

# Supreme Court of Kentucky

Pursuant to KRS 533.250, signed into law in May, 1998, the Pretrial Diversion Program for Class D Felons submitted by the Sixth Judicial Circuit (Daviness County) is hereby approved by the Kentucky Supreme Court and added to the Circuit's local rules.

Entered:

April 20, 1999

  
\_\_\_\_\_  
Chief Justice

**GENERAL ORDER APPROVING  
ADOPTION OF AMENDMENT TO THE LOCAL CRIMINAL  
RULES OF DAVIESS CIRCUIT COURT**

CLASS D FELONY DIVERSION  
PROTOCOL FOR THE SIXTH JUDICIAL CIRCUIT

[Editorial comments appearing in **bold type** are not intended to be part of the protocol but may provide guidance if need for interpretation arises.]

**I. Definition**

Pretrial diversion is the postponement of imposition of sentence upon any person who qualifies for this program, for a period of time not to exceed (5) years, subject to certain conditions established by the Court.

**I. Persons Eligible**

KRS 533.250

- A. 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 felony incarceration within the ten (10) years prior to commission of the current offense shall be eligible for pre-trial diversion.

[An individual charged with multiple Class D felonies is eligible for diversion. Diversion is available to non-Kentucky residents who would still be supervised by the Kentucky Department of Corrections. KRS 533.254].

- B. The person charged must enter a plea of guilty, or a plea pursuant to North Carolina v. Alford, before becoming eligible for pre-trial diversion.
- C. Persons not eligible for probation, parole or conditional discharge under KRS 532.045 shall be ineligible for this program.
- D. 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.
- E. No person shall be eligible for this program more than once in any five (5) year period.

### III. Procedure

- A. After indictment in circuit court, and no later than 30 days before trial, any person eligible for the program may apply to the Circuit Court and the Commonwealth for entry of a pretrial diversion order.

**[Last minute filing of an application for diversion may cause delay in the scheduled trial of a case and should be avoided.]**

- B. In 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's Attorney shall make a written recommendation to the Court in response to each application. KRS 533.250(2)
- D. Before making a recommendation to the Court, the Commonwealth's Attorney shall:
1. Have a criminal record check made by telephoning Pretrial Services at AOC at 1-800-928-6381, or faxing the request to (502) 573-1669. **DO NOT** send requests to the local Pretrial Services Officer. [Pretrial Services at AOC will fax the criminal history to the Commonwealth Attorney. Due to user agreement restrictions, NCIC reports cannot be faxed]. KRS 533.252.
  2. Interview and seek input from the victim and/or the victim's family and advise them of the time, date and place of the hearing of the petition by the Court; and
  3. When diversion is recommended, the Commonwealth must make written recommendations to the Court of conditions for the pretrial diversion as well as the appropriate sentence to be imposed if the diversion agreement is unsuccessful. KRS 533.252(3).

**[The Commonwealth will be bound by its recommendation. In the event diversion is unsuccessful, the Commonwealth will not be permitted to argue for a sentence in excess of the original recommendation. Moreover, the Court cannot impose a sentence greater than the recommendation without allowing the defendant the opportunity to withdraw the plea.]**

[The Commonwealth is statutorily required to make a recommendation, whether favorable or unfavorable, on every application. A circuit court cannot act on a request for diversion absent a recommendation from the prosecutor. DUE TO CONSTITUTIONAL CONSIDERATIONS, IT IS BELIEVED DIVERSION IS UNAVAILABLE ABSENT A FAVORABLE RECOMMENDATION FROM THE COMMONWEALTH.

[The Commonwealth may withhold its recommendation pending completion of a presentence investigation. However, the defendant would then be permitted to challenge the findings of the PSI. Representatives from the Department of Corrections suggest a request for a PARTIAL PSI would be adequate and not as burdensome on their staff. Statutorily, a PSI is required before sentencing, but sentencing is not occurring when a charge is diverted.

It is recommended the defense attorney simultaneously submit an application to the Circuit Court and to the prosecutor. The Commonwealth will then request the criminal record check, contact the victim, etc.; after charges are filed, AOC Form 347, styled MOTION FOR PRETRIAL DIVERSION OF A CLASS D FELONY, which contains the Commonwealth's recommendation and is signed by the defendant, defense attorney, and the Commonwealth's Attorney, will be filed by the Commonwealth with the Circuit Court Clerk].

#### IV. Order of Pre-Trial Diversion

- A. The Court may, in its discretion, order pre-trial diversion for eligible petitioners upon terms and conditions which it deems appropriate. AOC Form 345, styled Order Granting Pretrial Diversion of a Class D Felony, was designed for this purpose.

[It is recommended that the diversion plan be submitted to the Court as part of a plea agreement. It is suggested that when a defendant who has applied for diversion enters his/her guilty plea or plea pursuant to North Carolina v. Alford, the Court modify the colloquy to reflect these items on the record:]

1. Is your guilty plea/plea pursuant to Alford in this case part of an agreement you and your attorney have made with the Commonwealth?
2. In return for your guilty plea/plea pursuant to Alford, the Commonwealth has agreed to recommend

a sentence of \_\_\_\_\_. Is this correct?

3. The Commonwealth has also recommended your case be diverted on the following conditions: \_\_\_\_\_ . Is this correct? [At this point the Court should inquire about the absence/inclusion of certain conditions in the diversion motion which may seem appropriate/inappropriate.]
4. The Commonwealth has tendered to the Court a diversion agreement. Have you read the diversion agreement? Have you discussed it with counsel? Has your attorney answered any questions you have about the diversion agreement?
5. Have you signed the diversion agreement?
6. Did you voluntarily sign the agreement?
7. Do you understand that if you successfully complete the diversion agreement the charge(s) against you will be dismissed?
8. Do you understand that if the Commonwealth alleges you have failed to comply with the terms of the diversion agreement, the Court will schedule a hearing and, upon completion of the hearing, make a finding as to whether you failed to comply with the diversion agreement?
9. Do you understand that if the Court finds you have violated the diversion agreement, the Court will schedule a sentencing hearing and at that hearing, the Court may sentence you to the penalty recommended by the Commonwealth?

B. The Order of Diversion shall include:

1. Restitution, if applicable. [Made mandatory by KRS 533.254 where victim has suffered monetary damage].
2. Whether the diversion shall be supervised or unsupervised (and include supervision fees, if applicable). [The Corrections Department advises the actual monthly cost of supervision, as of January, 1999, is \$97.00. Probation and

Parole requests, and it is recommended, a monthly supervision fee of \$25.00, but no less than \$10.00, be imposed on the diverttee. KRS 533.250(3)].

3. Duration of the diversion.
  4. Require defendant to obey all rules and regulations imposed by Probation and Parole.
  5. As required by KRS 533.030(1) [conditions of probation-restitution], direct the defendant not to commit any offense during the period of the pretrial diversion. Specifically, direct the defendant to comply with any other provision of KRS 533.030 or any other condition the Court deems appropriate.
- C. The Order of Diversion may include: [These items are not statutorily required but it is suggested they be considered and imposed depending upon the nature of the particular charge].
1. That the petitioner remain drug and alcohol free and be subject to random testing.
  2. That the petitioner have no violation of the Penal Code or the Controlled Substances Act.
  3. That the petitioner possess no firearm or any other deadly weapon. [For the safety of parole officers who are supervising the diverttees, Probation and Parole requests, and it is recommended, access to handguns be prohibited during the pendency of the diversion contract when home visits are ordered.]
- D. Duration of pre-trial diversion shall not exceed five (5) years without the agreement of the petitioner. Duration of the diversion agreement shall not be less than the time required to make restitution in full.

[The Court should then advise the parties as to whether it will accept the diversion agreement. If it is accepted, a specific finding should be made on the record that the defendant entered the plea AND entered into the diversion agreement voluntarily, freely, intelligently and understandingly.

If the plea agreement AND the diversion agreement are rejected, the Court should notify the parties and advise the defendant

he/she has the option of withdrawing the plea and proceeding to trial, OR maintaining the plea with the knowledge the Court will not order diversion but instead will impose a sentence within the penalty range permitted by law.

Following the colloquy, if the Court is uncertain as to whether it will accept the agreement without benefit of a PSI, the Department of Corrections asks that a PARTIAL PSI be requested. (In light of the groundwork, the Commonwealth is statutorily required to do, including a criminal history check and discussions with the victim/victim's family, there should be little information available via a PSI which has not already been provided to the Court). If a partial PSI is requested, the Court should reassign the case for a later date; review the partial PSI; and, announce the decision either accepting or rejecting the guilty plea and the diversion agreement].

V. Voiding a Diversion Order

KRS 533.256

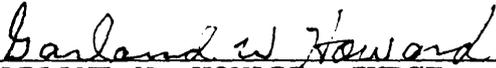
- A. After a hearing, with notice to the Commonwealth and to the defendant, the Court may void a person's participation in pretrial diversion upon a showing of failure to comply with the conditions of diversion or a failure to make satisfactory progress. AOC Form 346, styled Order Voiding Pretrial Diversion of a Class D felony, was designed for this purpose.
- B. If an order of pre-trial diversion is voided, the defendant shall be sentenced according to law, based on his or her prior plea of guilt/plea pursuant to North Carolina v. Alford. [When revocation is ordered, a full PSI must be ordered and a sentencing hearing must be scheduled].
- C. Under KRS 533.256(2), the same criteria applicable to a probation revocation hearing applies to a proceeding to void an order granting diversion. Pursuant to KRE 1101(d)(5), the Rules of Evidence are inapplicable in 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.

VI. Completion of Diversion Program

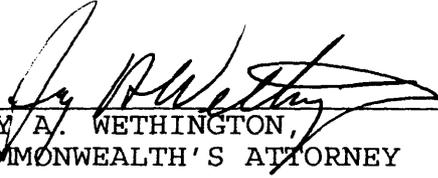
If the defendant successfully completes the provisions of the pre-trial diversion agreement, the charges against the defendant shall be dismissed." [By statute, when a diversion contract is successfully completed, the case is closed out as DISMISSED-DIVERTED. A new SUSTAIN code, "DD", has been assigned for this purpose. It is recommended that defendants be told from the beginning that successful completion of a diversion contract does not result in automatic expungement of a criminal charge under KRS 431.076].

[Class D Felony cases in which a charge is diverted will be CLOSED by the Circuit Court Clerk when Form AOC-345 (Order Granting Pretrial Diversion of a Class D Felony) is entered. This means diverted cases will not appear in a judge's pending case report.]

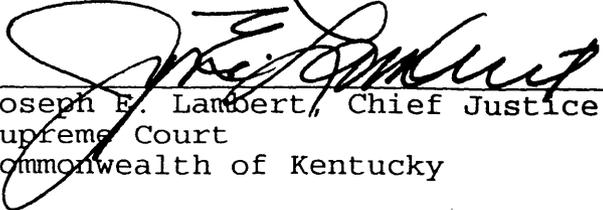
Approved, this the 11<sup>th</sup> day of March, 1999, by GARLAND W. HOWARD, Circuit Judge, Division I, and THOMAS O. CASTLEN, Judge, Division II, and JAY A. WETHINGTON, Commonwealth's Attorney, to be effective immediately.

  
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GARLAND W. HOWARD, JUDGE  
DAVIESS CIRCUIT COURT  
DIVISION NO. I

  
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THOMAS O. CASTLEN, JUDGE  
DAVIESS CIRCUIT COURT  
DIVISION NO. II

  
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JAY A. WETHINGTON,  
COMMONWEALTH'S ATTORNEY

APPROVED THIS THE 20 DAY OF April, 1999.

  
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Joseph E. Lambert, Chief Justice  
Supreme Court  
Commonwealth of Kentucky