harm reduction principles to the policing of retail drug markets*, International Drug Policy Consortium (March 2013) at 6, http://fileservr.idpc.net/library/MDLE-report_3_applying-harm-reduction-to-policing-of-retail-markets.pdf; Samuel R. Friedman, *Drug Arrests and Injection Drug Deterrence*, 101 *AM J PUBLIC HEALTH* 344 (Feb. 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3020200/>; Samuel R. Friedman et. al, *Relationships of deterrence and law enforcement to drug-related harms among drug injectors in US metropolitan areas*, 20 *AIDS* 93, 97 (2006), https://www.hri.global/files/2011/08/08/4.08_Freidman_-_Deterrence_and_Law_Enforcement_.pdf.

treatment to address the root causes of crime.⁸ Studies of diversion programs consistently show substantial cost savings to taxpayers as compared to traditional prosecution. Diversion and treatment are less expensive than probation or incarceration,⁹ and because diversion is more likely to reduce recidivism, the long-term savings attributable to a lower incidence of crime and subsequent processing of additional criminal cases is dramatic.¹⁰

This Office commits to expanding opportunities for pretrial diversion. The policy provides for three different diversion opportunities that have varying degrees of intensity. This decision will be made based on a person's criminal history, current charges, and treatment needs. If a lower level of intervention proves inadequate to address the need, the case will be escalated to a higher level of intervention. If diversion programs ultimately prove insufficient to rehabilitate or treat the individual, prosecution may be pursued. Those levels are:

- **Level One:** The first level offers minimal punishment and provides education for individuals who committed the offenses of misdemeanor possession of cannabis and/or possession of drug paraphernalia.
- **Level Two:** The second level is for participants with no or minor recent criminal history who committed offenses involving simple possession of illegal narcotics, felony possession of cannabis, and possession of cannabis with intent to sell or deliver. All these offenses are non-violent, low level felonies.
- **Level Three (Drug Court or Probation):** The third level is for participants who have a drug addiction that requires treatment. Level Three Diversion involves participation in Drug Court (if the individual is eligible and Drug Court will address his or her needs) or participation in our already established pre-trial diversion program.

⁸ National Association of Drug Court Professionals (NADCP) standards, I.D.(commentary) at 7, <https://www.nadcp.org/wp-content/uploads/2018/12/Adult-Drug-Court-Best-Practice-Standards-Volume-I-Text-Revision-December-2018.pdf>. However, interventions that are offense-specific (i.e. drug or theft classes) are largely ineffective and disfavored. See National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Diversion / Intervention* (2008) ("NAPSA Standards") § 5.1, <https://napsa.org/eweb/DynamicPage.aspx?Site=napsa&WebCode=standards>.

⁹ See Michael Rempel, et. al, *NIJ's Multisite Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness*, Center for Court Innovation (April 2018), <https://www.ncjrs.gov/pdffiles1/nij/grants/251665.pdf> at 32-33.

¹⁰ RTI International, *Study: Replacing Prison Terms with Drug Abuse Treatment Could Save Billions in Criminal Justice Costs* (Jan. 8, 2013), <https://www.rti.org/news/study-replacing-prison-terms-drug-abuse-treatment-could-save-billions-criminal-justice-costs>; see also Micah W. Kubic and Taylor Pendergrass, *Diversion Programs Are Cheaper and More Effective Than Incarceration. Prosecutors Should Embrace Them*. ACLU.org (Dec. 6, 2018), <https://www.aclu.org/blog/smart-justice/diversion-programs-are-cheaper-and-more-effective-incarceration-prosecutors> (discussing the RTI International study).

The prosecution of less serious offenses diverts resources from the prosecution of the most serious offenses; unnecessarily clogs up the criminal justice system; unjustly criminalizes poverty; and disproportionately targets black and brown communities. Additionally, research shows that it is arrest, and not prosecution or punishment, which deters crime. The Office should divert cases where incarceration would not further the goals of fairness and public safety. The Office acknowledges that there is no one-size-fits-all approach to diversion and instead has created diversion programs aimed at meeting the unique needs of its participants.

LEVEL ONE:

Offenses: The following four offenses are eligible for Level One Diversion: (1) misdemeanor possession of cannabis, (2) possession of drug paraphernalia, and (3) offenses involving only trace amounts of any drug.

(1) Misdemeanor possession of cannabis, (2) possession of drug paraphernalia

Actions required by the defendant:

All Level One defendants will be offered the opportunity to attend a one-hour drug education class provided they have not participated in a Level One diversion in the last six months.

Purpose:

The purpose of the class is to educate individuals on the law of illicit drugs and potential dangers of the drugs. A discussion of the legal consequences of drug possession will also occur. This class should be made available electronically linked on the State Attorney's Office website (www.sao9.net) and will be taught by the State Attorney's Office Community Engagement/Education Unit. Upon completion of the class, charges will be dismissed.

(3) Possession of trace amounts of drugs.

Actions required by the defendant:

Likely no action is required.

With respect to offenses involving only trace amounts of any drug, the presumption is that these cases will not be filed. Experience has shown that these cases generally cannot legally be charged, and even those that legally can be charged, they cannot be proven beyond and to the exclusion of any reasonable doubt at trial. Under Florida law, a prosecutor has a legal, professional, and ethical obligation to refrain from filing a charging document if a good faith basis to believe the case can be proven beyond a reasonable doubt at trial does not exist. Because such a good faith basis rarely exists in cases of this nature, the presumption is that these cases will not be filed. However, as with all cases, offenses involving only trace amounts of any drug will still be reviewed by an Assistant State Attorney. Before filing charges involving only trace amounts of any drug, an ASA will review the case with a supervisor and get supervisor approval to file charges and will notate the file, explaining why this case should be filed. A

defendant's criminal history will not be taken into consideration when deciding whether to file charges in cases involving only trace amounts of any drug, as a defendant's criminal history is rarely, if ever, admissible evidence at trial and will not impact an ASA's ability to prove the case beyond and to the exclusion of any reasonable doubt at trial.

The State Attorney recognizes that Florida Statute section 893.21 does not require suppression of drug evidence for those subjected to Florida's Marchman Act, as explained in State v. Silliman, 168 So. 3d 245 (Fla. 5th DCA 2015). However, it is the expectation that individuals who are simultaneously subjected to a Marchman Act and who are in possession of illegal narcotics will likely meet the criteria for treatment of their case under Level Two, as explained below.

Violations: If a participant in Level One Diversion is rearrested for an offense that is diversion eligible or fails to attend the drug education class prior to the first scheduled pretrial conference, he or she should be referred to Level Two Diversion.

LEVEL TWO:

Offenses: For a defendant with no or minor recent criminal history, the following offenses are eligible for level two deferred prosecution: (1) Simple possession of illegal narcotics. These drugs include heroin, cocaine, felony cannabis, and fentanyl, among others, (2) Possession of cannabis (misdemeanor or felony amounts) with intent to sell, (3) Purchase of illegal narcotics, (4) Obtaining or attempting to obtain illegal narcotics by fraud, and (5) Possession of a Controlled Substance without Prescription.

Actions required by the defendant:

Defendants who qualify for the program and who are interested in participating must notify the prosecutor of an intent to participate, and sign a Level Two Drug Diversion Program Contract, and thereafter in a timely fashion complete the following. In addition, there may be a need for a Waiver of Speedy Trial:

- A. **Pay** a \$100 cost of prosecution fee, pay a \$50 cost of representation fee, if represented by the Office of the Public Defender or the Regional Conflict Counsel, and pay the appropriate cost of investigation fee (which the Assistant State Attorney will write into the contract.) These monies will be paid to the Clerk of the Court, and will be paid pursuant to an Order signed by the trial judge, (signed at the time of entering the Level Two Drug Diversion Program Contract in open court.)
- B. **Complete 4 hours of community service** with a 501(c)(3) nonprofit; the proof of completion must be on letterhead, with an original signature. The letter must include a phone number, in case the Assistant State Attorney or Pretrial Diversion Officer chooses to call to verify. The letter must include the date the community service was completed, and
- C. **The Defendant must complete one of the following**, (Defendant's choice:)

1. A 4-hour online substance abuse course which provides a certificate of completion at the conclusion of the program. OR
2. The Defendant must complete at least 2 hours of face to face substance abuse education with a licensed/certified treatment provider, such as with a professional holding a CAP, MCAP, MSW, LCSW, LMHC, ABA, BCBA, PsyD, or MD. These initials indicate Certified Addiction Professional, Master's Level Certified Addiction Professional, Master's in Social Work, Licensed Clinical Social Worker, Licensed Mental Health Counselor, Applied Behavior Analysis Therapist, Board Certified Behavior Analyst, Doctor of Psychology, Medical Doctor. This need not be one on one, and can be in a larger group setting. The proof of completion must be on letterhead, with an original signature, and the signature block should show one or more of these credentials. The letter must include a phone number, in case the Assistant State Attorney chooses to call to verify.
OR
3. The Defendant must complete an assessment (not a screening) for substance abuse through an evidence-based assessment tool, with any recommendations provided to the defendant. Appropriate assessments such as the ASI, ASI-MV, a BioPsychoSocial evaluation, the TASC Substance Abuse and Mental Health Assessment Report or TASC Behavioral Health Index will satisfy this expectation. This assessment must be completed by a licensed substance abuse counselor. The defendant must provide a letter on letterhead from the licensed substance abuse counselor indicating that they have had the assessment, and that the full report was provided to the defendant. This letter must include the date of the evaluation, the type of the evaluation, and that the full report was provided to the defendant. (The defendant need not provide the report to the State Attorney's office.)

Proof of payment of the above-listed monies, proof of community service hours and proof of completion of the 4-hour online substance abuse education class or 2 hour face to face substance abuse education class or assessment must be provided by the defendant at or before the first scheduled pretrial conference. All Level Two defendants must avoid re-arrest (supported by sufficient evidence to be prosecuted) during the span of 6 months.

Purpose:

The drugs that fall under this category are highly addictive and can be extremely dangerous. Individuals who possess these narcotics are at a greater risk of forming an addiction. The goal of this level of diversion is to educate the individual allow him or her to discuss their personal situation with a trained and qualified professional. The four hours of community service or substance abuse class was added to minimally increase the conditions that must be satisfied in order to have a case dismissed by our office.

Violations: If a participant in Level Two Diversion is rearrested for an offense that is diversion eligible or fails to make the required payments or fails to provide proof of substance abuse education or the assessment and community service hours, he or she should be referred to Level Three Diversion with required individualized programming designed to address the root causes

of his or her behavior or at the discretion of the prosecutor be denied Level Three and will instead be prosecuted accordingly.

LEVEL THREE:

Offenses: Offenses listed in Level Two but it appears these individuals have a drug addiction that requires treatment.

Actions required by the defendant:

Enter our PTD program or enter drug court and waive speedy trial.

Purpose:

To provide treatment to individuals who suffer from a drug addiction. Participants in Level Three Diversion receive individualized rehabilitative services as well as the opportunity to minimize collateral consequences through their successful participation. Level Three participants either enter Drug Court or, if treatment in Drug Court is not appropriate to address their needs or the participant is not eligible, enter a plea and participate in our pre-trial diversion program that provides individualized terms and conditions that will give the participant the help they need.

Violations: If a participant in Level Three Diversion is rearrested for an offense or fails to successfully complete the diversion program, the participant will be removed from the program and prosecuted accordingly.

FOR MORE INFORMATION ABOUT THIS PROGRAM:

Please see the State Attorney's Office website. (www.sao9.net)