

**ARTICLE 16A**  
**Preprosecution Diversion**

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**31-16A-1. Short title.**

Statute text

This act [[31-16A-1](#) to [31-16A-8](#) NMSA 1978] may be cited as the "Preprosecution Diversion Act".

History

**History:** Laws 1981, ch. [33](#), § [1](#).

**31-16A-2. Purpose.**

Statute text

The purposes of the Preprosecution Diversion Act [[31-16A-1](#) NMSA 1978] are to remove those persons from the criminal justice system who are most amenable to rehabilitation and least likely to commit future offenses, to provide those persons with services designed to assist them in avoiding future criminal activity, to conserve community and criminal justice resources, to provide standard guidelines and to evaluate preprosecution programs.

History

**History:** Laws 1981, ch. [33](#), § [2](#).

**31-16A-3. Program establishment.**

Statute text

Each district attorney shall establish a preprosecution diversion program in his judicial district in accordance with the provisions of the Preprosecution Diversion Act [[31-16A-1](#) NMSA 1978] to the extent public or private funds permit.

History

**History:** Laws 1981, ch. [33](#), § [3](#).

**31-16A-4. Eligibility.**

Statute text

A. A defendant must meet the following minimum criteria to be eligible for a preprosecution diversion program:

(1) the defendant must have no prior felony convictions for a violent crime and no prior felony convictions for any crime for the previous ten years;

(2) the crime alleged to have been committed by the defendant is nonviolent in nature, with the exception of domestic disputes not involving a minor;

(3) if the defendant was on probation previously, his probation must not have been revoked or unsatisfactorily discharged;

(4) the defendant has not been admitted into a similar program for the previous ten years;

(5) the defendant is willing to participate in the program and submit to all program requirements;

(6) the crime alleged to have been committed by the defendant does not involve substantial sale or possession of controlled substances; and

(7) a person meeting all of the above criteria and any additional criteria established by the district attorney may be entered into the preprosecution diversion program. The district attorney may elect to not divert a person to the preprosecution diversion program even though that person

meets the minimum criteria herein set forth. A decision by the district attorney to not divert to the preprosecution diversion program is not subject to appeal and may not be raised as a defense to any prosecution or habitual offender proceeding.

B. A district attorney may set additional criteria.

History

**History:** Laws 1981, ch. [33](#), § [4](#).

**31-16A-5. Program functions and responsibilities.**

Statute text

The preprosecution diversion program in each judicial district shall include:

A. individual counseling and guidance for all participants;

B. required victim restitution where applicable to the extent practical. In addition to monetary restitution, a program may require public service restitution; and

C. referral resources where clients may be sent for treatment and rehabilitation.

History

**History:** Laws 1981, ch. [33](#), § [5](#).

Annotations

**ANNOTATIONS**

**Termination of preprosecution agreement by state.** — The state may terminate a preprosecution diversion agreement, even if the sole ground is the defendant's nonwilful failure to make restitution, but only if there are no adequate alternatives to termination which will meet the state's legitimate penological interests. *State v. Jimenez*, [111 N.M. 782](#), [810 P.2d 801](#) (1991).

**31-16A-6. Waivers; suspension of criminal proceedings.**

Statute text

A. A defendant must secure or be appointed defense counsel to be present at a preprosecution diversion screening interview prior to applying for acceptance into a preprosecution diversion program, and, upon applying, the defendant shall waive his constitutional right to a preliminary hearing as set forth in Rule 15(d) of the Rules of Criminal Procedure for the Magistrate Courts [[Rule 6-202D](#) NMRA].

B. If a defendant is certified eligible by the district attorney and by the preprosecution diversion program, the defendant shall also waive his constitutional right to a speedy trial and any rights as provided by Rule 37(b) of the Rules of Criminal Procedure for the District Court [Courts] [[Rule 5-604B](#) NMRA]. Upon entry of this waiver, the district attorney shall divert the defendant into the preprosecution diversion program and criminal proceedings against the defendant shall be suspended. Participating defendants shall also waive any confidentiality provided by the Arrest Record Information Act [[29-10-1](#) NMSA 1978] to permit scrutiny of records; provided that the publication of the personal information, except the name of the defendant, gathered while a defendant is participating in a program shall not be a public record.

History

**History:** Laws 1981, ch. [33](#), § [6](#).

Annotations

**Bracketed material.** — The bracketed material in this section was added by the compiler for clarity and it is not part of the law.

**31-16A-7. Program participation; costs; termination.**

Statute text

A. A defendant may be diverted to a preprosecution diversion program for no less than six months and no longer than two years. A district attorney may extend the diversion period for a defendant as a disciplinary measure or to allow adequate time for restitution, provided that the extension coupled with the original period does not exceed two years. A district attorney may require as a program requirement that a defendant agree to such reasonable conditions as the district attorney deems necessary to ensure that the defendant will observe the laws of the United States and the various states and the ordinances of any municipality and shall require the

defendant to pay to his office the costs related to his participation in the program not exceeding one thousand twenty dollars (\$1,020) annually to be paid in monthly installments of not less than fifteen dollars (\$15.00) and not more than eighty-five dollars (\$85.00), subject to modification by the district attorney on the basis of changed financial circumstances. All costs collected by a district attorney pursuant to this subsection shall be transmitted to the administrative office of the district attorneys for credit to the district attorney fund.

B. If a defendant does not comply with the terms, conditions and requirements of a preprosecution diversion program, his participation in the program shall be terminated, and the district attorney may proceed with the suspended criminal prosecution of the defendant.

C. If the participation of a defendant in a preprosecution diversion program is terminated, the district attorney shall state in writing the specific reasons for the termination, which reasons shall be available for review by the defendant and his counsel.

History  
**History:** Laws 1981, ch. [33](#), § [7](#); 1984, ch. [110](#), § [5](#).

Annotations

**Cross references.** — For creation of district attorney fund, see [36-1-28](#) NMSA 1978.

**The 1984 amendment** added the third and fourth sentences in Subsection A.

## ANNOTATIONS

**Time limit for refiling charges.** — The legislature did not intend to limit the state's ability to refile charges against a defendant for non-compliance with a preprosecution diversion program. *State v. Davis*, [2007-NMCA-022](#), [141 N.M. 205](#), [152 P.3d 848](#), cert. denied, [2007-NMCERT-002](#), [141 N.M. 339](#), [154 P.3d 1239](#).

**Prosecutor's unilateral termination limited.** — The prosecutor's authority to unilaterally terminate a diversion program is limited to a termination on the basis of defendant's noncompliance with the program. *State v. Trammel*, [100 N.M. 543](#), [673 P.2d 827](#) (Ct. App. 1983).

A trial court may require a prosecutor to keep his end of a diversion program agreement and may determine whether the prosecutor has terminated the preprosecution diversion agreement in violation of his statutory authority. *State v. Trammel*, [100 N.M. 543](#), [673 P.2d 827](#) (Ct. App. 1983).

**Termination of preprosecution agreement by state.** — The state may terminate a preprosecution diversion agreement, even if the sole ground is the defendant's nonwilful failure to make restitution, but only if there are no adequate alternatives to termination which will meet the state's legitimate penological interests. *State v. Jimenez*, [111 N.M. 782](#), [810 P.2d 801](#) (1991).

**Court review of reasons for failure to pay.** — In proceedings to terminate a preprosecution diversion agreement for failure to pay restitution, the court reviewing the termination must first inquire into the reasons for the failure to pay. *State v. Jimenez*, [111 N.M. 782](#), [810 P.2d 801](#) (1991).

If a defendant has wilfully refused to pay or has failed to make sufficient bona fide efforts legally to acquire the resources to pay, the state may revoke a preprosecution diversion agreement and begin prosecution of the alleged crime or crimes. If, however, the court determines that the defendant has not been at fault in failing to make restitution, then the court must consider whether there are alternatives to termination which will meet the state's legitimate penal interests. *State v. Jimenez*, [111 N.M. 782](#), [810 P.2d 801](#) (1991).

Only if a court determines that alternative measures are not adequate to meet the state's interests may that court uphold termination of a preprosecution diversion agreement when the defendant has made sufficient bona fide efforts to pay. *State v. Jimenez*, [111 N.M. 782](#), [810 P.2d 801](#) (1991).

**Wrongful termination of agreement as defense.** — A claim that a prosecutor has wrongly terminated a diversion agreement is a defense to the initiation of a criminal prosecution and must be raised prior to trial. *State v. Trammel*, [100 N.M. 543](#), [673 P.2d 827](#) (Ct. App. 1983).

**Six-month trial period starts when arraignment waived.** — Since the defendant was originally indicted for numerous offenses, was diverted into a preprosecution diversion program (PDP), after which

the state dismissed the indictment, was later terminated from the program because she had violated the terms of PDP contract, was reindicted on the same charges for which she had previously been indicted, and waived her arraignment on the charges in the second indictment, the six-month time period for commencement of trial (Rule 5-604B NMRA) was calculated from the date the defendant waived arraignment on the second complaint, and not from the date the defendant was terminated from the PDP, where there was no evidence that the dismissal of the initial indictment and the defendant's later reindictment were carried out for purposes of delay or an attempt to circumvent Rule [5-604B\(6\)](#) NMRA. State v. Altherr, [117 N.M. 403, 872 P.2d 376](#) (Ct. App.), cert. denied, [117 N.M. 524, 873 P.2d 270](#) (1994).

### **31-16A-8. Record keeping.**

Statute text

A. Each district attorney shall maintain an accurate record of each individual accepted into a preprosecution diversion program for the purpose of complying with the requirements of Paragraph (4) of Subsection A of Section 4 [[31-16A-4A\(4\)](#) NMSA 1978] of the Preprosecution Diversion Act.

B. Each district attorney shall be required to forward to the state police accurate records of acceptance, successful termination or unsuccessful termination of each individual accepted into the program. The state police shall be required to maintain accurate records of all information forwarded to them by each respective district attorney concerning acceptance, successful termination or unsuccessful termination of all preprosecution diversion programs.

History

**History:** Laws 1981, ch. [33](#), § [8](#).

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