

**Attachment "D"**

**CLASS D FELONY PRETRIAL DIVERSION PROTOCOL  
FOR THE 29<sup>TH</sup> JUDICIAL CIRCUIT**

**1. DEFINITION**

Pre-trial diversion is the postponement of imposition of sentence upon any person who qualifies for this program, for a period of time not to exceed five (5) years or duration of the diversion agreement shall not be less than the time required to make restitution in full, subject to certain conditions established by the Court

**2. PERSONS ELIGIBLE**

Any person charged with a Class D Felony, who has not had a felony conviction in the ten (10) years prior to commission of the current offense, or who has not been on felony probation or parole or released from incarceration within the ten (10) years prior to commission of the current offense, shall be eligible for pre-trial diversion.

- a. The person charged must enter a plea of guilty or a plea pursuant to North Carolina v. Alford, before becoming eligible for pretrial diversion.
- b. Persons ineligible for probation, parole or conditional discharge under KRS 532.045 shall be ineligible for this program.
- c. A person convicted of a Class D felony for which early release is disallowed by statute, including KRS 189A.010(8) and KRS 189A.120(2), shall be ineligible for this program.
- d. No person shall be eligible for this program more than once in any five (5) year period.
- e. A person convicted of a sex crime as defined in KRS 17.500 is ineligible for pretrial diversion under KRS 533.250(1)(d).

**3. PROCEDURE**

- a. After indictment in circuit court, and no later than 45 days before trial, any person eligible for the program may apply to the Circuit Court and the Commonwealth for entry of pre-trial diversion order.
- b. If applying for pretrial diversion, counsel for the defendant must state, and the defendant must agree on the record, that in the event diversion is granted, any right to a speedy trial or disposition of the charge against him/her is waived.
- c. The Commonwealth shall make a written recommendation to the Court in response to each application. KRS 533.250(2)
- d. Before making the recommendation to the Court, the Commonwealth shall:
  - i. Have a criminal record check from Courtnet and shall supply a copy to the Court and Defendant.
  - ii. Interview and seek input from the victim and/or victim's family and advise them of the time, date and place the motion will be heard by the Court;

- iii. Conduct any other investigation that the Commonwealth Attorney's Office believes is reasonable necessary in making a decision whether to recommend pre-trial diversion; and
- iv. When diversion is recommended, the prosecutor must make a written recommendation to the Court of conditions of the pre-trial diversion as well as appropriate sentence to be imposed if the diversion agreement is unsuccessful. KRS 533.252(3)

#### 4. ACCEPTANCE AND SUPERVISION

The Court may, in its discretion and with the consent of the Commonwealth, order pre-trial diversion for eligible defendants upon terms and conditions it deems appropriate. Supervision of the participants in the program shall be performed by the Division of Probation and Parole and the provisions of KRS 533.030 relating to conditions of probation and restitution shall, so far as possible, be applicable to pre-trial diversion. No Judgment of Conviction shall be entered on the plea of guilty at the time of the entry of the pre-trial diversion order. Judgment of conviction shall be entered on if the Defendant fails to comply with the terms of the Diversion as set forth below.

- i. The order of Diversion shall include:
  - a. Restitution if applicable
  - b. Duration of the diversion
  - c. Require the defendant to obey all rules and regulations imposed by Probation and Parole
  - d. As required by KRS 533.030(1), conditions of probation-restitution, direct the defendant not to commit any offense during the period of pre-trial diversion. Specifically, direct the defendant to comply with any other provision of KRS 533.030 or any other condition the Court deems appropriate.
- ii. The order of Diversion may include:
  - a. That the defendant remain drug and alcohol free and be subject to random drug testing at the defendant's sole cost and expense, if applicable.
  - b. That the defendant have no violation of the Penal Code or the Controlled Substances Act.
  - c. That the defendant possess no firearm or any other deadly weapon.
  - d. Duration of the pretrial diversion shall not exceed five (5) years without agreement of the defendant. Duration of the diversion agreement shall not be less than the time required to make restitution in full.

#### 5. REVOCATION

- a. After a hearing, with notice to the Commonwealth's Attorney and defendant, the Court may revoke or void defendant's participation in the pre-trial diversion

program upon showing of failure to comply with the conditions of diversion or failure to make satisfactory progress. AOC Form 345, styled Order Voiding Pretrial Diversion of a Class D Felony, was designed for that purpose.

- b. If a pre-trial diversion program is revoked or voided, a judgment of conviction shall be entered and the defendant shall be sentenced according to law, based on this or her prior plea of guilty.
- c. Under KRS 533.256(2), the same criteria applicable to probation revocation hearings apply to a proceeding to void diversion. Pursuant to KRE 1101(d)(5), the Rules of Evidence are inapplicable to miscellaneous proceedings such as those revoking probation. A proceeding to determine whether an order granting diversion should be voided also constitutes a miscellaneous proceeding and therefore the Rules of Evidence are inapplicable to such hearings.

6. COMPLETION OF DIVERSION PROGRAM

If the defendant successfully completes the provision of the pretrial diversion agreement, the charges against the defendant shall be dismissed and the matter shall be treated as required by KRS 533.258.

Approved, this the 8<sup>th</sup> day of April, 2014, by the Hon. Judy D. Vance, Chief Circuit Judge of the 29<sup>th</sup> Judicial Circuit and Gail Williams, Commonwealth's Attorney, to be effective immediately.



Judy D. Vance  
29<sup>th</sup> Judicial Circuit Judge



Gail Williams  
Commonwealth's Attorney  
29<sup>th</sup> Judicial Circuit